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Contesting Criminal Responsibility for Rape: Reframing Institutional and Individual Complicity

> I am grateful today, to be alive, for all those I love, and for all those who have the courage to stand up for others. I said I was angry recently, and I have a few reasons, #metoo, in case you couldn't tell by the look on my face. I feel it's important to take your time, be fair, be exact, so … Happy Thanksgiving Everyone! (Except you Harvey, and all your wicked conspirators – I'm glad it's going slowly – you don't deserve a bullet) – stay tuned.
>
> Uma Thurman, Instagram, 27 November 2017

During the writing of this book, Hollywood and the global entertainment industry have been shaken by revelations of what appears to have been widely known, but hidden and normalised within the industry: namely, that young female actors, as a result of decisions to pursue careers in show business, were routinely subjected to a range of sexual abuses. These abuses ranged from non-consensual sexual acts perpetrated by violence, threats, spiking of drinks or administering of drugs, through to 'normalised' but degrading acts of indecency and sexual harassment. For many decades, the 'casting couch' culture licensed movie producers, directors, actors and their agents to abuse positions of power and privilege – using force, coercion, deception and manipulation – to procure sex from women (some of whom were underage minors).

Examining the scale of the abuse complaints now coming forward,[1] it is surprising that so few cases, many of which were essentially 'stranger' rapes, proceeded to criminal investigation and prosecution. But such is the position of unassailable power and untouchable status of these 'industry gatekeepers'. Those women brave enough to complain about the abuse would be threatened with industry blacklisting. Some victims in the United States, who bravely persisted with their allegations, were funnelled into civil claims on the ground that outcomes would be more certain than a criminal trial. While civil settle-

1 The growing 'A-list' of international celebrities revealing the extent of this rape culture within this industry is extraordinary: Caroline Davies and Nadia Khomami, 'Harvey Weinstein: The Women Who Have Accused Him', *The Guardian* (online), 26 May 2018 <https://www.theguardian.com/film/2017/oct/11/the-allegations-against-harvey-weinstein-what-we-know-so-far>; 'Harvey Weinstein: Company Faces Harassment Inquiry', *BBC News* (online), 23 October 2017 <http://www.bbc.com/news/world-us-canada-41726134>.

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ments secured compensation for victims, they were made 'without admission' and typically contained stringent non-disclosure terms that shielded the identity and reputation of those involved. Women who refused to stay quiet and accept 'hush money' inevitably suffered severe loss of career opportunities and ongoing professional reputational harm.[2]

Until now, this wider institutional and professional culture of facilitation and 'turning a blind eye' has provided a cloak of legal impunity for powerful professional men to sexually abuse women and children. The growing publicity campaigns that began in late 2017 (#MeToo and #TimesUp) continue to uncover cases of predatory behaviour, historic abuse and institutional cover-ups across a wide range of industries and professions.[3] Like the institutional child sexual abuse scandals of the previous decade, which rocked the foundations of religious institutions across the globe, there are urgent calls for independent inquiries, reopening investigations and, in some cases, even criminal prosecution. When such cases of sexual abuse are exposed to public glare, media attention invariably focuses on the predatory profile of the perpetrators, and the individual blame which attaches not only to the sexual acts themselves but also to the ongoing associated harms (physical, psychological, emotional and financial) experienced by the victims.

What was striking about the recent torrent of revelations, apart from the cultures of impunity and blame-shifting strategies of alleged perpetrators, is that this conduct was often notorious within the workplace, frequently facilitated or condoned by senior colleagues, co-workers, 'gophers' and assistants. It appears that a professional coterie of abuse facilitators inhabits multinational corporations and institutions, willingly identifying and facilitating opportunities for abusers to be alone with their targets, or, upon gaining knowledge of that abuse, doing nothing to prevent it continuing. To add insult to injury, these facilitators may assist with the 'cover-up' of this abuse, in order to protect corporate and professional reputations, when allegations were likely to become public.[4]

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2 The Australian Human Rights Commission reports that '[d]isturbingly, in recent years, we have seen an increase in the number of people alleging negative consequences as a result of reporting sexual harassment, for example, through a reduction in hours, demotion or workplace bullying'. See Australian Human Rights Commission, *Ending Workplace Sexual Harassment: A Resource for Small, Medium and Large Employers* (2014) 34 <http://www.humanrights.gov.au/sites/default/files/document/publication/EWSH_2014_Web.pdf>; see also Australian Human Rights Commission, *Working Without Fear: Results of the 2012 Sexual Harassment National Telephone Survey* (2012) 39 <http://www.humanrights.gov.au/sites/default/files/content/sexualharassment/survey/SHSR_2012%20Web%20Version%20Final.pdf>.

3 Jessica Haynes, 'What is the #MeToo Campaign?', *ABC News* (online), 17 October 2017 <http://www.abc.net.au/news/2017-10-16/what-is-the-metoo-campaign/9055926>.

4 For a discussion of the extent of complicity in the case of Harvey Weinstein, see Megan Twohey et al, 'Weinstein's Complicity Machine', *New York Times* (online), 5 December 2017 <https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html>.

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Culture is often said to be one of the root causes of rape and sexual abuse, creating and sustaining degrading and harmful attitudes to women, sexuality and victim-blaming.[5] But culture, whether relating to specific institutions or society in general, cannot be indicted for rape or sexual assault (except perhaps in a metaphorical sense). Criminal responsibility may attach to individual perpetrators and facilitators of that abuse. The question posed in this chapter is whether our current principles of responsibility can be extended to apply to hold 'legal persons' (the corporations, universities, professional and sporting bodies whose acts or omissions facilitate institutional sexual abuse) liable under the criminal law.

Drawing lessons from recent inquiries into institutional child sexual abuse in Australia, the United States and the United Kingdom,[6] the first part of the chapter explores the new and emerging legal strategies being used to hold institutions, not merely individual perpetrators, criminally liable for their failure to prevent rape and other sexual harm. We then examine how existing criminal law doctrines potentially extend accessory liability for sexual abuse to other facilitators, who assisted or encouraged, by act or omission, existing institutional abuse.

Putting Institutional Cultures on Trial for Sexual Abuse

Commencing investigation and prosecution of 'historic' sexual abuse allegations is challenging from the perspective of the two goals of criminal justice, namely, the public interest in bringing to justice those who commit serious crimes, while ensuring those who are accused are duly afforded their right to a fair trial. Such cases often relate to events alleged to have occurred decades ago. Although a delay in reporting the abuse may be reasonable due to the nature of the trauma and the age at the time of victimisation, investigations and legal proceedings may be defeated by formal procedural obstacles, such as statutes of limitations, that require prosecution to commence within a

5 See Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Simon & Schuster, 1975); Amy Grubb and Emily Turner, 'Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming' (2012) 17(5) *Aggression and Violent Behavior* 443, 444; see also Emilie Buchwald, Pamela Fletcher and Martha Roth (eds), *Transforming a Rape Culture* (Milkweed Editions, 1995).

6 For a discussion of national inquiries in the United Kingdom, see the following chapters in Yorick Smaal, Andy Kaladelfos and Mark Finnane (eds), *The Sexual Abuse of Children: Recognition and Redress* (Monash University Publishing, 2016): Timothy W Jones, 'Finding Child Sex Abuse in the Archives: The Treatment of Sexually Offending Clergy in the Church of England, 1871–1960', 45; Mark Kebbell and Nina Westera, 'Investigating Historical Allegations of Sexual Abuse: The Investigation of Suspected Offenders', 123. For a discussion of abuse within the Catholic Church in the United States, see Karen J Terry, 'Child Sexual Abuse in the Catholic Church' in Yorick Smaal, Andy Kaladelfos and Mark Finnane (eds), *The Sexual Abuse of Children: Recognition and Redress* (Monash University Publishing, 2016) 78.

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defined time-period. Even in jurisdictions that do not time-bar prosecutions, the alleged perpetrator may be dead, unidentifiable, or so old and unwell that they are not fit to stand trial. Even where an accused can stand trial, there are inevitable questions about the fairness of instituting legal proceedings so long after the alleged events. As we explored in Chapter 6, although the notions of fairness are historically contingent and inherently contestable, it remains vital that our collective desire to 'do justice' in sexual offence cases – which involves holding individuals accountable under the criminal and civil law for the harms done to their victims – cannot compromise the fundamental legal duty to ensure a fair trial.[7]

Because of the often insurmountable procedural and evidential challenges confronting 'historic' cases of sexual abuse, there has been growing interest within both academic and policy circles in exploring whether criminal responsibility extends beyond the individual perpetrator, potentially attaching to institutions that have facilitated – or even failed to prevent – abuse committed by perpetrators employed by or associated with those institutions. In Australia, the debate about historic abuse has focused on the findings and recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (2013–2017) ('the Royal Commission'). The Royal Commission's Final Report, published in late 2017, revealed the repeated and culpable failures of senior officials and office-holders within institutions to investigate complaints, protect victims in their care, and to report their suspicions to the police. Even when complaints were made, police often failed to act on these allegations.[8] Failures to intervene, which in some cases involved high level 'cover-ups',[9] created a culture of impunity that condoned and facilitated perpetration of sexual abuses for many decades. The Royal Commission's Final Report on Redress and Civil Litigation in 2015 recommended the establishment of

7 For a discussion of the fair trial principle, and, in particular, feminist attempts to challenge traditional adversarial and defendant-centric notions of fairness, see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 107 [2.80], [2.135].

8 Police are often accused of being complicit in these cover-ups. For example, *The Age* reported that 'for decades police were part of the problem, with key officers actively working for the church and against fellow officers investigating rogue priests. They were known as the Catholic mafia – men who covered up crimes, tipped off the church and allowed sex offenders to continue molesting children': John Silvester, 'Catholic Cops in Cover-up of Child Abuse by Priests', *The Age* (online), 4 June 2015 <http://www.theage.com.au/victoria/catholic-cops-involved-in-coverup-of-child-abuse-by-priests-20150603-ghfwdt.html>.

9 For example, Case Study 44 of the Royal Commission focused on the alleged cover-up of John Joseph Farrell's abuse over a 20-year period by other members of the clergy, including Catholic Cardinal George Pell: Truth Justice Healing Council, *Case Study 44: Hearing Room Updates* (22 September 2016) <http://www.tjhcouncil.org.au/royal-commission/case-study-44-farrell-sept-2016/case-study-44-hearing-room-updates.aspx>.

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national redress schemes to coordinate and provide effective compensation and support for victims.[10]

This strategy of shifting the legal and policy debate about responsibility towards institutions does not seek to undermine or weaken the significance of attaching legal blame or responsibility to individual perpetrators. It recognises, however, that sexual offending often occurs within institutional and professional contexts, and that the institutions which fail to investigate or report – or worse still, take active steps to conceal known or suspected abuse – will only facilitate further abuse. Ongoing institutional failure to intervene to prevent crime has the potential to impact a much wider range of victims, and to allow the victimisation to carry on unchecked for a much longer period. From the perspectives of both crime prevention and moral blameworthiness, the conduct of facilitators (both institutional and individual) who create 'abuse conducive cultures' warrants more serious attention from our police and prosecutors, as well as scholars, policy-makers and law-makers.

Corporatising Rape: Criminalising Organisational Cultures of Abuse Facilitation

The 18th century English judge and jurist, Baron Thurlow, famously decried that the corporation has 'no soul to be damned, and no body to be kicked', adding that 'by God, it ought to have both'.[11] The history of corporate crime reflects Thurlow's ambivalence towards the status of 'legal persons'. Over time, legislatures and courts came to accept the necessity of holding corporations criminally responsible for the harms and wrongs committed in their name. Offences were enacted targeting specific corporate behaviours, attaching criminal liability – usually as a form of strict liability that dispensed with the mental state or mens rea – to breaches of corporate regulations. In this way, regulatory breaches could be punished by imposition of a criminal fine upon the corporation. These statutory regulatory offences attracted little if any judicial or academic attention, which left the broader question of criminal responsibility of corporations for crimes requiring proof of mens rea unresolved until the 1970s and the formulation of the so-called 'Tesco principle'.[12]

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10 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report – Redress and Civil Litigation* (2015) <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf>.

11 See John C Coffee Jr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386, 386. Coffee observed that the latter part of Thurlow's quote, cited in Henry L Menken, *A New Dictionary of Quotations on Historical Principles from Ancient and Modern Sources* (Alfred A Knopf, 1942) 223, is 'probably apocryphal'.

12 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. This model has been variously described as the identification, attribution or alter-ego rule. Though restrictive and subject to academic criticism, this test has recently been affirmed in *R v A Ltd, X, Y* [2016] EWCA Crim 1469.

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Rather than apply the vicarious liability test favoured by the US courts, the English courts held that, under the common law, corporate responsibility for an offence requires the identification of the requisite mens rea within the controlling or directing 'mind of the company' – namely, the managing director, board of directors, or other senior officials to whom the responsibility has been delegated. The Tesco principle was initially followed in Australia. However, the problem with the Tesco principle is that it requires proof of fault (typically knowledge, intention or recklessness) on the part of the most senior officials within the corporation. Under this model, finding fault becomes much easier to prove in small to medium sized companies, and much harder to prove in large multinational corporations. Put simply, senior executives in the 'corporate suites' may be shielded or insulated from crimes committed on the 'factory floor' or in regional offices, and thus lack the requisite fault needed for criminal responsibility to be attributed to the corporation.[13]

A succession of large-scale disasters caused by global corporations in the 1980s and 1990s revealed cultures of corporate impunity that placed profit before people. The pioneering work of Australian criminologist, John Braithwaite, and criminal lawyer, Brent Fisse, explored how the existing principles of criminal responsibility failed to hold corporations accountable for the serious criminal wrongs and harms.[14] Across a range of sectors, from safety breaches in mining operations to 'deceptive and misleading' marketing of financial products in remote and vulnerable communities, corporate senior executives could rely upon the Tesco principle to plead ignorance and 'plausible deniability' of illegal practices applied by employees and agents.

This legal gap in relation to criminal responsibility for corporations was identified in the 1990s by the Model Criminal Code ('MCC') project, an ambitious law reform program that set out to modernise and harmonise the principles of responsibility in Australia. Drawing directly on the academic work of Braithwaite and Fisse, the MCC set out to address the limitations of the Tesco principle described above, proposing a broader test of corporate responsibility based on 'organisational culture'. Although the MCC did not achieve the uniformity or harmonisation hoped for, its innovative approach

13 Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 47. Some civil law systems, especially those influenced by German law principles, are reluctant to recognise criminal responsibility for legal entities: see Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) 252, 267.

14 In the 1980s, the large-scale deaths and injuries from the Herald of Free Enterprise Ferry Disaster and the Bhopal Cyanide Gas Leaks from a Union Carbide plant in India placed the spotlight on the legal impunity of multinational corporations: see Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2001) 85. See generally, Peter Grabosky and Adam Sutton (eds), *Stains on A White Collar: Fourteen Studies in Corporate Crime or Corporate Harm* (Federation Press, 1989).

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to corporate criminal responsibility was incorporated into federal criminal law with the passing of the *Criminal Code Act 1995* (Cth) ('the Criminal Code').[15]

The Criminal Code provides that a 'body corporate' may be liable for an offence where it 'authorises or permits' the commission of the offence, which may be inferred from proof of: (a) a corporate culture that 'directed, encouraged, tolerated or led to non-compliance with the relevant provision', or (b) failure to 'create and maintain a corporate culture that required compliance'.[16] Culture for this purpose is defined 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'.[17] Although bold and innovative, the 'organisational culture' provisions of the Criminal Code have never been tested in the Australian courts.[18] It is certainly true that a 'body corporate' *potentially* can be held criminally responsible for failures to prevent the commission of *any* offence under the federal criminal law, and in theory at least, this includes sexual offences.

But there remains a number of obstacles to institutional prosecution. First, there may be doubts whether the institution under investigation fits within the definition of 'legal person' under current law. In the civil liability sphere, the legal status of religious and charitable organisations, including for instance that of the Catholic Church, remains uncertain.[19] The position is similarly murky in the criminal law. The definition of 'person' in the Criminal Code, read alongside s 2C(1) of the *Acts Interpretation Act 1901* (Cth), includes a natural person, a body politic or corporate, as well as a Commonwealth authority that is not a body corporate. While the terms 'body politic' and 'body corporate' are not further defined in the Criminal Code, the latter concept is presumably narrower than 'organisation'. To address institutional forms of responsibility for sexual abuse, the criminal law in Australia clearly needs to adopt a wider concept of 'legal person' that extends to unincorporated associations, organisations, partnerships and other like bodies. Indeed, the Sentencing Report prepared for the Royal Commission recommended the adoption of a broader definition that extends to 'any public or private body, agency, association, club, institution, organisation or other entity or group of

15 For an essay exploring the impact and legacy of the MCC project, see Simon Bronitt, 'Is Criminal Law Reform a Lost Cause?' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 133.

16 *Criminal Code* (Cth) s 12.3(2)(c), (d).

17 *Ibid* s 12.3(6).

18 Simon Bronitt, 'New Regulatory Paradigms for Preventing Institutional Child Sexual Abuse: Lessons from Corporate Crime and White-Collar Criminals' in Yorick Smaal, Andy Kaladelfos and Mark Finnane (eds), *The Sexual Abuse of Children: Recognition and Redress* (Monash University Publishing, 2016) ch 13, 184.

19 The uncertainty about the legal status of the Catholic Church, which is an unincorporated association, was examined in *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565.

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entities of any kind (whether incorporated or unincorporated), and however described'.[20]

The second obstacle to institutional prosecution is cultural, but in this context, it is the culture of law enforcement and prosecution, not the corporation, at fault. To date, both law enforcement and prosecution agencies have been slow to embrace corporate *criminal* responsibility in relation to serious financial and economic crimes, where there is a strong preference for using civil remedies and enforceable undertakings.[21] That said, there are periodic calls for 'crackdowns' and tougher responses to corporate wrongdoing, such as industrial homicide,[22] environmental harm,[23] and even extraterritorial human rights violations.[24]

In our view, the grounds for extending criminalisation to the failure of institutions to prevent sexual abuse is compelling, and is certainly borne out in several recent scandals. As noted above, scandals across a wide range of domains have revealed normalised patterns of sexual abuse within institutions that condone or tolerate sexual harassment, indecent acts, sexual 'hazing', as well as 'consensual' sexual relations tainted by abuse of power, coercion or deception.[25] What is striking in all these situations is the degree of prior institutional fault; there is mounting evidence across both public and private

20 Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (July 2014) Royal Commission into Institutional Responses to Child Sexual Abuse, 244 <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Sentencing%20for%20Child%20Sexual%20Abuse%20in%20Institutional%20Context%20-%20Government%20responses.pdf>. See also Bronitt, above n 18, 186.

21 For a recent empirical study of enforcement activity in relation to the *Corporations Act 2001* (Cth), see Jasper Hedges et al, 'The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis' (2017) 40(3) *Melbourne University Law Review* 905. Recent research suggests that criminal enforcement action is often used to deal with small company compliance issues, rather than prosecute serious financial and economic crime: Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Companies and Securities Law Journal* 289.

22 See Aidan Ricketts and Heidi Avolio, 'Corporate Liability for Manslaughter: The Need for Further Reform' (2009) 13 *Southern Cross University Law Review* 56.

23 Robert Paehlke, 'Environmental Harm and Corporate Crime' in Frank Pearce and Laureen Snider (eds), *Corporate Crime: Contemporary Debates* (University of Toronto Press, 1995) 305; see also Rob White, 'Reparative Justice, Environmental Crime and Penalties for the Powerful' (2017) 67 *Crime, Law and Social Change* 117.

24 See Radha Ivory and Anna John, 'Holding Companies Responsible: The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations' (2017) 40 *University of New South Wales Law Journal* 1175.

25 University campuses have long been a site of sexual abuse and exploitation: see Peggy Reeves Sanday, *Fraternity Gang Rape: Sex, Brotherhood, and Privilege on Campus* (New York University Press, 1990) for a detailed analysis of the prevalence of such occurrences within residential halls, college campuses, and all-male enclaves such as fraternities. Sanday's findings, while much wider in scope and more academic in nature, are echoed in Anna Krien's *Night Games* (Random House, 2015), which exposes the predatory 'group sex' culture among players from the AFL and NRL.

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institutions that senior managers and colleagues were aware of the risks posed by the perpetrators, yet failed to intervene, or worse still, condoned or deliberately concealed the sexual abuse.[26] A recent scandal in the United States illustrates the existence of such abuse cultures in the university context.

Dr Larry Nassar, a senior sports medicine specialist working for Michigan State University ('MSU'), abused his position of trust over two decades in order to perpetrate sexual abuse against hundreds of young female athletes and cheerleaders. He initially defended the allegations, claiming that his use of penetrative vaginal examinations was a legitimate form of medical treatment. (The issue of medical fraud negating consent is explored in Chapter 2.) He subsequently pleaded guilty to seven counts of sexual assault at trial, as well as possession of child sexual exploitation material. The case, which was widely reported across the globe, resulted in Dr Nassar being sentenced to more than 100 years of imprisonment.[27] From the sentencing hearing, it was apparent that MSU senior executives had been repeatedly made aware of the alleged abuse, and had taken some steps to investigate and manage his 'risky' behaviour, even adopting a policy requiring a chaperone to be present during all of his examinations. However, it appears that no steps were taken by MSU to ensure that these restrictions on his practice were observed. Due to MSU's failure to intervene, the abuse of the young athletes continued for many more years. While the confidence in MSU leadership was shattered by the scandal, leading to the resignation of MSU's President and other senior coaching officials, the case raises the question of whether the university itself, as a legal entity, should bear criminal as well as civil liability for these crimes.[28]

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26 For a critique of the disproportionate media attention directed towards recent ball tampering scandals in cricket, as opposed to sports 'stars' who sexually assault women, see Holly Wainright, 'Comment: If You Think Ball-Tampering is Our National Sporting Shame, You Haven't Met Matt Lodge', *MSN Sport* (online), 30 March 2018 <https://www.msn.com/en-au/sport/rugby-league/comment-if-you-think-ball-tampering-is-our-national-sporting-shame-you-havent-met-matt-lodge/ar-AAvezYo?ocid=sf>.

27 'Larry Nassar Jailed for Another 40 to 125 Years', *BBC News* (online), 5 February 2018 <http://www.bbc.com/news/world-us-canada-42950478>.

28 From the US perspective, it is unlikely that criminal liability could be attached applying the vicarious liability test, since the prosecution would need to establish that such flagrant abuse was within the ordinary scope of employment. Nevertheless, suggestions that MSU was aware of reports against Nassar have resulted in federal investigations of MSU for having violated the Clery Act, which requires disclosure of crimes on campus: Jen Kirby, 'Michigan State's Larry Nassar Fallout Has Begun', *Vox* (online), 27 March 2018 <https://www.vox.com/policy-and-politics/2018/1/30/16934634/michigan-state-larry-nassar-investigations>. Notwithstanding that the sexual abuse may fall 'outside the scope of conventional sports misconduct', there may also be significant fines and penalties upon the institution by the sports regulatory body (NSAA): see Michael McCann, 'Four Key Sports Law Implications of the Larry Nassar Scandal', *Sports Illustrated* (online), 19 January 2018 <https://www.si.com/olympics/2018/01/19/larry-nassar-scandal-sports-law-implications>.

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The challenge is to explore how 'sexual abuse cultures' may be held accountable by extending the principles of corporate criminal responsibility to institutional abuse. We may wait for some time for law enforcement officials and prosecutors to investigate and commence appropriate 'test cases'. In the meantime, as foreshadowed above, a preferable reform strategy would be for the legislature to enact a new offence which criminalises institutional failures to prevent sexual abuse.

Criminalising Institutional Failures to Prevent Abuse: Lessons from White Collar Crime

Calling for blame-sharing based on criminalising the 'failure to prevent crime' is hardly revolutionary. As leading criminal law scholar Andrew Ashworth points out, strategies involving 'diffusion of responsibility'[29] have been applied across many fields, including domestic violence and child sexual abuse,[30] foreign bribery and corruption,[31] and tax evasion.[32] Such offences have also been applied to individuals who fail to prevent acts of terrorism.[33]

29 Andrew Ashworth has called this strategy of criminalisation the 'diffusion of responsibility': Andrew Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *Law Quarterly Review* 606; Andrew Ashworth, 'Re-assessing the Principle of Individual Criminal Responsibility' (Speech delivered at the Current Legal Issues Seminars 2017, The University of Queensland, 2 November 2017).

30 *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5 (failing to protect a child or vulnerable member of the household). In 2015, Victoria introduced a similar offence of failing to protect a child from risk of sexual abuse: *Crimes Act 1958* (Vic) s 49O. The offence is designed to target persons working in institutions in positions of authority who *know* of the risk and negligently fail to reduce or remove the risk.

31 For example, *Bribery Act 2010* (UK) c 23 supplemented existing core offences of giving or receiving bribes with a new ancillary offence which applies to commercial organisations that fail to prevent foreign bribery by employees or associated persons. The definition of 'relevant commercial organisation' under the *Bribery Act* is broad and includes partnerships and unincorporated associations: at s 7(5). In Australia, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (currently before Parliament) proposes to introduce a 'failure to prevent foreign bribery' offence, modelled on the UK provisions.

32 The 'failure to prevent bribery' offence has provided the template for a new proposed offence of failing to prevent money laundering: Ministry of Justice (UK), *Corporate Liability for Economic Crime: Call for Evidence* (13 January 2017) <https://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence>, discussed in Andrew Ashworth, 'Positive Duties, Regulation and the Criminal Sanction', above n 29, 607.

33 *Terrorism Act 2000* (UK) c 11, s 38B (information about acts of terrorism). The diffusion of responsibility to institutional actors occurred following the fatal police shooting of Jean Charles de Menezes in 2010. Rather than prosecute the individual counter terrorism police officers involved in the operation, the Metropolitan Police were charged with breaches of health and safety laws, for 'endangering the public … when officers pursued Mr Menezes and shot him seven times': 'Profile: Jean Charles de Menezes', *BBC News* (online), 10 June 2015 <http://www.bbc.com/news/uk-33080187>.

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We contend that there are similar compelling reasons, based on principle and sound policy, to extend the diffusion strategy to institutions which fail to take adequate steps to prevent rape and other forms of sexual abuse. Such strategies rest on reversing the onus of proof – typically by imposing strict liability on institutional defendants – so that institutions can only escape liability by proving on the balance of probabilities that they acted with due diligence (by taking adequate and reasonable steps) to prevent the proscribed harm. Applied to the corporate context, the creation of *direct* institutional liability, with its strong preventive rationale, would criminalise organisational cultures that fail to take adequate or reasonable steps to prevent institutional sexual abuse. As in the context of criminalising corporate failures to prevent foreign bribery, concern about the potential overbreadth of institutional liability for sexual abuse may be addressed through prosecutorial guidelines, which offer organisations detailed guidance on how they may discharge their legal duties under the criminal law, and most significantly lay a plausible evidential foundation for the due diligence defence. Prosecution and punishment of institutions for sexual abuse – either by applying the general principles of corporate responsibility discussed above or by enacting a specific 'failure to prevent' sexual abuse offence – would signal the seriousness of wrongdoing and arguably serve the purpose of deterrence, general and specific.

Another related regulatory innovation which has emerged to deal with corporate crime in the United States and the United Kingdom, and is now proposed for Australia, is the introduction of the deferred prosecution agreement (DPA). The DPA is a voluntary negotiated settlement with a corporate defendant in relation to criminal wrongdoing, where the prosecution exercises its discretion in the public interest to 'defer' or stay proceedings upon certain conditions. Under the UK DPA scheme, a judge must approve both the decision to negotiate the DPA, which needs to satisfy a public interest threshold, and the terms of the agreement, which must be reasonable and proportionate.[34] The typical DPA includes terms that require payment of a financial 'penalty', apology and compensation to victims, agreement to cooperate with any investigation (including reimbursement of investigation costs), disgorging proceeds of crime, and implementing compliance and monitoring programs.[35] The breach of the DPA may lead to discharge of the stay of proceedings and resumption of prosecution.

It is beyond the scope of this chapter to provide a detailed examination of advantages and disadvantages of this new regulatory tool – it should be noted that to date, DPAs have only been considered necessary for serious economic or financial offences by corporations. In our view, there is clearly a compelling case, based on principle and public policy, to consider extending DPAs

34 See *Crime and Courts Act 2013* (UK) c 22, sch 17.

35 See generally, Justin O'Brien, 'The Sword of Damocles: Deferred Prosecutions and the Search for Accountability' in Justin O'Brien and George Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Hart Publishing, 2013) 161.

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to institutional sexual abuse cases; indeed, this option was recently explored in some of the expert reports prepared for the Royal Commission.[36] The DPA offers many benefits, especially regarding terms which require corporations or other legal entities to implement preventive measures and effective restitution schemes, as well as to promote and monitor ongoing organisational culture change. While tough penalties grab media headlines, there is also the danger that such costs, like 'hush money' payments in settlements, will be incorporated into the business model as yet another legal risk or 'cost of doing business' that needs to be managed.

By refocusing the 'blame game' for rape and sexual abuse onto the *institutional* level – targeting corporations, legal entities, organisations and professional groups that facilitate abuse by either action or omission – to reiterate, this chapter does not seek to deny or minimise the wrongful and harmful conduct of individual perpetrators. Rather, consistent with the book's overarching theme, our purpose is to contest the dominant legal model of criminal responsibility for rape – the individual perpetrator model – to expose the culpability of a range of institutional and individual facilitators that assist, encourage or fail to intervene to prevent sexual harm to women and children. Our invitation to think *institutionally* about responsibility for abuse challenges and reconstructs prevailing legal paradigms of blame and harm in the modern criminal law. In this respect, we draw inspiration from the projects of feminist scholars such as Catharine MacKinnon, who contested the prevailing legal wisdom of sexual harassment as a *private* wrong (as a tort of sexual battery), advocating in its place a new model of sexual harassment as a *public* wrong (as a violation of civil rights law).[37] At that time, viewing sexual harassment as a matter of gender discrimination was radically unorthodox. Of course, it is unexceptional to view such gender-based abuse as a *public* wrong today, capable of triggering conventional redress through human rights and anti-discrimination law, and in some cases sufficiently serious to warrant criminalisation.

Rethinking Complicity for Facilitators of Sexual Abuse

'I am not my brother's keeper' is a biblically derived tenet which establishes an ethical and moral limit for attributing personal responsibility for the harmful actions of others.[38] In the modern criminal law, this foundational principle of autonomy means that individuals should bear no criminal liability for

36 These expert reports and proposals are discussed in Bronitt, above n 18. The author argues that DPAs should not be framed in punitive terms or impose 'penalties' – since there has been no formal determination of guilt by a court – but rather should be guided by preventive and restorative objectives.

37 Catharine MacKinnon, *Toward A Feminist Theory of the State* (Harvard University Press, 1989).

38 Genesis 4:9: 'Then the LORD said to Cain, "Where is Abel your brother?" He said, "I do not know; am I my brother's keeper?"'

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failing to intervene to prevent another person's crime or harms inflicted upon another person, even where that intervention would be reasonable (ie, impose no significant cost or burden on the intervener) or the ethically and morally correct course of action in the circumstances.[39] The principle of autonomy is reflected in the ideals of 19th century liberalism, which looked askance at the idea that the common law imposes general liability for omissions or freely conscripts citizen-strangers into general crime or harm prevention roles. This is most dramatically illustrated in countless textbooks which include the famous example of a stranger who sees a baby drowning in a puddle but does not intervene or summon help. While deserving our moral condemnation, under the common law the stranger is under no legal duty to intervene, and therefore that omission to act does not give rise to liability for homicide.[40]

For every general legal rule or proposition there are exceptions, and the modern criminal law imposes a wide range of legal duties to intervene to prevent crime or specific harms. Some of these duties may arise from a pre-existing legal relationship with the other person (ie, arising from a family, employment, professional or other relationships recognised by law) or the voluntary assumption of a duty of care in relation to another person. In both cases, these persons acquire a duty to intervene due to the control, trust and responsibility that they have in respect of the other party. These established deviations, historical or statutory, do not counter the paramount position taken in the modern criminal law: there is no general duty to prevent crime, and an individual does not *cause* an offence or become a party to it simply by witnessing it and failing to intervene. How do these ideologies of legal individualism, reflected in underlying legal doctrines, apply to persons who fail to intervene to prevent rape or sexual abuse?

Passive Spectators, Complicity and Gendered Assumptions

Jodie Foster's debut Oscar-winning role in the movie *The Accused* (1988) famously explored the treatment of a victim who was raped in the presence of a group of men, some of whom were bystanders who did nothing to stop the rape, and the legal aftermath, where those bystanders were acquitted,

39 Indeed, the early common law's commitment to individualism was less apparent than 19th century and 20th century theorists claim. From the 14th century, a legal duty was placed on individuals to 'keep the peace', breach of which could give rise to a binding over order. It should be noted that breach of the peace was not a crime per se, except in Scotland. Another example of citizen conscription in crime prevention was the offence of 'misprision of felony', which criminalised the failure to report or disclose to authorities the commission of a felony.

40 See Sir James Fitzjames Stephen's famous example: 'A number of people who stand around a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt shameful cowards, but they can hardly be said to have killed the child': Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 3, 10. See discussion of accessorial liability for omissions in Bronitt and McSherry, above n 7, 405–9.

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prompting public debate and controversy about the case in the United States and elsewhere.[41] Notwithstanding the paramount status of the principle of individual autonomy,[42] Australian courts have, exceptionally, been prepared to extend complicity to certain classes of spectators or voyeurs in the context of rape and other forms of sexual violence on the basis of their presence during the commission of offence by others and who failed to intervene to stop the abuse or summon help. As we explore in the following two cases from Tasmania, the modern law of complicity does leave open, in theory at least, secondary liability for rape on the basis that a failure to intervene could suffice for 'aiding or abetting, counselling or procuring'.[43]

The legal analysis of complicity in 'spectator cases' typically begins with reaffirmation of the general principle: namely, that 'mere presence' during the commission of the offence ordinarily will not give rise to liability, unless there is a legal duty to intervene or such a presence is proven to have an effect that encourages the perpetration of the offence. One notable example where mere presence could 'exceptionally' constitute encouragement of another person's sexual offending is the Tasmanian case of *Randall v R* (2004) 146 A Crim R 197. The case concerned the rape of a patron at a nightclub. Randall, the principal offender, was the manager of the nightclub, and Farmer, the co-accused, was a majority owner. Both Randall and Farmer were aware that the patron was so intoxicated that she was incapable of standing, walking, sitting up, or making a rational decision. Nevertheless, both Randall and Farmer encouraged other male patrons into the office where she was laid on a desk, and Randall raped her in front of other 'leering males'.[44] Farmer was charged with aiding and abetting the rape.

Upholding Farmer and Randall's convictions on appeal, the Tasmanian Court of Criminal Appeal held that Farmer had facilitated and encouraged the crime by permitting his office to be used; laughing while others in the room were encouraging Randall; and by failing to use his power as owner to prevent the others' conduct.[45] The Court of Criminal Appeal agreed with the trial judge

41 Rebecca Ford, '"The Accused" Oral History: A Brutal Rape Scene, Traumatized Actors and Producers' Fights to Make the Movie', *Hollywood Reporter* (online), 5 December 2016 <http://www.hollywoodreporter.com/features/accused-oral-history-a-brutal-rape-scene-traumatized-actors-producers-fights-make-movie-952>; Jane Gilmore, 'Why "The Accused" is Still So Important, Almost 30 Years On', *Daily Life* (online), 20 January 2015 <http://www.dailylife.com.au/news-and-views/dl-opinion/why-the-accused-is-still-so-important-almost-30-years-on-20150120-12u84b.html>.

42 The principle of individual autonomy in causation is set out in *Kennedy (No 2)* [2007] UKHL 38 [14] (Bingham LJ); see also Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 109; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014) 83.

43 *R v Clarkson* [1971] 1 WLR 1402; *R v Coney* (1882) 8 QBD 534. See discussion in Bronitt and McSherry, above n 7, 404.

44 *Randall v R* (2004) 146 A Crim R 197 [41] (Cox CJ).

45 Ibid [41], [49].

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that Farmer's conduct went far beyond that of a 'spectator', and 'was a gross violation of this woman's dignity and integrity'.[46]

In some cases, this form of bystander liability may even extend to women who, as mothers and wives, fail to intervene to prevent abuse perpetrated on their children by their partner. There are troubling aspects to these family abuse cases – there is a danger that law may be used to criminalise women whose passivity in the face of offending leaves the perpetrator in a position to continue the abuse within the family. Such an example is *Smith v R* (Unreported, Tasmanian Court of Criminal Appeal, Campbell J, 6 March 1979) where the appellant, Mrs Smith, was convicted of aiding and abetting her boyfriend, Fitzallen, who raped Mrs Smith's daughter at her home while lying next to her in bed. The trial judge accepted that Mrs Smith's 'conduct, which encouraged the rape, was entirely passive' and that she was 'very much under the … domination of [the principal offender who] … appears to have been cruel and aggressive' towards her. Mrs Smith's fear that Fitzallen was 'quite capable of killing the girls or wreaking violence on them' was accepted to be the primary reason why the appellant failed to intervene. However, in upholding the appeal, Crawford J found that it was open to the jury to find that the appellant's passive acquiescence and failure to object to Fitzallen's conduct 'intended to encourage the rape'. The Court found further that:

> [a]s a mother, she was under at least a moral duty to do what she reasonably could to prevent her daughter being indecently assaulted, defiled and raped. As a mother, she had the authority to order that her daughter leave the bed and go to her own bedroom.

His Honour concluded by stating the principle that a spectator who believes that a crime is about to be committed 'and who might be expected to protest but does not protest; may, in circumstances such as those of this case, be properly found to have abetted the principal offender by encouragement'. The defence of duress was not raised at trial or on appeal. Today, if raised, the degree of 'coercive control' exercised over Mrs Smith could be bolstered by expert evidence on the effects of being a domestic violence victim, to ensure that the jury has a better understanding of the psychological consequences of abusive relationships as well as the real fears of violence and death to the appellant herself and her daughter that induced this apparent complicity through passivity.[47]

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46 Ibid [49], [51].

47 Not all legal systems endorse or condone bystander apathy. Many jurisdictions impose on their citizens legal duties to intervene to assist persons in peril. In Germany, for example, the offence 'Unterlassene Hilfeleistung' makes it a crime to fail to assist those whose lives are in danger. Three persons were recently convicted and required to pay hefty fines for their failure to assist an elderly man who collapsed and eventually died: Cassandra Santiago and Stephanie Halasz, 'Germany Convicts 3 for Not Helping an Elderly Man Who Collapsed', *CNN World* (online), 19 September 2017 <https://edition.cnn.com/2017/09/19/europe/germany-good-samaritan-case-trnd/index.html>. There are reported at least 28 countries with similar 'Good Samaritan' laws that impose

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Today, passive voyeurism of sexual abuse is digitally-enabled through the ubiquity of covert surveillance technology embedded in our smartphones and free access to online porn and streaming services. The 'allure of attention' from online views, reinforced by indicators of 'encouragement' in the form of Facebook shares and likes, means that abuse voyeurism takes on a new quality.[48] As previously noted, 'it is not merely that criminals' "tools of the trade" have changed. Technology is also producing new forms of sexual harm',[49] such as non-consensual filming, live streaming and subsequent sharing of explicit and intimate materials online, which causes further trauma and ongoing revictimisation.

Within the Australian Defence Force (ADF), there have been widely reported cases of such technology-enabled sexual abuse. This included the 2011 'Skype incident' where six ADF Academy cadets conspired to 'live' broadcast a fellow cadet having sex with an unsuspecting female colleague in the adjacent dormitory room, and the 2013 'Jedi Council' ring where around 100 Army members shared images, commentary and videos of women and their 'sexual conquests'.[50] As we explored in Chapter 2, the person who engages in sex and does not disclose the covert recording or streaming potentially changes the nature of consent obtained or given: the circulation of such material in some jurisdictions may constitute a new form of sexual abuse (known colloquially as 'revenge porn') which punishes the distribution of intimate images without consent.[51]

These successive scandals in the ADF led to inquiries and reviews which have found, unsurprisingly, that entrenched practices of discrimination, harassment and unwanted sexual attention exist at an organisational level, and that urgent cultural change is needed to penetrate 'military insularity'.[52] But

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such a duty to assist in emergency and confer legal immunities on the rescuers for any harms arising from their attempted rescue. A recent spate of rape cases in India, where bystanders failed to intervene, render or summon assistance, have led to calls for the expansion of 'Good Samaritan' laws. Such laws would provide bystanders to crimes like rape (who are loathe to assist due to their warranted distrust and fear of police) with the necessary legal confidence to intervene and assist victims: Geeta Pandey, 'India Rape: Bystanders Ignored Vishakhapatnam Attack', *BBC News* (online), 24 October 2017 <http://www.bbc.com/news/world-asia-india-41736039>.

48 Olivia Solon, 'Why a Rising Number of Criminals are Using Facebook Live to Film Their Acts', *The Guardian* (online), 27 January 2017 <https://www.theguardian.com/technology/2017/jan/27/rising-numbers-of-criminals-are-using-facebook-to-document-their-crimes>.

49 Bronitt and McSherry, above n 7, ix.

50 Ben Wadham, 'Tinkering with Tribalism: Women and Cultural Change in the ADF', *The Conversation* (online), 26 July 2013 <https://theconversation.com/tinkering-with-tribalism-women-and-cultural-change-in-the-adf-16329>.

51 Bronitt and McSherry, above n 7, 727–31 [11.205].

52 Wadham, above n 50; Australian Human Rights Commission, *Review into the Treatment of Women at the Australian Defence Force Academy*, Audit Report (2013) <https://www.humanrights.gov.au/sites/default/files/document/publication/adfa-audit-report-2013.pdf>; Ian McPhedran, 'Six Inquiries into ADF Scandal', *Daily Telegraph* (online), 12 April 2011 < https://www.dailytelegraph.com.au/six-inquiries-into-adf-scandal/

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the question arises yet again – how should we 'indict' organisational cultures beyond the mere metaphorical? Do we leave it simply to senior leadership promises of 'culture change' and civil redress? Or should we entertain, for the most serious cases, the occasional prosecution of perpetrators and/or facilitators? Or should we recognise that in some cases, the failure to intervene to prevent known or suspected risks of abuse demands an indictment for *institutional* criminal responsibility? Rather than mount costly and uncertain 'test cases' seeking to resolve the legal status of Commonwealth defence organisations and entities, the better approach is to enact specific measures – such as a failure to prevent institutional abuse offence – as suggested above.

Conclusion

> Make no mistake, I consider the events of my sexual assault and this university's response to be equally despicable. There is a shocking correlation between someone not listening to you say 'stop' and an organization not listening to you scream 'help'.[53]

Rape law is anthropocentric. It is a crime of a deeply intimate, interpersonal nature. Indeed, the MCC framed its chapter dealing with rape and related offences as *Sexual Offences Against the Person* in order to reflect how this type of criminal behaviour harms the individual's autonomy, dignity and physical and mental health. But perpetration of rape and other forms of sexual abuse *against* an individual occurs in a wider cultural context, raising questions of both policy and principle about how best to change 'rape cultures' – societal and institutional – that facilitate, condone or fail to take necessary steps to prevent this form of abuse. The Royal Commission has started a broader discussion about the scope of responsibility and redress, redirecting blame beyond a narrow class of individual perpetrators towards blame that attaches at the institutional level for its failure to prevent abuse. It is vital that this diffusion of responsibility is not confined to historic sexual abuse cases involving minors and religious institutions, since institutional abuse is more varied in form and obviously ongoing in nature. As this chapter has revealed, no institution within society is immune from facilitation of sexual abuse, including universities, where senior colleagues and organisational cultures continue to condone, fail to prevent, or 'cover-up' sexual abuse that occurs on campus.

Across various jurisdictions, a wide variety of institutions are currently facing an integrity crisis. In Australia, the latest Royal Commission into misconduct in the banking, superannuation and financial services industry is

news-story/965915ad9a8ee5b5d13b3a4eae3edbad?sv=ff56bd5948dde1407a280eb518ba36ad&nk=90f91cc8cfbc4cc99480674c6d35a8f8-1535454087>.

53 Nina Funnell, 'Sixteen of My Students at the University of Sydney Told Me They Were Raped', *Sydney Morning Herald* (online), 24 February 2017 <http://www.smh.com.au/comment/sixteen-of-my-students-at-the-university-of-sydney-told-me-they-were-raped-20170224-gukz30.html>.

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exposing entrenched institutional cultures of dishonesty and 'cover-up' within many parts of corporate Australia. The depth of this unfolding scandal, like the prior 'cover-ups' of institutional child abuse, will invariably lead to calls for culture change, law reform, and new offences with toughened penalties for corporate criminality.[54] It is our hope that the call to end corporate impunity extends beyond 'white collar' economic and financial crimes.

Corporate criminality knows no limits or territorial borders. It is a grave mistake to silo our policy and regulatory approach to 'corporate' wrongdoing. Industrial, environmental, and sexual harms implicate a wide diversity of 'legal persons'. In our view, criminal law in the 21st century has an important role to play, in both functional and morally expressive terms, in holding institutions responsible for the harms and wrongs they cause directly or indirectly or condone by failing to intervene. The law can and should do more to contest institutional abuse cultures; to facilitate justice and redress for victims, rather than merely facilitating the perpetration of abuse through continued institutional impunity.

54 The Australian Securities and Investments Commission has recently proposed amending the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) with the effect of extending the scope of Part 2.5 of the Criminal Code: John HC Colvin and James Argent, 'Corporate and Personal Liability for "Culture" in Corporations?' (2016) 34 *Company and Securities Law Journal* 30. On 20 April 2018, the Federal Government committed to increasing civil and criminal penalties for corporate crime: 'Federal Government Looks to Increase Criminal and Civil Penalties for Corporate Misconduct' *ABC News* (online), 21 April 2018 <http://www.abc.net.au/news/2018-04-21/federal-government-looks-to-increase-penalties-for-misconduct/9683348>.

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