SUBMISSION TO THE ROYAL COMMISSION CRIMINAL JUSTICE CONSULTATION PAPER

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RESPONSE TO CHAPTER 6: THIRD PARTY OFFENCES

The ongoing Australian Royal Commission into Institutional Responses Child Sexual Abuse proffers an opportunity to reform criminal legal system responses to harms caused by or within organisations. The focus of the Royal Commission has demonstrated the significance of collective, systemic failures to prevent and/or adequately respond to child sexual abuse. There is a disjunction between the condemnation articulated by the Royal Commission in response to systemic failures and the criminal legal position of these organisations. There has, in fact, been no criminal justice response whatsoever to these collective failures. This mirrors concerns articulated generally in academic literature about the disjunction between the moral condemnation of organisations and the legal position of these companies (Colvin, 1995). This article argues that organisations should have some criminal liability for the creation, management and response to risk when it has materialised in harm to a child and endorses the creation of a new offence criminalising institutional child sexual abuse.

The Royal Commission into Institutional Responses to Child Sexual Abuse commenced in 2013 and has been extended to continue until the end of 2017.[i] At the time of writing, the Royal Commission has undertaken 45 public hearings, and held more than 5,500 private sessions with victim/survivors of child sexual abuse, with more than 1,500 people awaiting private sessions. The formal public hearings examine evidence about child sexual abuse and how institutions have (not) responded to allegations of abuse. The public hearings are open to the general public and are also telecast live on the web, the transcripts are available on the website and the findings are then summarised in Reports. The Royal Commission has considered child sexual abuse in a wide range of institutions including schools, after-school care, religious organisations, the Australian Defence Force, the entertainment industry, sporting clubs, and health care providers. The Royal Commission has provided an incredible amount of detail about systemic failure, its impacts upon child sex offending and reactions by the institution, and highlights the need for offences at an organisational level. The Royal Commission is part of a series of public inquiries that have occurred internationally into institutional child abuse (Daly, 2014, Swain, 2014). The Royal Commission, like the other public inquiries, offers an opportunity to address the unsatisfactory criminal justice response to institutional child sexual abuse. This potential can be situated as part of the criminal legal system's response (or lack thereof) to organisational or corporate malfeasance. Reforms in relation to corporate crime have often been motivated by particular events. For example, the corporate manslaughter reforms in the United Kingdom were motivated by unsuccessful prosecutions in response to the deaths of 188 people on the *Herald of Free Enterprise* in 1987 and the Southall rail crash in September 1997. Accordingly, the current Royal Commission could act as a catalyst for reforms to criminal legal system responses to institutional wrongdoing.

Corporate criminal responsibility 'is often tolerated rather than encouraged' (Wells, 2014). Corporate criminal law has emerged on a case by case and more recently statute by statute basis with a consequent lack of general principles (with a notable exception of the Australian Model Criminal Code discussed below). There is a wealth of excellent literature about the difficulties the criminal legal system has in grappling with corporate responsibility (Fisse and Braithwaite, 1993,

Gilchrist, 2012-2013, Gunningham, 1987, Wells, 2014). The principles of criminal law were developed prior to industrialisation and corporatisation, with a limited conceptual vocabulary that has not mapped easily onto business corporations. In particular, the general principles of criminal law have been constructed based primarily upon individual responsibility, and this has meant that the criminal legal system has had difficulties in responding to the developing dominance of business corporations (Wells, 2014).

The continuing discomfort with organisational liability has unfortunately been reflected in the recent proposals by the Royal Commission for criminal law reform in the consultation paper entitled *Criminal Justice* (Abuse, 2016). The central focus of the Royal Commission is indicated in its title – *Institutional* Responses to Child Sexual Abuse. This is also emphasised by the Letters Patent which require the Commission to consider the role of institutions where child sexual abuse has occurred and their activities that have 'created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk' (Letters Patent, 2013: Para (m)(ii)). However, the *Criminal Justice Consultation Paper* suggests that despite all the details in the Reports, the Royal Commission's focus has remained primarily on individual responsibility, specifically the criminalisation of child sexual abusers, and improving the response of the criminal justice system to individuals. This article does not suggest that these reforms are not important. But what is disappointing is the very small amount of time that has been devoted to the conceptually challenging area of collective liability. Of the almost 800 page document, only 10 pages, or a part of one of the 15 chapters is focused on criminal justice responses to institutional failings. The bulk of analysis regarding systemic or collective wrongdoing is actually in a separate report – *Sentencing for Child Sexual Abuse in Institutional Contexts* (Freiberg et al., 2015).[ii] Arguably the authors' focus on criminalising collective wrongdoing was beyond the terms of the brief of that report as no organisations have been punished for collective wrongdoing. However, the authors justified their approach in a Chapter entitled 'Institutional Offending: The Limits of the Law' – 'the power to sentence is contingent upon the conviction, or finding of guilt, of the perpetrator. Sentencing of offenders for child sexual abuse focuses on individuals rather than institutions or organisations' (Freiberg et al., 2015). Freiberg et al. go on to consider how institutions might be criminally prosecuted in relation to institutional child sexual abuse as a precursor to analysing potential for sentencing. The arguments detailed in the *Sentencing Report* are then referred to in the *Criminal Justice Consultation Paper.*

The focus of this article is not upon the sex offender, but the officials around him who could (and should) have done something to prevent and/or react to the abuse, but did not. I am using the term 'official' to include staff, management and the institutions.
I analyse proposed reforms in light of the details provided in Royal Commission hearings and through the prism of academic literature about corporate wrongdoing. The Royal Commission demonstrates that a collective model of culpability must be developed in order to adequately respond to institutional child sexual abuse. A key concern of this article is that organisations are most likely to cause systemic harms, and yet the more complex an organisation, the less likely it is to be held criminally responsible (Crofts, 2016, Veitch, 2007). I rely upon the detail of *Report of Case Study Number 12: The response of an independent school in Perth to concerns raised about the conduct of a teacher between 1999 and 2009*.[iii] The Report analyses the response (or lack thereof) to concerns raised between 1999 and 2009 by several teachers and a parent about the behaviour of a male teacher in the preparatory school towards a number of his students. The abuse was finally reported to police in September 2009 and YJ was charged and convicted of committing sexual offences against five students. All of the victims were pupils in one of YJ's classes at the

time of the offending. I have selected Report No. 12 because it is sadly illustrative of the kinds of institutional failures detailed in all of the Royal Commission findings. I demonstrate that the individualistic focus of the criminal legal system does not adequately or accurately encapsulate the collective, institutional failings detailed by the Royal Commission. I argue firstly that although mandatory reporting offences are important, these offences do not adequately respond to collective failings. Historically criminal legal responses to collective wrongdoing has retained an individualistic focus, I argue in favour of developing a new institutional offence constructed upon the concept of corporate culture. I conclude by arguing that the expressive role of criminal law justifies and requires the criminalisation of this kind of collective wrongdoing.

Individualistic Response to Third Party Offending: Mandatory Reporting

Currently, the pinnacle of the criminal justice response to those people or institutions that have not perpetrated abuse but were 'third parties' has been mandatory reporting. Most jurisdictions have provisions requiring that reports must be made (to police or child protection agencies) if a specified person has reasonable grounds to know or believe a child is being sexually abused (Mathews, 2014). There are differences across Australian jurisdictions concerning who has to report, what types of maltreatment must be reported, and whether criminal or civil, state of mind of the reporter,[iv] whether the reporting duty applies to past or currently occurring abuse only, or also to a perceived risk of future abuse. Seven out of the eight jurisdictions have penalties for non-compliance.[v]

Mandatory reporting laws tend to draw on the capacity of professionals who typically deal with children in the course of their work and who encounter cases of serious child abuse and neglect to report these situations to helping agencies. The aims are to protect the child from significant harm and decrease the likelihood of recurrence. Mandatory reporting laws help identify cases of child sexual abuse which would otherwise not be revealed, enable detection of the offender and offer an opportunity to provide medical and other therapeutic assistance to the abused child and her or his family (Mathews 2004). The efficacy of the laws have been both criticised (Ainsworth, 2002, Ainsworth and Hanson, 2006, Melton, 2005) and defended (Besherov, 2005, Drake and Jonson-Reid, 2007, Finkelhor, 2005, Mathews, 2012, Mathews and Bross, 2008).

Offences of mandatory reporting can have some applicability to systemic failures (Death, 2015).[vi] The Victorian Inquiries and the current Royal Commission highlight active attempts, particularly by religious organisations, to conceal wrongdoing and protect the organisation:[vii]

> There has been a substantial body of credible evidence presented to the Inquiry and ultimately concessions made by senior representatives of religious bodies… that they had taken steps with the direct objective of concealing wrongdoing.

The mandatory reporting offences are appropriate for those who know about the perpetration of child abuse and actively intervene to protect the perpetrator and/or did nothing. There has, however, been a reluctance to investigate, charge or prosecute. Prosecutions for failure to report under mandatory reporting duties are very rare, partly because of an emphasis upon encouraging reporting rather than policing it. Mathews (2014) has identified only six prosecutions in the five jurisdictions across Australia with a mandatory reporting regime.

Mandatory reporting offences reflect the criminal justice system's focus on the individual in constructions of culpability, with a preference for requiring some form of subjective blameworthiness. The emphasis upon some kind of subjective element of knowledge, suspicion or belief is ostensibly appropriate. It is in accordance with our understandings of responsibility

that we can only be responsible for what we knew or intended. How could a person or institution possibly be held criminally responsible for what they did not know? However, in many of the Royal Commission Reports, the issue was not that individuals knew or believed that child sexual grooming and/or abuse was occurring, but that they had not recognised the grooming or offending behaviour at all. For example in Report Number 12, despite eight separate complaints across time about an offending teacher's behaviour, the former heads of the preparatory school and headmasters did not place sufficient or correct significance on the concerns raised with them about the offending teacher. All of them gave evidence that they did not receive any guidance or training in detecting or reporting child sexual abuse or grooming behaviour (41). The Royal Commission found:

> We are satisfied that the school did not have a dedicated child protection policy until 2004.
>
> We are satisfied that the school's child protection policies that were in force from 2004 until 2009, although compliant with re-registration standards during the period, were deficient when measured against current standards of 'best practice' because:
>
> - they provided insufficient information about how child sexual abuse occurs
> - there was no reference to grooming behaviours, no definition of grooming behaviours and
> - no instruction on how grooming behaviours might be detected and when they should be reported
> - there were no separate guidelines for handling reports of (i) suspected child abuse; and (ii) grooming or inappropriate behaviour by staff that did not involve a specific allegation of child sexual abuse or (after 2009) fell below the threshold for mandatory reporting. (8)

The masters at the school would probably not have been prosecuted for failure to report because they lacked knowledge or belief that child sexual abuse was occurring. But it is this very lack of knowledge or belief that is the problem. Their failure to attach sufficient and correct significance to the reports of inappropriate behaviour was due to an organisational failure to adequately train staff to recognise and report grooming behaviours. The absence of any knowledge or belief was a systemic problem – and the current criminal justice focus on individual, subjective blameworthiness is accordingly inappropriate and misguided.

Individualistic Bias in the criminal justice system

The individualistic focus of the *Criminal Justice Consultation Paper* reflects general principles of criminal law that have been developed and articulated primarily around individual responsibility. There are exceptions, such as the doctrine of complicity and conspiracy, but this 'group dimension' is characterised and regarded as exceptional. The individualistic focus of criminal law has been retained in the regulation of corporations. This has been demonstrated partly in the historic reluctance to criminalise organisations. Legal responses have been hampered by the idea that the corporation as a person was a fiction. For example:

> I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has the hands to carry out his intentions. A corporation has none of these… (Lord Reid, *Tesco Supermarkets Ltd v Nattrass* 1972 App Cas 153, 170).

One argument against extending liability to corporations was that they lacked mens rea. This reflects the contemporary emphasis upon the necessity of subjective culpability for attributions of blameworthiness (Crofts, 2013a, Fletcher, 1978). A second argument was that traditional methods of punishment, in particular imprisonment, could not be applied to corporations

(Colvin, 1995, Coffee, 1981). These arguments reflect and inform doubts as to whether or not it is appropriate to attribute criminal liability to organisations that cause harm. The challenge remains to forge a coherent link between the general principles of criminal law and the realities of the corporate form.

Conceptions of collective fault

The focus on individual subjective culpability has also framed the way in which corporate offences have been structured. Historic approaches for attributing blame to corporations were based on the assumption that corporate wrongdoing could only be derivative of individual wrongdoing. The agency or vicarious principle held a company liable for the wrongful acts of all its employees, providing they were acting within the scope of their employment or authority. This principle has tended to apply to strict liability offences. A more specialised form of vicarious liability is identification liability, which holds a company liable only when a director or senior officer has acted with the requisite fault, expounded in *Tesco v Nattrass* [1972] AC 153.[viii] Identification theory has been recognised as highly restrictive and not always appropriate. The 'directing mind' model distorts decision-making in large corporations - modern corporations divide authority in a myriad of ways which create more than one directing mind.[ix]

The focus on individual personnel in the Royal Commission Reports does not adequately reflect the presence or absence of corporate fault. The problem that the Reports highlight, is that it is not what the upper management knew or intended, but what they did not know or turn their mind to. Upper management failed to prioritise the safety of children and to develop and enforce appropriate child safety policies. The higher up in the corporate hierarchy, the less likely was a person to know of (suspected) grooming or child sex offending. The reporting procedures at the school in Report Number 12 militated against upper and middle management being aware of suspicions about the offending teacher. The school had two separate personnel file systems operating – one at the preparatory school and the central file at the high school more than a kilometre away – and neither files required a reference to each other. There was no centralised database to record concerns or complaints or to facilitate a comprehensive review of the files when a complaint was made. The separate systems meant that complaints were unlikely to be heard or seen by the headmaster, who was unaware of the complaints until the preparatory master reported them to him in 2004. The school council and Archbishop were not informed until 2009, and that was only upon the insistence of a parent. Upper management was broadly unaware of complaints and there was no system to connect up information.[x] When the headmaster was finally informed of the teacher's offending behaviour, the headmaster arranged a meeting with the teacher, but the head of the preparatory school was not present. This meant that there was a lack of continuity and knowledge in response to the teacher. The head master relied only on the information that was recorded in the files.

Vicarious principles and identification theory reflect a nominalist theory of corporations, which views corporations as nothing more than a collectivity of individuals. That is, the idea that corporations can only act through individuals. On this account, the corporation is simply a name for the collectivity and the idea that the corporation itself can act and be blameworthy is a fiction. These accounts regard corporate responsibility as derivative – it must be located through the responsibility of an individual actor. In contrast, realist theories assert that corporations have an existence that is, to some extent, independent of the existence of their members (Belcher, 2006). Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault (Colvin, 1995). The details of the Royal Commission hearings

demonstrate that a realist approach is vital. The criminal legal system needs to develop an account where the responsibility of the corporation is primary – what corporation the did or did not do; what it knew or ought to have known about its conduct; and what it did or ought to have done to prevent harm from being caused.

Conceptualising criminogenic corporate culture

The *Criminal Justice Consultation Paper* (2016) based on the *Sentencing Report* (2015) suggests several different organisational offences, such as being negligently responsible for the commission of child sexual abuse, negligently failing to remove a risk of child sexual abuse, reactive organisational fault and an offence of institutional child sexual abuse (Chapter 6). The proposed offences have the advantage of focusing on collective culpability, rather than individual culpability. The negligence offence is the most accessible as it slots corporate failure into existing legal doctrine of negligence – requiring a legal duty, criminally negligent breach of that duty and that this breach was a cause of the harm. The most innovative and challenging offence is that of institutional child sexual abuse, a modification of the *Criminal Code 1995 (Cth)* Part 2.5:

> An organisation commits an offence if:
> 1. A person associated with the organisation is convicted of an offence of child sexual assault; and
> a) the organisation, or a high managerial agent of the organisation, recklessly authorised or permitted the commission of that offence by that person.
> 2. The means by which such authorisation or permission may be established include proving that the managing body of the institution or a high managerial agent:
> a) expressly, tacitly, or impliedly authorised or permitted the commission of the offence; or
> b) a corporate culture existed that tolerated or led to the commission of the CSA offence; or
> c) failed to create and maintain a corporate culture that would not tolerate or lead to the commission of the CSA offence.
> It is a defence to such an offence for the organisation to show that it had adequate corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation; or provided corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation.

The most important aspects of this proposed new offence are subsections 2(b) and (c) because of the reliance upon the idea of corporate culture. Corporate culture is defined in the Commonwealth Criminal Code Act as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'. These provisions for organizational liability in the Commonwealth statute have been celebrated as 'arguably the most sophisticated model of corporate criminal liability in the world' (Clough and Mulhern, 2002). When constructing the corporate liability provisions, the Model Criminal Code Officers relied quite heavily upon academic literature in formulating the corporate culture provisions. The Final Report drew on academic writing to outlines its 'key' concept of corporate culture:

> The rationale for holding corporations liable on [a corporate culture] basis is that '... the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any

> individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation.' (see Field and Jorg, 'Corporate Manslaughter and Liability: Should we be Going Dutch?' [1991] *Crim LR* 156 at 159) (Attorneys-General, 1992).

The idea of corporate culture recognises that different corporations have different cultures, and these different cultures can exercise influence over individual agents. Good corporate culture can prevent wrongdoing, whilst bad corporate cultures might encourage or fail to discourage some wrongdoing (Gilchrist, 2012-2013). In its *Interim Report*, the Royal Commission recognised that corporate culture impacts upon child sex abuse within institutions (*Criminal Law Consultation Paper 2016:* 250):

> Situations allow criminal behaviour:
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> - Situations can provide the opportunity that allows a criminal response to occur. For example, a lack of supervision could provide this opportunity.
> - Opportunistic perpetrators are unlikely to actively create opportunities but are likely to recognise and take any that arise.
> - Situational perpetrators are unlikely to create or identify opportunities.
> - Situations influence criminal behaviour:
> - Situations present behavioural cues, social pressures and environmental stressors that trigger a criminal response. For example, a sense of emotional congruence with a child might turn into a sexual incident.
> - Situational perpetrators are most likely to be influenced by these triggers to commit abuse.

Despite recognition of the importance of corporate culture, it has been the subject of some criticism, due to difficulties of proving the existence of a culture, concern that there may be varying subcultures within an organisation, and that the institution's culture may have changed over time. Concern has also been expressed that it is anomalous to hold corporations criminally liable for 'permitting' conduct, which can be understood as no more than failing to prevent such conduct, when the criminal legal system is generally reluctant to hold individuals liable for omissions.[xi] Critics have argued that this may be why Part 2.5 has been excluded from operating in the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act* 2010 (Cth).

The idea of corporate culture is that it allows corporate criminal responsibility to mirror, as closely as possible, the fault element of criminal responsibility. It reflects increasing recognition in academic literature of the notion of corporations as criminogenic – that is, corporations by their nature can produce crime (Apel and Paternoster, 2009, Tombs and Whyte, 2014). Despite this, very few of the existing provisions for organisational responsibility have been tested in the courts. The concepts that have been created are novel and because their reach is potentially broad, they have been resisted by the corporate world and even by governments that might be held accountable for their negligent acts under such laws (Hogg, 2013). The Royal Commission provides an example of why developing the idea of corporate culture as a means for attributing collective blameworthiness is essential.

The Royal Commission has provided a myriad of examples where corporate culture tolerated or failed to prevent child sex offending. For example, a common problem in institutions is that staff have not been trained to recognise grooming behaviour. In Report No. 12, the staff did not realise they were witnessing grooming behaviour, but still regarded it as sufficiently 'inappropriate' to report it to management. The positive effects of even minimal knowledge of grooming were demonstrated in Report No. 12 by a mother who watched a *Four Corners* television program called *Unlocking the Demons* which explained how paedophiles groom victims and their families.

As a consequence of this program the mother raised her concerns about the offending teacher with the preparatory school head. She felt that her family may have been 'groomed' by the offending teacher and communicated her concerns about the attention the offending teaching had shown to both her sons.

Not only was there a lack of training of staff about recognizing and reporting grooming and child sexual abuse, there was also a culture of bullying so that staff were afraid to report their suspicions. Teachers gave evidence that they were afraid to report not only because their lack of training meant they were not confident that they were dealing with child sexual abuse, but they were concerned they would be subjected to rejection, ostracism or bullying and harassment from some staff if they were identified as 'whistle blowers'. For example, after reporting the offending teacher to YN, the then head of the preparatory school, WG felt that some of the older males who had been teaching at the school were 'nasty to her'. She communicated the bullying to the new head of the preparatory school, YK, and described an incident where another teacher had tried to run her over. WG said she felt that the new head 'did not want to know about it'. WG said she stopped working at the school because of the way she was treated by her colleagues after reporting the abuse (32). Awareness of the protective culture around the offending teacher was shown in 2004, when head of school asserted that if he had dismissed the offending teacher it would have caused 'division amongst other teachers' (39). Fear of reporting due to lack of knowledge about grooming behavior was exacerbated by the bullying culture. Both ignorance and bullying could and should have been addressed by management and this failure to do so created an environment that facilitated, tolerated and failed to prevent child sex offending.

Despite ignorance and the culture of fear there were clear reports by multiple teachers of consistently inappropriate behavior by the offending teacher. One teacher wrote:

> We are not suggesting anything more serious (as in 'sexual') has occurred. We have no proof of anything like that. However there are several aspects to our concerns. First and foremost is the safety, both physically and emotionally of all children who have come and will come into contact with YJ. Even if what has been outlined in this letter is the total extent of what has occurred, I believe it is still totally unacceptable within any organisation let alone any school and especially our school (23).

In other words, there was sufficient evidence of inappropriate behaviour by the offending teacher to require and justify a response by the school. Despite this the school's response was grossly inadequate. At times the preparatory school master did nothing in response to a complaint except file it. Where there was a response by the preparatory head this tended to involve a meeting with the offending teacher, who was informed that his behaviour was inappropriate and that he should modify his own behaviour. Even the teacher's response at these meetings should have raised red flags – for example in one meeting he said that 'he had always dealt with students in a tactile manner' (22). The head of school resolved to keep the offender under closer supervision and scrutiny, but did not do this. Management wrote formal letters of warning, but the teacher refused to acknowledge or sign these. After the third and 'final warning', the headmaster then sent another 'final warning'. This response by management was inadequate and inappropriate. It gave a message to the offender and also the staff that there were no repercussions for grooming behaviour. This discouraged staff from reporting offending behaviour and encouraged the offender to continue. The failure by the principals to respond appropriately was partly due to a lack of training and policies.[xii] This was exacerbated by a failure to report concerns to the police, child protection officers or anyone who had experience in the protection of children. Reports of the offending teacher's behaviour to any of these experts would likely have prevented a continuation of his overt grooming behaviour. The school needed to have

developed clear written policies on how to detect child abuse of grooming behaviours, the procedures for reporting child abuse or grooming behaviours, handling complaints, expertise training for staff on detecting and reporting child abuse and grooming behaviour, and an environment which is conducive to staff, parents and students reporting concerns (*Report Number 12*, 10).

Report No. 12, along with other Royal Commission reports, highlights systemic problems that go beyond the organisations. Of particular concern was the registration process undertaken by independent schools in Western Australia. Despite complaints on file about the offending teacher dating from 1999 onwards, the school was approved for registration in 2004 until 2010. The registration report stated that the school had developed and implemented a child protection police and that its documented policies and procedures were of a very high standard (15). The Registration standards had not incorporated the concept of grooming behaviours. Nor were there clear standards regarding reporting allegations of child sexual abuse. The Western Australian Registration standards did not clearly articulate the current standards or benchmarks to child protection policies and procedures against which best practice is assessed and a school registered (16). This absence of adequate and appropriate regulatory standards may reflect and reinforce the difficulties of imposing organizational liability. The systemic, cultural problems go beyond the school, to the state and national levels of regulation and enforcement. However, the Royal Commission has consistently articulated and clarified the standards that should be required or individuals and organisations involved in the care of children. Based on the Royal Commission findings it should not be that hard to develop a national standard of care that is applicable and enforced across states.

Report No 12 demonstrates how corporate culture tolerated or led to the commission of child sexual offences and failed to create or maintain a corporate culture that would not tolerate or lead to the commission of child sex offences. Overall, the Royal Commission concluded that, taken together, the history of events indicates 'a serious systemic failure to protect children in the care of the School' (40-41). Organisations involved in the care of children have existing statutory and common law duties of care. It is essential to articulate appropriate standards of care and then measure organisations against these standards. Organisations which provide care of child must establish cultures in which prevention of child sexual abuse is accepted as an ordinary responsibility of all adults and the organisation. Failure to do so means that the corporation is criminogenic and can and should be prosecuted.

The notion of corporate culture can assist in developing appropriate parameters in terms of prosecution and punishment. For example, in the United Kingdom, the *Bribery Act 2010 (UK)* specifies that an organisation will be guilty of corporate failure to prevent offences of bribery unless it can prove that it had adequate procedures to prevent the conduct (Wells, 2014). The Act then details six principles based on the Organisation for Economic Co-operation and Development guidelines on compliance (OECD, 2010) that comprise proportionate procedures, top-level commitment, risk assessment, due diligence, communication (and training), and monitoring and review. These principles of compliance could be developed to determine whether or not there was commitment by an organisation to a culture to the prevention of child sexual abuse. This would also circumvent concerns that about prosecuting an organisation for past failures from which it had since reformed. Moreover, in the Australian and international context increasing reliance is placed upon 'deferred prosecutions' or remedies such as 'compliance programs' or 'enforceable undertakings' to use the threat of criminal legal prosecutions and/or sanctions to compel corporations to comply with existing regulatory standards (Belcher, 2006,

Parker, 2004). This provides an incentive to management to undertake responsive organisational change (Fisse and Braithwaite, 1993).

Conclusion

Systemic failure extends beyond institutions to legal institutions. The enforcement of regulatory laws has not always been vigorous and there have been no prosecutions of organisations. This reflects opposition by corporations generally to the notion of collective responsibility (Wells, 2001, Wells, 2010). One key argument to justify criminalisation of collective wrongdoing is to emphasise the expressive power and role of the criminal law (Gilchrist, 2012-2013). The criminal legal system explicitly and implicitly organises and depicts conceptions of wrongfulness or badness as part of its system of blaming, in addressing the core issue of what is required to be sufficiently culpable to justify the attribution of criminality and the application of sanctions. The law routinely classifies conduct, defines action, interprets events and evaluates worth; it then sanctions these judgments with the force and authority of law (Crofts, 2013b). Criminal liability carries 'a formal and solemn pronouncement of the moral condemnation of the community' (Hart Jr, 1958). Conviction carries with it serious consequences and social stigma. It expresses condemnation – it is not about just wearing a penalty for breaking the law – but opprobrium. This expressive aspect of the law has value (Garland, 1990). Moreover, it has been suggested by theorists that criminalising corporate conduct/failures has specific expressive value:

> Deterring inefficient conduct is one socially desired objective, but repudiating the false valuations embodied in corporate wrongdoing is another. (Kahan, 1998)

Accordingly, the fact of condemnation is itself significant.

The law asserts models of right and wrong, good and bad, and this assertion is enforced with the imposition of sanctions. Theorists have recognized and argued that the form of the law will affect, reflect and reinforce perceptions of the morality of a particular practice or behaviour.[xiii] The Royal Commission *Criminal Justice Consultation Paper* is similarly premised on 'the importance of seeking and obtaining a criminal justice response to any child sexual abuse in an institutional context' (Chapter 2). The symbolic, expressive power of the law is very important, which is why it is so disappointing that there was not more focus on collective culpability in the *Criminal Justice Consultation Paper*. Reforming the criminal law in this area proffers an opportunity to reframe our notions of culpability. It is not an unfortunate accident or bad luck that offenders have been able to offend with impunity across months and years in specific institutions (Death, 2015). The Royal Commission hearings have provided repetitive and remarkably consistent examples of the ways in which specific organisations tolerated, facilitated or failed to prevent child sexual abuse, and these organisations can and should be regarded as criminogenic.

The failure to prosecute or conceptualise harms caused by corporations as culpable has its own symbolism. It suggests that 'corporations may violate criminal laws if they are willing to pay for it.

Corporate crime would thus be little more than a menu of harms and prices' (Gilchrist, 2012-2013). There is currently a disjunction between community responses to organizational failure and the response of the law. It is not simply a matter of a legal demand for culpability for a criminal conviction that did not adequately meet moral condemnation. But the structure of the criminal law has prevented any inquiry whatsoever into the ways in which the corporate organisation is at fault for facilitating, tolerating, or failing to prevent child sex offending. We need imagination and creativity to develop and structure notions of collective liability that adequately reflect and reinforce the fault and responsibility of organisations for crime.

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[i] For further information refer to the Royal Commission website: https://www.**child**abuse**royalcommission**.gov.au/. Henceforth in the text I will refer to the Royal Commission into Institutional Responses Against Child Abuse as 'the Royal Commission'.
[ii] Henceforth the *Sentencing for Child Sexual Abuse in Institutional Contexts Report* will be referred to in text as the *Sentencing Report*.
[iii] Henceforth this will be referred to Report No. 12 in text.
[iv] In four jurisdictions the reporter must have a 'belief on reasonable grounds', and in four other jurisdictions the reporter 'suspects on reasonable grounds'.

[v] Eg the ACT currently imposes a maximum penalty of $5,500 and/or imprisonment for a maximum of 6 months *Children and Young People Act 2008 (ACT)*. The Northern Territory imposes a $26,000 penalty *Care and Protection of Children Act 2007 (NT)*. Victoria previously imposed a penalty of $1408 *Children, Youth and Families Act 2005 (Vic)*. NSW originally provided a penalty but this was omitted after the Wood Inquiry recommendations and legislation in 2009.

[vi] Although, as I argue below, whether civil or criminal there appears to be a lack of enforcement of these offences. See for example, the Cummins Inquiry (2012) noted the lack of application and enforcement of the existing 'Offence to fail to protect child from harm' (s493).

[vii] In regard to the Catholic Church specifically, the Committee found that rather than being instrumental in exposing the criminal abuse of children and the extent of the problem, senior leaders of the Church:

- Trivialised the problem
- Contributed to abuse not being disclosed or not being responded to at all prior to the 1990s
- Ensured that the Victorian community remained uninformed of the abuse
- Ensured that the perpetrators were not held accountable, with the tragic result being that children continued to be abused by some religious personnel when it could have been avoided.

COMMITTEE, F. A. C. D. 2013. Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations. Melbourne: Victorian Government.

[viii] These general principles have been adopted in Australia. *Hamilton v Whitehead 166 CLR 121, 127.*

[ix] For examples of judicial criticisms of identification theory see Lord Hoffman, Privy Council in *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 3 All ER 918; Justice Estey, *Canadian Dredge & Dock Co v R* [1985] 1 SCR 662 at 693.

[x] The experience of staff at the school was different from other organisations. At the Perth school the staff communicated with each other about their concerns. In contrast, in Report No. Six (2015) staff did not communicate their concerns with each as much, and the lack of systemic understanding of the complaints was due in part because staff expressed their concerns to different members of upper management who then did not inform each other CROFTS, P. 2016. Legal irresponsibility and institutional responses to child sex abuse. *Law in Context,* 34**,** 79-99.

[xi] Evidence of Hon Chief Justice Gleeson, excerpted in Senate Legal and Constitutional Committee, *Criminal Code Bill 1994 and Crimes Amendment Bill 1994* (December 1994) 31. For an analysis of responsibility for omissions in criminal legal doctrine see ASHWORTH, A. 2013. *Positive Obligations in Criminal Law,* Oxford, Hart Publishing.

[xii] In contrast, in the YMCA there were too many policies and principles. Staff did not know about the policies and they were not enforced by management.

[xiii] For example, Duster and Manderson have undertaken analysis of drug laws in different jurisdictions and have argued that a change in the legal status of drug laws leads people to think of an activity as immoral even though they had not thought so previously. Immoral connotations in relation to illicit drugs developed through a process of social stigmatisation of drug users, by shifting from regulation by the free market to doctors and then to police and criminal justice agencies. DUSTER, T. 1970. *The Legislation of Morality*, MANDERSON, D. 1993. *From Mr Sin to Mr Big,* Melbourne, Melbourne University Press. The intersection of law and morality has also been argued in relation to the production of sexual identities. See, for example, CROFTS, P. 2010. Brothels: Outlaws or Citizens? *International Journal of Law in Context,* 6**,** 151-166, STYCHIN, C. 1995. *Law's Desire: Sexuality and the Limits of Justice,* London, Routledge.