THE FAILURE OF THE FAILURE TO PREVENT BY A PERSON IN AUTHORITY OFFENCE

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The Royal Commission into Institutional Responses to Child Sexual Abuse which spanned from 2013 to 2017 ('Royal Commission'), provided an extraordinary amount of detail and evidence about the extent of child abuse in a wide range of public and private institutions. The Royal Commission demonstrated that child sexual abuse was not only historical but continues to occur in the present. As indicated by its formal title, the Royal Commission was tasked with investigating *institutional* responses to child sexual abuse. Evidence was presented where institutions had failed to protect children in their care from child sexual abuse, whether by allowing the abuse to occur and/or inhibiting detection and response. Despite the findings demonstrating that it was not by tragic accident that perpetrators of child sexual abuse were able to offend against children for long periods of time in specific organisations, no reforms were recommended by the Royal Commission to criminalise *organisational* failure. The pinnacle of recommended reforms in terms of 'third party offending' by the Royal Commission is to criminalise a failure by a person in authority to protect a child from sexual abuse.[1] This article argues that these reforms are insufficient as shown by evidence presented at the Royal Commission. The offence is too narrowly framed and fails to grapple with culpable people in authority and the organisational failure to prevent child sexual abuse.

I FAILURE TO REDUCE OR REMOVE RISK OF CHILD SEXUAL ABUSE

In addition to recommending a broad failure to report offence,[2] the Royal Commission recommended the creation of an offence of failure to protect by a person in authority, modelled on the Victorian offence introduced in 2015 in response to the Betrayal of Trust Report.[3] In response to this Royal Commission recommendation, in 2018 the New South

[1] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, 2017) Executive Summary and pts I–II, 56 ('*Criminal Justice Report*').The recommendation is modelled on the section 49O of the *Crimes Act 1958* (Vic) which criminalises the failure by a person in authority to protect a child up to 16 years old from a sexual offence, and carries a maximum penalty of five years imprisonment. In response to Royal Commission recommendations, the Australian Capital Territory ('ACT') passed the *Royal Commission Criminal Justice Legislation Amendment Bill 2019* (ACT), which inserted section 66A in the *Crimes Act 1900* (ACT) and carries a maximum penalty of five years imprisonment.

[2] *Criminal Justice Report* pts I–II, 50–1.

[3] Ibid 54–6.

Wales ('NSW') legislature passed the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) which created an offence with a maxium of two years imprisonment for a failure by an adult who is a position holder to reduce or remove risk of a child becoming a victim of child abuse:

> (1) A person commits an offence if—
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> (a) the person is an adult who carries out work for an organisation, whether as an employee, contractor, volunteer or otherwise (a ***position holder***), and
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> (b) the organisation is the employer of an adult worker who engages in child-related work, and
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> (c) there is a serious risk that the adult worker will commit a child abuse offence against a child who is, or may come, under the care, supervision or authority of the organisation, and
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> (d) the position holder knows that the risk exists, and
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> (e) the position holder, by reason of the person's position, has the power or responsibility to reduce or remove that risk, and
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> (f) the position holder negligently fails to reduce or remove that risk.[4]

In recommending that all states and territories should enact a 'failure to protect' offence, the Royal Commission noted that the Victorian offence is 'targeted quite narrowly'.[5] The NSW Parliament has maintained the narrow focus of the offence by specifying that the offence only applies to a person in authority who has the necessary knowledge of a 'serious risk … against a child who is, or may come, under the care … of the organisation', 'has the power or responsibility to reduce or remove that risk', and 'negligently fails to reduce or remove that risk'.[6] I will now consider one of the rare examples of where the offence could possibly apply to demonstrate that the offence is too narrow in its construction.

II APPLICATION OF THE OFFENCE TO DR PATERSON AT KNOX GRAMMAR SCHOOL

Part IV Chapter 15 of the Royal Commission's *Criminal Justice Report* provides a summary of some of the case studies where abuse was not reported or where steps were not taken to protect children by third parties.[7] Of those case studies, very few provide examples where a

[4] *Crimes Act 1900* (NSW) s 43B.
[5] *Criminal Justice Report* (n 2) Executive Summary and pts I–II, 55.
[6] *Crimes Act 1900* (NSW) ss 43B(c)-(f).
[7] *Criminal Justice Report* (n 2) pts II-IV, 134.

person in authority would have had the necessary knowledge *and* negligently failed to reduce or remove that risk against a child in care at that organisation.[8]

I will consider in detail the example of Dr Ian Paterson, the headmaster at the prestigious Knox Grammar School ('Knox') from 1969–98, to tease out the limits of the new offence. The offence does not apply retrospectively, so this is a hypothetical analysis. I have selected this case study because unlike many of the other case studies, Paterson satisfied the legislative requirement of knowledge of a serious risk that a worker employed by the organisation will commit a child abuse offence against a child under the care of the organisation. The Royal Commission found that Paterson had knowledge of different allegations against, and admissions by, five teachers who were employed by Knox during the time that Paterson was headmaster and were later convicted of child sex offences against students in 2009.[9] Paterson would also have met the requirement as a 'person in authority', because he was 'responsible for the day-to-day operations and governance of the school, including the recruitment and supervision of staff'.[10] Unlike other case studies, where the person in authority changed over time,[11] Paterson was in a position of authority for many years, thus this element is also established. Although Paterson offers an extreme example from the Royal Commission case studies in terms of a person in authority having knowledge of the risk of child sex abuse over a long period of time, it would still be difficult to establish the elements of the failure to prevent offence.

The question would be whether Paterson's responses *negligently failed* to reduce or remove that risk. This requires a *criminal* standard of negligence, that is that the act or omission of the person in authority fell so far short of the standard of care which a reasonable person would have exercised in the circumstances and such a high risk of [child sexual abuse], that

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[8] The few examples where the new failure to prevent offence could possibly be established (if it had existed at the time) were in religious organisations. For example, the Royal Commission found in Case Study 11 that there were repeated allegations of child sexual abuse against Brothers some of whom were transferred to another Christian Brothers organisation and were allowed to have contact with children: ibid pts III–IV, 136; and in Case Study 13, Brother Chute admitted to sexually abusing children to senior Marist Brothers as early as 1962 and yet ongoing allegations were not reported to police and Chute was able to have continued contact with children until he was removed from teaching in 1993: ibid. It should be noted that the leadership at these organisations has changed across time and that difficulties establishing the failure to prevent offence would arise out its requirement that its elements be proved against a specific person in authority.

[9] *Royal Commission into Institutional Responses to Child Sexual Abuse*: *The Response of Knox Grammar School and the Uniting Church of Australia to Allegations of Child Sexual Abuse at Knox Grammar School in Wahroonga, New South Wales* (Report of Case Study No 23, June 2016) ('*Report of Case Study 23*'). 5-8, 24.

[10] Ibid 10.

[11] See, eg Case Studies 12, 13 and 42.

he or she merits criminal punishment.[12] Like many other case studies, Paterson failed to report allegations (and admissions) to the police.[13] This would be covered by the failure to report offences and would go towards, but not be sufficient in and of itself, in establishing *criminal* negligence.

Paterson gave positive references to staff who left Knox after allegations and/or admissions of child sexual abuse which then enabled the staff members to work at other schools. For example, in 1988 there was a sexual assault on a boarder while he was in bed in one of his dormitories by a perpetrator wearing a Knox tracksuit and a balaclava.[14] The assault was not reported to the police or Community Services.[15] Paterson admitted that he suspected that Fotis, a teacher and resident master at Knox, was the perpetrator.[16] Fotis was removed as resident master but kept his job as teacher until he was charged with indecent exposure on two separate occasions.[17] Paterson then required Fotis to leave the school.[18] No record was made as to the real reasons why he was required to leave.[19] Paterson gave Fotis a positive reference and failed to mention suspicions that he had committed a serious sexual assault and that he had been arrested for indecent exposure.[20] Fotis then went on to teach in the state school system.[21] Although the Royal Commission found that the reference was 'grossly misleading', the provision of positive references for staff would not go towards negligence because the offence requires the risk of child abuse to be against 'a child who is, or may come, under the care, supervision or authority of the organisation'.[22] Paterson could argue that by providing positive references he had removed the risk of abuse of children in his care. This is a major weakness of the offence as whilst there are some organisations, like the Catholic Church within which abusers can (be) move(d),[23] in education, abusers can be given

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[12] *Nydam v The Queen* [1977] VR 430, 445.
[13] See, eg *Royal Commission into Institutional Response to Child Sexual Abuse: Scouts and Hunter Aboriginal Children's Service* (Report of Case Study 1, September 2013) ('*Report of Case Study 1*'). Mandatory reporting of child sexual abuse existed at the time that Paterson was headmaster: *Children (Care and Protection) Act 1987* (NSW) s 22.
[14] *Report of Case Study 23* (n 7) 50.
[15] Ibid. 50-2.
[16] Ibid 55.
[17] Ibid 56-7.
[18] Ibid 57.
[19] Ibid 56.
[20] Ibid 57.
[21] Ibid 58.
[22] Ibid 57.
[23] *Report of Case Study 1* (n 13). Steven Larkins was stood down as a scout leader in one area and simply joined another troop and went on to become a district leader: at 4, 10.

positive references and move to another school and this would not go towards a finding of criminal negligence.

Paterson knew of serious allegations against Nisbett, who was a teacher at Knox between 1971–2004, including indecent assaults, and giving alcohol and cigarettes to the boys.[24] Paterson removed Nisbett from his role as a resident master of one of the boarding houses, but no other action was taken.[25] He wrote a letter to Nisbett which made no mention of disciplinary action.[26] Paterson also did not keep any record of the investigation into Nisbett on his file and failed to record the true reason for Nisbett's removal in 1986, which meant that when Paterson left Knox, the new headmaster was unaware of the allegations.[27] This failure to adequately record child sexual abuse allegations for principals employed after Paterson would not go towards negligence as Paterson would no longer be the person in authority and the children no longer in his care. In 1990, Paterson allowed Nisbett to return to occupy a residence located near a new boarding house and to fill the role of housemaster from time to time. This allowed Nisbett to be alone with the boys on occasion.[28] Paterson claimed that he said to Nisbett, 'I hope you are careful with your touching habits with boys', but knew that he had not undertaken any counselling and did not ensure supervision of Nisbett.[29] Allowing Nisbett to be alone with boys after the allegations and also allowing his return to housemaster could contribute towards, and might amount to, criminal negligence.

Paterson also had no procedures in place for making allegations of child sexual abuse; in fact, he actively discouraged allegations. For example, Vance was employed as resident master at Knox in 1984.[30] Although the job of resident master involved caring for boarders (at times without supervision), Knox did not require an applicant to fill out an application form or prepare a CV.[31] This absence of procedures of recruitment and employment to ensure that staff who supervise children are child-safe would go towards negligence. A student

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[24] *Report of Case Study 23* (n 7) 28.
[25] Ibid 5.
[26] Ibid 29.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid 31.
[31] Ibid. The lack of safe recruitment policies for a high risk position would contribute to negligence, however in this case, a criminal record search would not have revealed anything untoward. For further analysis regarding failures in recruitment procedures at the YMCA, see Penny Crofts, 'Monsters and Horror in the Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2018) 30(1) *Law and Literature* 123.

complained to Paterson that Vance had inappropriately touched him in 1989.[32] Paterson told the student that this was a serious allegation and sent him away to think about it.[33] Despite this discouragement, the student maintained his allegations against Vance.[34] Vance admitted that the allegations were true but Paterson failed to report it to the police.[35] Vance was permitted to resign but, despite mandatory reporting obligations, Paterson did not notify police or the child's parents.[36] Paterson gave Vance a written reference that made no mention of his dismissal from school.[37] Once again, Paterson's actions and omissions would be negligent but probably not criminally negligent, particularly as the positive reference would be excluded.

The closest example of Paterson's knowledge *and* criminal negligence would be when Paterson was visited by Inspector Cullen from the NSW Police Child Protection Enforcement Agency about allegations she had received against of child sexual abuse by all five teachers in 1996, three of whom were still employed by Knox at the time. Paterson was aware of reports and allegations against all (and admissions by some of the) five teachers.[38] Despite this, Paterson did not reveal any of these allegations or admissions to Inspector Cullen.[39] He allowed her to have access to files which, because of his poor recording practices, he knew did not contain any information.[40] Doctor Paterson was questioned as to whether he had deliberately hindered Inspector Cullen's investigation, and the Royal Commission ultimately rejected Paterson's disavowals of having deliberately misled Cullen.[41] Specifically for the purposes of the failure to protect offence, Paterson conceded that his failure to tell her about the incidents was a 'gross failure'.[42]

The Knox example shows another weakness in the new offence – negligence relates to the actions or omissions of the person in authority in relation to one specific worker. The inaction of Paterson (and the Board) in relation to sex offending at Knox was cultural and cumulative,

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[32] *Report of Case Study 23* (n 7) 32.
[33] Ibid.
[34] Ibid.
[35] Ibid 33.
[36] Ibid.
[37] Ibid 35-6.
[38] Ibid 59.
[39] Ibid.
[40] Ibid.
[41] Ibid 60-64.
[42] Ibid. 64.

but criminal negligence would have to be established in relation to the failure to prevent a risk of sex offending by a specific employee who worked at Knox. The Knox example also shows the difficulty of establishing the knowledge of those in authority.[43] Whilst Paterson knew of the allegations, the Board (could claim that it) did not. Although the Board had a duty of oversight which it did not fulfil, this lack of knowledge about allegations would mean that (members of) the Board could not be criminally liable. Paterson never (formally) informed the Board of any of the allegations or the police investigation. Although Knox is not a particularly large organisation, it reflects insights of corporate law theory that the more senior a person is in an organisation, the less likely they are to know about harms and crimes. The new offence is framed in accordance with the dominant theory of corporate accountability, that of identification theory.[44] This requires proof of *mens rea* by the directing mind and consequently discourages auditing and knowledge by board members – as ignorance precludes criminal prosecution.[45] Moreover, there were many case studies, including at Knox, where there were multiple Board members across time, so even if a specific member of the Board had the necessary knowledge, they were unlikely to have been sufficiently negligent in relation to a specific child at risk.[46]

III CONCLUSION

The failure to prevent offence by persons in authority is too narrowly framed, even on the basis of the findings of the Royal Commission itself. Too many people in authority fail to have the necessary knowledge of the risk of child sexual abuse, and this lack of knowledge is often due to systemic failures, for example, a lack of training of staff to recognise grooming behaviour, a culture of bullying so that staff are reluctant to report allegations, no clear

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[43] See also *Royal Commission into Institutional Responses to Child Sexual Abuse: The Responses of a Primary School and the Toowoomba Catholic Education Office to the Conduct of Gerard Byrnes* (Report of Case Study No 6, January 2015). Byrnes began teaching in 1970 and had been a teacher or principal in a number of Catholic schools for 31 years: at 10. He was sentenced to 10 years' imprisonment in 2010 after he pleaded guilty to 44 child sexual abuse offences against 13 girls: at 4. The headmaster minimised allegations when he reported to two senior education officers at the Toowoomba Catholic Education Office who in turn did not report the allegations to their supervisor: at 39. This led to the Assistant Director later approving Byrnes as a relief teacher, because she was unaware of the allegations against him: at 39.

[44] See *Tesco v Nattrass* [1972] AC 153. Analysed in Penny Crofts, 'Criminalising Institutional Failures to Prevent, Identify or React to Child Sexual Abuse' (2016)6(3) *International Journal for Crime, Justice and Social Democracy* 104, 107-109.

[45] Ibid. See also, Mihailis E Diamantis, 'Functional Corporate Knowledge' (2019) 61(2) *William and Mary Law Review* 319.

[46] See, eg, *Report of Case Study 1* (n 13). There were multiple members of the Service Management Committee of the Hunter Aboriginal Children's Service (HACS). The Royal Commission found that the committee members were inexperienced as board members and in relation to legislative and regulatory requirements: at 36.

processes or policies of complaints and recording, and a lack of an appropriate response by those in authority on the rare occasions when they became aware of allegations which then discourages further complaints. Moreover, the offence requires *criminal* negligence by the person in authority in relation to the threat of a specific individual. This does not cover situations like that at Knox where there were multiple offenders who were enabled by systemic failures to offend, nor multiple persons in authority who contributed to systemic failure. The offence also does not include the provision of positive references to staff which enable them to leave the organisation and to work for other organisations. The failure to prevent offence by a person in authority is a necessary offence but needs to be more broadly framed to reflect the findings of the case studies. I have argued extensively as to why there needs to be a failure to prevent child sexual abuse at the organisational level.[47] This article has argued that the failure to prevent offence by a person in authority is overly restrictive in its requirements and is likely to be very difficult, if not impossible, to establish, despite culpable failures by people in authority.

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[47] See eg, Penny Crofts, 'The Need to Criminalise Institutional Child Sexual Abuse' *International Journal for Crime, Justice and Social Democracy* (2016) 6(3) 104-122; Penny Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' *Sydney Law Review* (forthcoming).