SUMMARY

Royal Commission Research Project

Sentencing for Child Sexual Abuse in Institutional Contexts

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This research report was commissioned and funded by the Royal Commission into Institutional Responses to Child Sexual Abuse. The report was prepared by Arie Freiberg, Emeritus Professor, Faculty of Law, Monash University, Hugh Donnelly, Director, Research and Sentencing, Judicial Commission of New South Wales, and Karen Gelb, Director, Research and Sentencing, Judicial Commission of New South Wales.

The views and findings expressed in the report are those of the authors and do not necessarily reflect those of the Royal Commission, or of the Judicial Commission of NSW.

The report examines sentencing law and practice in relation to child sexual abuse (CSA), the principles of sentencing, sentencing standards and the range of non-sentencing statutory measures available to detain offenders in custody as well as restrictions and monitoring of their movement.

This summary focuses on Chapter 7 of the Report which examines the existing law relating to organisational criminal responsibility and suggests some reforms that could be implemented to render institutions involved in CSA subject to the criminal law.

The suggestions made in the report for law reform are intended to apply prospectively.

Chapter 7: Institutional Offending: The Limits of the Law

Individual and Organisations

The report acknowledges that the criminal law is primarily concerned with individual responsibility in relation to the committing of offences. It rarely addresses the broader causes of offending behaviour. Sentencing is always related directly to a conviction or a finding of guilt in relation to a perpetrator and there are few, if any, offences that hold institutions directly or vicariously liable for the commission of child sexual abuse offences by their members, employees or associated persons (p.219). In other unrelated areas, such as occupational health and safety, and environmental law, it has been difficult for the courts to apply principles of corporate criminal responsibility (p.219).

The report notes that the broad terms of the Letters Patent for the Royal Commission into Institutional Responses to Child Sexual Abuse 'invite a review of the current limits of the criminal law and sentencing' (p.219). The report makes some general observations about the failings of the criminal law in relation to its capacity to ensure that crime and punishment are appropriately linked and that institutions are appropriately held to account in the future (p.219).

The authors argue that one of the functions of the criminal law is to play a symbolic role in marking the boundaries of acceptable and unacceptable behaviour, and, in this context, making organisations

criminally responsible is valuable because of the moral statement that is made about what the community considers to be right and wrong.

Instead of referring to individuals who have offended in an institutional context as 'rotten apples' or the behaviour as 'isolated instances', the report argues that institutions themselves should be considered accountable and in some way responsible.

> Institutions themselves may be criminogenic or may contribute to offending indirectly. The Commission has noted: 'It is apparent that perpetrators are more likely to offend when an institution lacks the appropriate culture and is not managed with the protection of children as a high priority' (p.220).
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> Any strategy, whether it be public or private, that focuses solely upon excising sick or deviant offenders from an institution that purports to be 'healthy' is likely to be ineffective in addressing the causes of crime if it ignores the underlying influences that have shaped or contributed to an offender's conduct (p. 220).

Organisational Responsibility for CSA

The report argues that if institutions are directly or indirectly responsible for criminal behaviour such as CSA then the law should hold them to account.

Historically, however, it has been difficult to hold organisations to account (either civilly or criminally), in part because of the 'uncertain legal status of various faith-based organisations or institutions' (p.221).

The literature in relation to organisational responsibility however has been concerned with distinctions about an organisation's vicarious or direct responsibility for the acts of individuals working for it or associated with it, and individual and collective fault. The debate has been complicated by situations in which the actions of an individual within an organisation are outside the scope of the individual's authority.

The authors suggest that a different approach should be taken, namely that:

> …liability could be imposed on a risk-creator when another acts within the created risk's ambit and inflicts injury, even if the harm-doing actor was self-interestedly abusing an opportunity furnished by the organisation to which she belonged… (p.221).

The argument is made that it is the *omission* to minimize the risk that makes an organisation potentially liable.

This approach is based on principles of negligence, and suggests that the basic issue for the law relating to CSA is that of risk management and the attribution of liability, whether it be civil or criminal, for the 'creation, management, and response to risk where it has materialised in harm to a child' (p.222).

Individual or Organisational Responsibility?

There has been much debate about the desirability of holding organisations to account and the difficulties of sanctioning organisations. Individuals are more readily identifiable and the traditional purposes of sentencing (and the sentences themselves) are more readily understandable and applicable to individuals. However, the report notes that this focus on the individual minimises the collective dimensions of organisational or institutional action. The focus, it argues, should be on the extent of collective negligence of the organisation, namely a 'failure to meet the standard of care expected of an organisation in the same type of situation' (p.222).

Some judicial remarks have been made in relation to the need to look beyond individual offenders to the institutional environment in which they committed their crimes.[1]

> In light of the evidence of the extensive nature of institutional abuse in both the commercial and religious spheres, the need to erode or destroy the historical sanctuaries that the law has provided is patent and urgent (p.223).

The Civil Law

In Australia, attempts under civil law to obtain redress against educational or other institutional bodies for the criminal acts of their employees have generally proved fruitless. In *New South Wales v Lepore*,[2] the High Court left open the question of whether an education authority, in this case, the State of New South Wales, could be held vicariously liable for the sexual abuse of a school pupil by a school teacher. It held however that the State had not breached a non-delegable duty of care to its students. Although there were multiple and differing judgments, the overall effect of the case was to severely restrict avenues of civil redress against institutions for CSA in Australia.

The report provides a discussion about recent court decisions in UK and Canada and their far less restrictive approach to civil redress. In particular, the UK and Canadian courts have held that if there is a risk of CSA, and harm occurs, then the organisation must be held responsible for that harm. The courts have recognised that an employer is under a legal responsibility when it places employees in positions of power and trust that can be abused. (p.224)

There are major differences between the Australian and UK and Canadian Courts in relation to a number of key issues. These include:

- The fact that many religious organisations are not formal legal entities that can be sued
- The issue about whether a religious or government institutions can be held vicariously liable for the intentional acts of another, and
- Whether acts of CSA are committed within the' course or scope' of employment.

An issue of particular relevance in Australia is whether a priest is in an 'employment relationship' with his diocese. The prevailing understanding (both in canon and common law) is that a priest holds an 'office' rather than a position as an employee of the Bishop or Diocese. Recent decisions in the UK however have held that 'although there were differences between the employment of priests

[1] (see *Kramer* [2014] VCC 24/7/13, *Ridsdale* [2014] VCC 285 at [35] and *Walker* [2013] VCC 12 at [5].

[2] (2003) 212 CLR 511.

and employees of other organisations, the role of the priest was sufficiently akin to that of an employment relationship as to be able to form the basis for the vicarious liability of a bishop or a particular diocesan trust' (p.225).

In relation to whether an act of CSA was committed in the course or scope of employment, this test has been construed narrowly in the civil law in Australia. The report notes that the Supreme Court in Canada reframed the test to ask whether the 'employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm'. Similarly in the UK, courts have held that the primary consideration for the attribution of vicarious liability was whether there was a 'material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm' (p. 225).

A further issue that arises in the context of the civil law surrounding liability of organisations is whether an institution can be held directly responsible for breaching a duty of care to the children who have been sexually assaulted by their employees. In civil law, this is referred to as a 'non-delegable duty'. However, in the High Court decision in *Lepore*, six of the seven judges held that even where a non-delegable duty of care may exist, a school authority is not liable to its students in cases of child sexual assault where an intentional criminal act is committed' (p.226).

The report highlights some criticism of the High Court's decision, and explores the possibility of a theoretical shift from viewing organisations as 'honey pots' to seeing them rather as 'criminogenic' or 'crucibles' for crime.

The 'honey pot' theory holds that offenders are drawn to institutions precisely because they offer opportunities to offend (such as schools, scouts, sporting organisations etc). In contrast, the institutional responsibility theory holds that the holding of a position of authority or trust as a teacher or priest creates a responsibility on the institution in which the offender works or operates to those under its care (see further pp.226-227).[3]

The Limits of the Criminal Law

The criminal law has historically been regarded as predominantly retributive. Conviction of a crime carries with it serious consequences and attendant social stigma. The severe sanctions that may be imposed as a consequence of a conviction mean that a number of procedural safeguards, such as requiring proof beyond reasonable doubt and the availability of the privilege against self-incrimination, apply to protect the rights of an accused person.

In contrast with the way that criminal law attributes responsibility in relation to an individual (as a principal offender; a person who incites, aids, abets, counsels or procures an offence; an accessory to an offence; as a party to a joint criminal enterprise; as a conspirator or as a person who conceals an offence for benefit; or an accessory after the fact), the law surrounding criminal liability and organisations is more complex. In this context, two broad models of organisational criminal liability are canvassed: the derivative model and the direct liability model. The derivative model, based on concepts of the vicarious liability of a person for the acts of another, draws upon civil law principles,

[3] See further Wangmann, J (2004) 'Liability for Institutional Child Sexual Assault: Where does *Lepore* Leave Australia?' 28(1) *Melbourne University Law Review* 169, and Hall, M (2000) 'After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse' 22 *Journal of Social Welfare and Family Law* 159.

whereas the direct liability model looks at the organisation as a separate entity with an ability to act and make decisions independently of its employees (p.227).

The report argues courts should be given the capacity to deliver accountability for law breaking by 'attributing fault directly to an organisation for its culpable omissions or failures to act'. The following paragraph provides the rationale for the report's reasoning surrounding criminal liability of organisations in relation to CSA:

> A company has its own distinctive goals, its own distinctive culture, and its own distinctive personality. It is an independent organic entity, and, as such, should be responsible in its own right, directly and not derivatively, for the criminal consequences that arise out of the way that its business is conducted… what is needed is a theory of criminal liability that captures the distinctive nature of corporate fault… Typically, the company's fault will lie in its failure to have put into place protective mechanisms that would have prevented harm from occurring. It is for this failure that the company bears responsibility for the harm. Recognising that corporate crimes are more often crimes of omission than commission reinforces the poverty of derivative theories of corporate liability that attribute the offences of individuals to a company. While it may be feasible to link wrongful acts to particular actors, it is often impossible to determine who should have done something that was not done. The obligation to put into place systems that would avert crime is collective and the failure to do so is a reflection of the way that the company has chosen to conduct its business (pp.228-229).

The report acknowledges the difficulties associated with any attempt to reform the criminal law, given the possibly severe sanctions that may be imposed upon institutions not normally considered to be 'criminal' and the stigma that may be associated with them.

The report discusses some alternatives to punitive responses, as well as approaches which involve adopting a broader view of the role and purposes of the criminal law. The underlying purpose is to harness an organisation's ability to transform itself, and find appropriately designed sanctions to ensure that it does so (p.230).

The report identifies four elements that are critical to establishing a regime of organisational liability for child sexual abuse. These include the definition of an organisation; persons for whom the organisation may be responsible; the nature of organisational criminal liability, and sanctions that can be imposed upon organisations.

1. Definition of an organisation

The first requirement is to identify the 'entity' that can be held liable for committing a crime. Historically these have been limited to bodies that are formally recognised or constituted by the law, such as corporations or other commercial entities. Unincorporated associations, which do not have a separate legal personality, are not usually included in legislation that ascribes corporate liability. However, the report argues that there is no reason why a wider range of entities should not be held responsible for the criminal conduct of those associated with them if those entities have some continuing and separate identity, albeit one that does not fit comfortably within existing commercial legal taxonomies (p.231).

The report cites the Canadian Criminal Code 1985 which incorporates a broad definition of 'organisation', as well as the definition of organisation that has been expanded in the Victorian Crimes Act. The Victorian legislation defines 'a relevant organisation' to broadly include (amongst others) a church, a religious body or a school, for the purposes of the offence of failing to protect a child from a sexual offence.[4]

2. Persons for Whom the Organisation may be Responsible

Existing criminal provisions that refer to the physical elements of a crime apply generally to the acts of 'an employee or agent or person acting in the actual or apparent scope of their authority'.

However, given that in the civil law context the employment status of those convicted of CSA in some of the religious institutions in Australia is ambiguous, this has been a difficult thing to establish.

The research paper cites the Victorian Crimes Act (which defines a person 'associated with an organisation' for the purposes of the offence of failing to protect a child from CSA very broadly) and the Letters Patent for the Royal Commission (which refers to 'an official of an organisation' rather than an 'employee' when defining the scope of those who might be liable) and suggests that there would appear to be scope to extend or replace the traditional notions of vicarious liability to include persons who are not employees or agents of the organisation but who are more broadly associated with it or may be deemed to represent it (p.234).

3. Organisational Criminal Liability

The direct liability model views an organisation as a separate entity with an ability to act and make decisions independently of its employees. At common law, there are two elements that need to be established in relation to a crime – a physical element (*actus reus*) and a fault or mental element (*mens rea*). Both need to be proved beyond reasonable doubt for there to be a conviction.

Direct responsibility

It is very difficult to hold an institution criminally liable, either through vicarious or direct responsibility for the intentional acts of employees or agents. This is apparent from the very few prosecutions to date of organisations under state or federal law.

The report suggests that a preferable way forward in this area would be for the law to hold organisations *directly responsible* for failing to protect persons in their care, or for failing to disclose offences. Under this model, it would be the negligence of the organisation that would create the necessary connection not the scope of employment (p.234).

The report proposes a number of offences that 'attempt to avoid the fruitless historical distinctions between direct and vicarious responsibility, [and] which focus on an organisation's duty to 'ensure that reasonable care is taken', as well as its duty to take reasonable care' (p.235).

Proposed new offence: being negligently responsible for the commission of a CSA offence

[4] Crimes Act 1958 (Vic), s 49C(1)

> Where a person who is associated with an organisation is convicted of an offence of CSA and the organisation has provided inadequate corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation, or the organisation has failed to provide adequate systems for conveying relevant information to one or more of the persons associated with the organisation or institution, then the organisation or institution is guilty of the offence of permitting/causing a CSA.

Criminal liability for failure to protect

South Australia and Victoria have enacted laws that deal with specific risks to children. Under the *Criminal Law Consolidation Act 1935* (SA), it is an offence for a person who has a duty of care to a child and who was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by an unlawful act, to fail to take steps that he or she could be reasonably expected to have taken in the circumstances to protect the victim from harm. If the victim suffers serious harm, the maximum penalty is imprisonment for five years.

Similarly, in Victoria, under the *Crimes Act 1958* (Vic), it is a criminal offence for a person in authority to fail to protect a child from a sexual offence. The maximum penalty is five years' imprisonment. The Victorian provision applies only to individuals, but the intent of the law is to promote cultural change in the way that organisations deal with the risk of sexual abuse of children under their care, supervision or authority. The report concludes that it would not be difficult to extend the provision to create direct organisational responsibility for a failure to protect a child. It suggests the following proposed offence (p.239):

> ***Proposed new offence: negligently failing to remove a risk of child sexual assault***
>
> An organisation commits an offence if it exercises care, supervision or authority over children, and a person associated with the organisation commits a sexual offence against a child over which it exercises care, supervision or authority, and the organisation is negligent as to whether that person would commit a sexual offence against such a child.
>
> An organisation negligently fails to reduce or remove a risk if that failure involves a great falling short of the standard of care that a reasonable organisation would exercise in the circumstances.

Reactive organisational fault

An independent basis of culpability and criminal liability for organisations could be its behaviour once it has become aware of offending conduct by its staff.

The report defines 'corporate reactive fault' as 'an unreasonable corporate failure to devise and undertaken satisfactory preventive or corrective measures in response to the commission, by the personnel acting on behalf of the organisation, of the actus reus of the offence' (p.240).

Examples of 'offending' behaviour include failing, or delaying reporting an offence to the authorities, actively covering up known offending, recklessly allowing possible offending conduct, or failing to create or maintain effective communication or compliance programs.

The report suggests that an offence based upon 'organisational reactive fault' would be difficult to frame, but would require proof of:

- The commission of an offence by a person associated with the organisation (though not necessarily that the person has been convicted of an offence)
- Knowledge or recklessness as to the commission of the offence by the organisation or high managerial agent; and
- Unreasonable organisational failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the offence by the person associated with the organisation (p.241).

Criminal liability for concealing offences

The Commission has noted that in a number of child abuse cases, persons in authority failed to report suspected abuse to law enforcement authorities. Whilst most jurisdictions have mandatory reporting legislation in relation to child sexual abuse, the legislation is usually restricted to health professionals, teachers, police officers, childcare staff etc. Several inquiries have recommended that these laws be extended to religious personnel (p.241).

A number of general provisions exist to make it an offence to conceal an offence. In the Northern Territory and Victoria, laws have been enacted to extend the operation of these laws to specific offences dealing with child sexual abuse (see further pp.241-242). The report suggests that these laws could be adapted to extend the definition of 'person' to an organisation or institution.

The report also notes the developments in Ireland following a number of inquiries into sexual abuse of children in the Catholic Church. In particular, the *Criminal Justice (Withholding of Information against Children and Vulnerable Adults) Act 2012 (Ireland)* makes it an offence for a person who knows or believes that an offence has been committed by another person against a child to fail, without reasonable excuse, to disclose that information to the police. There is no exemption of information obtained in confession (p.242).

Direct responsibility for the acts of another person

The report discusses the concept of attributing the acts of the primary offender to the organisation on the basis that the organisation expressly, tacitly or impliedly authorised or permitted the commission of the offence. It notes that this is the most difficult means of holding an organisation directly responsible. Such an approach would be based upon existing provisions in the Commonwealth Criminal Code which apply to corporations. Whilst the report notes that some aspects of the law would not be applicable to institutions involved in CSA, it considers that those provisions that refer to the situation where a 'corporate culture' existed within an organisation that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or where the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provisions, could be applied more broadly to organisations involved with CSA.

The following proposed offence is suggested, following these principles:

> ***Proposed new offence: institutional child sexual abuse***
>
> An organisation commits an offence in the situation where a person associated with the organisation is convicted of an offence of child sexual assault *and* the organisation, or a high managerial agent of the organisation, recklessly authorised or permitted the commission of that offence by that person. Such an authorisation or permission would be established by proving that the managing body (or the high managerial agent) expressly, tacitly or impliedly authorised or permitted the commission of the CSA offence, or that a corporate culture existed that tolerated or led to the commission of the CSA offence, or that the organisation failed to create and maintain a corporate culture that would not tolerate or lead to the commission of the CSA offence.
>
> It would be a defence to such an offence for the organisation to show that it had (or provided) adequate corporate management, control or supervision of the conduct of one or more of the persons associated with the organisation.

4. Sanctions that can be imposed upon Organisations

On the assumption that a suitable criminal offence could be appropriately framed, the report goes on to explore what sanctions may be appropriate and effective for organisations that are found to have offended.

Retribution, denunciation and organisations

In situations where corporations are found culpable due to negligence or their own corporate culture, and harm can be proved, some possible sanctions suggested by the report include corporate probation, punitive injunctions or community service, together with the public denunciation of the conduct, the recording of a conviction against the organisation's name, together with any adverse publicity that may attach (p.246).

Deterrence: individuals and organisations

Because institutions have a collective interest they wish to protect, they are in that sense *deterrable*. In relation to organisations involved with CSA, their interest would be reputational rather than economic (p.246).

However, given that pure-deterrence based approaches to organisational compliance are generally ineffective in achieving their purposes, the report suggests that the use of a 'cooperative-enforcement' model is preferable when dealing with organisations. This approach focuses on the organisation's normative commitment to the law, while still retaining some coercive elements:

> A cooperative enforcement model builds on the desire of organisations to change and provides the legal means by which that change can be facilitated, guided or imposed. 'Behaviour change' rather than 'deterrence' is a better description of this approach that draws more from the regulatory than the criminological literature (p.248).

Sanctions and organisational change

The underlying purpose of sanctions is not so much about punishing organisations as it is about the promotion of 'good corporate citizenship through encouraging implementation of effective compliance programs, which – it is hoped, will prevent crime' (p.248).

There are a number of existing sanctions that involve some form of court or government supervision, organisational change or reparation to the community. These include probation orders, supervisory intervention orders, community service orders and enforceable undertakings. The report discusses the applicability of these sanctions to the institutional setting (see further pp. 248-251).

Public Attitudes to Corporate Crime

Whilst no studies have specifically examined public perceptions of institutional CSA to understand people's perceptions of the seriousness of such crimes or their preferred criminal justice responses, the authors draw upon studies that have been conducted in other related areas (such as white collar crime and corporate crime more generally) and conclude that the 'public would be supportive of assigning responsibility to the institutions in which CSA occurs' (pp.253-255).

A copy of the Royal Commission's report: *Sentencing for child sexual abuse in institutional contexts*, is available at: http://childabuseroyalcommission.gov.au/getattachment/8f9e5bb9-f560-408f-a5cc-de8700796a89/Sentencing-for-Child-Sexual-Abuse-in-Institutional