THE SEXUAL ABUSE OF CHILDREN

RECOGNITION AND REDRESS

EDITED BY YORICK SMAAL,
ANDY KALADELFOS AND
MARK FINNANE

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INTRODUCTION

Andy Kaladelfos, Yorick Smaal and Mark Finnane

Survivors' testimonies to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (hereafter the Royal Commission), which began in 2013 and will continue at least until 2017, have understandably preoccupied media and public responses to the sexual victimisation of children.[1] They have revealed the extent of the cover-up of abuse and the lack of accountability of those who committed criminal acts against children. Their testimonies challenge us to ensure that the mistakes of the past are not repeated and that redress for survivors is a just process. As Chair of the Royal Commission, Justice Peter McClellan, observed (McClellan 2015: 16), the systemic failures of institutions must be met with two responses: 'Firstly to protect against the occurrence of child sexual abuse, and secondly to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims.'

Child sexual abuse is now a pre-eminent area of concern for individuals, communities and governments. Scholarly research in the area began with the examination in the 1960s of the physical assault of children. Feminist activism in the 1980s and 1990s prompted investigation of incest, rape and child sexual abuse (Jenkins 1998: 118–44, Angelides 2005: 141–77, Daly 2014a: 16–19). As the chapters of this book show, scholarly research on child sexual abuse has since developed significant bodies of knowledge in psychology, law, criminology and social work.

By contrast, much of our knowledge of institutional child sexual abuse comes from proliferating public inquiries in Canada, the Republic of Ireland, the Netherlands, Northern Ireland and currently Australia, rather than academic research. Vivid journalistic and personal accounts from survivors have highlighted individual experiences of abuse in particular institutions (Coldrey 1993, Marr 2013, Penglase 2005). Academic studies have tended to examine the problem of institutional abuse after the development of public interest or

1 Contributors to this book use a range of terminology to refer to those who have been sexually abused. These terms—including 'survivor', 'victim' and 'complainant'—reflect the diverse experiences and responses of those affected by sexual abuse.

media controversy, much of which concerned sexual abuse in the Catholic Church (Keenan 2012, Lytton 2008, Parkinson 2003, Terry et al. 2011, Corby et al. 2001). Most recently, research by Kathleen Daly has examined the complexities of the redress schemes of those public inquiries (Daly 2014a).

This book developed from a seminar convened by the editors at Griffith University in 2013, shortly after the commencement of the Royal Commission. The seminar brought together researchers in different fields to examine the theoretical, practical and evidentiary problems raised in the latest scholarly research and by public inquiries into child sexual abuse. Developing a wide-ranging understanding of the problem of child sexual abuse has important implications for our knowledge of and responses to abuse in different contexts. Hence the function of the seminar was to better understand the latest research on child sexual abuse in various disciplines with the aim of creating an interdisciplinary dialogue between researchers. This publication is the result of those exchanges.

The Sexual Abuse of Children is an interdisciplinary collection that brings together scholars from history, criminology, psychology, sociology and law to consider the recognition and redress of child sexual abuse. The book's scope encompasses regulatory and informal responses to abuse in religious, educational and total institutions as well as abuse that occurred outside of institutions. It is the first book to consider past and contemporary responses to child sexual abuse and to compare responses to abuse in institutional and non-institutional settings. Our contributors draw on a range of case studies in Australia, New Zealand, the United States, England and Canada to undertake their analyses, which address aspects of the abuse of boys and girls from the late nineteenth century to the contemporary world. Thematically, contributors investigate child sexual abuse in a number of areas: they analyse the abuse of power by clergy and teachers; they investigate the difficulties of policing and prosecution; they critique the limited focus of public inquiries; they examine the vexed question of compensation and redress; and they put forward models for the prevention of abuse.

Part 1 of this book, 'Histories of Child Sexual Abuse', examines the latest historical research on the problem of sexual abuse within and outside institutions. Understanding the historical treatment of child sexual abuse dispels many contemporary assumptions about how the problem was dealt with in the past. The sexual abuse of children has been recognised as a serious criminal act for more than 150 years and has been the subject of substantial state intervention. Before 1960 there were at least 15,000 criminal prosecutions in Australia for the sexual victimisation of minors (Finnane and Smaal,

chapter 1). The state understood the potential for abuse within educational institutions and even developed specific criminal liability for such offending (Kaladelfos and Featherstone, chapter 2). The historical record suggests that at least some religious bodies—here the Anglican case is considered—recognised and responded to sexually abusing clergy within their ranks (Jones, chapter 4).

But if crimes and perpetrators within certain contexts and settings have been the object of policing and criminal sanction, historical abuse within children's institutions generally remained hidden because of the pervasive discourses of childhood innocence. Children who disclosed sexual matters in institutions were portrayed as precocious and untrustworthy, their complaints commonly disbelieved and met with punishment (Swain, chapter 3). The chapters in part 1 deal variously with limitations of the historical recognition of abuse: reporting of offences was constrained by the physical and social structures that regulated children's lives. Children who had access to adults who could report abuse on their behalf were better able to have their victimisation recognised. In contrast, many decades of silence would elapse before the abuse of those without that benefit would be disclosed.

Part 2, 'Recognising and Responding to Abuse', examines how the problem is dealt with in the present. The opening of part 2 examines the psychological and criminogenic patterns in child sexual abuse. Understanding the geographies of offending and their relationship to offence types is important for designing successful prevention strategies (Smallbone and McKillop, chapter 5), as is appreciating the scope, nature and causes of abuse within specific institutional structures, such as the Catholic Church (Terry, chapter 6). Successful prevention remains limited by the failure to report offences, a consequence of social barriers to community interventions in suspected cases of abuse (Fay-Ramirez, chapter 7).

However, in order to recognise child sexual abuse and respond to it effectively, governments must consider all forms of abuse. A shortcoming of the current Royal Commission (inherent in its terms of reference) has been its lack of examination of abuse within the home (Salter, chapter 8), despite 'the family' being the foundational unit of social organisation and an institutional structure that might be considered to contribute to the victimisation of children. The Victorian Royal Commission into Family Violence (2015–16) provides an important avenue for examining this enduring social problem.

Part 3 analyses the lessons learned about sexual abuse and examines critical questions in achieving justice and redress for victims. Investigating historical allegations of sexual abuse has become a considerable part of policing in recent years. These complaints give rise to their own unique challenges, especially

the erosion of evidence and memory in the decades between the event and notification (Kebbell and Westera, chapter 9). For children reporting abuse today, psychological research has shown the continuing gap between how children should be cross-examined to elicit the most accurate outcomes and current practices that can contaminate memory and result in false evidence (O'Neill and Zajac, chapter 10). Implementing strategies to regulate the questioning of children will result in better and more just outcomes.

Redressing abuse can be achieved through various means, including counselling, social services, compensation and criminalisation. These issues are considered by a number of contributors. Survivors of abuse within religious institutions often have unique needs: not only is harm caused by physical or sexual acts of abuse but a loss of spiritual faith can be an additional trauma (Sauvage and O'Leary, chapter 11). Such experiences necessitate the development of a complex trauma approach, giving service providers an appreciation of the different manifestations of abuse. The practical and theoretical complexities of redress schemes are considered by examining the contentious issue of monetary payment (Daly, chapter 12), which in some cases have ranked individuals' experience of abuse as more or less deserving of compensation. Finally, the question of criminal responsibility for abuse within institutions is an important one for the Royal Commission (Freiberg et al. 2015). Contemporary regulation of corporate crime and organisational responsibility may provide a model framework for establishing criminal responsibility and institutional liability in cases of child abuse (Bronitt, chapter 13).

Addressing both Australian and international contexts, *The Sexual Abuse of Children* examines past and present practices in prevention, justice and redress for abuse. The collection reveals that the problem of child sexual abuse has a long legacy. Certainly the extent and harm of child sexual abuse has increasingly been recognised and addressed, within particular settings and at particular moments. Yet the persistent defences of ignorance or denial of harm by those in positions of trust continue to challenge redress and subvert the promise of effective protection and prevention.

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Part 1

Histories of child sexual abuse

Chapter 1

SOME QUESTIONS OF HISTORY

Prosecuting and punishing child sexual assault

Mark Finnane and Yorick Smaal

In January 1924, an article in the Sydney newspaper *Truth* alerted its readers to a spate of crimes against children that had recently appeared before the courts. Sexual offences against three girls and one boy had been committed in various suburbs around the city within a matter of weeks. It was shaping up to be a bad year, the paper claimed, potentially worse than 1922, which had the most recently accessible police data. The annual returns from the police commissioner for that year revealed that sexual crimes constituted 'a grave element' of the criminal calendar with an average of three offences per week coming to notice. While lamenting that there were 'no graphs or charts prepared by criminologists and penologists showing the rise and fall of this class of offence as compared to the total population each year', the paper was at pains to point out the 'startling' number of children to be found among the victims and, to a lesser degree, among offenders: 29 juveniles were arrested for sex crimes in 1922. From a list of 158 sexual matters, 14 offences had been committed on girls under the age of 10, with another 71 on girls between 10 and 16 (almost exclusively crimes of carnal knowledge and indecent assault). The report did not identify the number of crimes against boys, but recorded 22 arrests for indecent assaults on males of various ages and 10 'unmentionable' crimes. Added to the number of arrests, scores of other matters appeared on summons (*Truth* [Sydney], 27 January 1924: 8). *Truth* marshalled such evidence in calling for greater parental responsibilities, changes to the legal and education systems and the deportation of mentally defective immigrants (for further discussion see Kaladelfos 2010: 235–58).

Yet the statistics gathered for this campaign tell another story, one in which Australians in the first half of the twentieth century readily deferred to the criminal law to respond to sexual assaults against children.

Historical studies of prosecution and punishment patterns for the sexual maltreatment of children are rare. Australian criminal justice histories like those elsewhere remain underdeveloped despite attention to specific areas of inquiry such as gender, which bear on the subject of child victims (see for example Allen 1990, Bavin-Mizzi 1995, Kaladelfos 2010). Serious problems of access to public archives, where materials involving children are invariably closed or otherwise strictly controlled, frustrate scholarly efforts to assess the scope and detail of the law's response. These factors are exacerbated for institutions that had charge of children—researchers have had to wait for responses to public inquiries such as the current Royal Commission into Institutional Responses to Child Sexual Abuse to open organisational policies and practices to greater scrutiny.

This chapter reconsiders the popular assumption that mechanisms of prosecution and punishment for sexual offences against children are very recent historical phenomena. While recognising that responses to the maltreatment of children are not always located in the courtroom, we argue that the historical volume of criminal justice responses constitutes a significant index of social attitudes towards children. In that context, we review briefly some of the historical conditions for the recognition of child sexual assault, then consider the policing and justice responses that follow from its recognition and conclude by considering associated problems of silence and invisibility.

This chapter reports preliminary results from research conducted as part of a large-scale study of criminal prosecution across Australian jurisdictions in the nineteenth and twentieth centuries. Our findings are based on 220 cases of identifiable sex offences taken to trial and involving child victims in the three jurisdictions of Western Australia (28 cases), Victoria (110) and Queensland (81) in just two years: 1900 and 1950. This data is supplemented by newspaper and other archival evidence, as well as a case study of 179 criminal depositions from Queensland between 1870 and 1930,[1] which provide further details on the circumstances of cases that came to notice. These multiple sources of data allow us to sketch the broad patterns and

1 Representing a one-in-three year sample of available depositions between 1870 and 1900 (1870; 1873; 1876; 1879; 1882; 1885; 1888; 1891; 1894; 1897; 1900) and a one-in-five year sample of available depositions for the first thirty years of the twentieth century (1905; 1910; 1915; 1920; 1925; 1930).

determinants of policing and prosecution of sexual offences that might guide future investigations.

Legal conditions

The data we are considering here were those produced by the process of prosecuting offences for which the status of the child victim was progressively refined through the last two centuries. The colonial reception of English law meant the early adoption of severe sanctions, including the death penalty for many sexual offences; and some jurisdictions persisted with severe sanctions long after their demise in the home country. Rape of a girl under the age of 10 remained a capital offence in Victoria until 1949 and in New South Wales until 1955, while the corporal punishment of whipping was frequently urged and adopted as a penalty appropriate to sexual offences against children. The prevalence of indecent assaults on young children in Victoria in 1865 prompted media calls for the unsparing use of the lash as an additional punishment (*Age*, 24 January 1865: 6). Nearly a century later the Victorian legislature still prescribed whipping as a penal option in cases of offences against the person ([Vic] *Crimes Act 1957*, s. 477).

Offence definition also changed, as conceptions of childhood and vulnerability altered. Increases in the age of consent, sometimes affecting girls and boys differently, were inconsistent across jurisdictions, hampering effective comparison. Sexual offences against children were most commonly prosecuted under provisions defined by the age status of the child—usually offences of carnal knowledge and indecent treatment as the figures in the Sydney *Truth* article suggest. Less commonly, where the evidence permitted, they were prosecuted as crimes of sodomy or rape; the latter required the prosecution to prove the absence of consent, making conviction difficult. The three jurisdictions examined here each increased the age of consent in the 1890s, implementing protections for girls between 14 and 17 depending on the offence and jurisdiction. Even in the same jurisdiction, the 'ambiguity about the definition of childhood' was evident in different ages of consent, responsibility, culpability and victimisation, reminding us how much age was an unstable if central category in determining child vulnerability (Bates 2012, Hetherington 1995: 128–30, Robertson 2005). Statutes of limitations also differed by offence and territory, being 12 months in Victoria in the 1890s for crimes against girls over 12, but only two months in Queensland in the 1900s for the defilement of girls under the age of 14. A consequence of these variations between and within jurisdictions is that criminal prosecutions can

be no more than a crude index of the practices and victimisation rates in the general community at any time.

The punishment of those convicted of sexual offences against children was equally varied; debate around its severity is another index of the seriousness with which such victimisation might be viewed. Coterminous with amendments to the age of consent, the colonies of Victoria, Western Australia and Queensland also criminalised incest; the seriousness of the offence was indicated by a maximum of life imprisonment. The maximum for many other crimes against children could be significantly less, as low as two years imprisonment with hard labour for an indecent assault for example. Victoria and Western Australia also included offences by guardians, schoolmasters and teachers within the remit of the statute law, thus recognising the unique power dynamics present in such relationships (see Kaladelfos and Featherstone, chapter 2 of this volume).

Unlike Victoria, around 1900 Queensland and Western Australia codified their criminal law, consolidating case law and precedent. While male-only sex in any form was outlawed regardless of age or consent, both the Queensland (1901) and Western Australian (1902) Codes also criminalised assault on boys under 14 (the age in common law at which boys attained physical and mental capacity (Smaal 2012)). Different approaches to law for boys reflected gendered ideas about their physical development, as well as presumptions that older boys could resist unwanted advances and that 'unnatural crimes' were less frequent in occurrence (Taylor 1905: 317).

The social contexts of recognition

Criminal law was not the only response to the mistreatment and harm of children. Welfare intervention played a crucial role in shaping the emergence of contemporary child protection schemes in Australia as it did elsewhere (Ferguson 2004, Scott and Swain 2002). Public prosecution was nevertheless a significant response; its historical volume may be taken as an index of the incidence of offending and the seriousness with which it was regarded. The majority of sex offences prosecuted in the jurisdictions we have studied involve a minor as victim or complainant. Recovering the historical record can be painstaking, since official statistics fail to document the victim status in those offences (e.g. 'rape') that might be committed against adults or minors. The sample reported here (220 cases documented in court registers and for which the victim status has been determined by other sources) therefore provides a foundation for some estimation of the extent

of sexual victimisation of minors in the early twentieth century. Consider this calculation: extrapolating from our provisional sample of three jurisdictions in two years at either end of the first half of the twentieth century, there might have been more than 15,000 prosecutions of sex offences against children in the six main Australian jurisdictions over those 50 years. The figures on which we base this estimation are consistent with the findings of other historical studies, in Australia and elsewhere (Bavin-Mizzi 1995; Jackson 2000, 2015; Kaladelfos 2010). Although public awareness and debates about sexual and physical abuse of children waxed and waned over the last century, the frequency and continuity of criminal prosecution for these crimes is striking. This evidence suggests not only that abuse was common historically but also that it was recognised as harmful and prompted complaints from victims and their families or significant others on a scale that demanded continuing attention from police and prosecutors.

How did such offences come to public notice and eventual prosecution? Assaults against children in the past came to light most commonly through the complaints of victims or their siblings or friends to parents or other family. Mothers played the central role, but fathers too were among those who witnessed in court to the offences committed against their children. But fathers (very rarely mothers) were also numbered among offenders. Nearly 10 per cent of our 1900–1950 sample involved charges of incest or carnal knowledge with family members—most often fathers with a daughter (and sometimes two). Our detailed study of criminal depositions in Queensland (1870–1930) reveals a higher figure of family sex crime of almost 17 per cent, including incest by brothers, but also other nondescript sex offences involving cousins, uncles and grandfathers that can be discovered only with closer scrutiny of the historical record. Some incest cases came to light as a consequence of other inquiries, by police or sometimes medical or other non-familial personnel addressing unexplained pregnancies, or in the course of separation proceedings (Allen 1987: 209). Although incest and other intra-familial offending did not invariably result in severe sentencing, evidence of gross abuse of trust or prolonged harm—especially by fathers—was likely to result in the heaviest sentences.

If family were both informers and sometimes offenders, so too were acquaintances and neighbours. They account for almost half the 179 offences in the Queensland sample (1870–1930), making up 24 and 20 per cent of offenders respectively. Non-familial status did not necessarily imply stranger status; defendants were regularly known to victims (and their families), who might have encountered them at dance halls or other social, neighbour-

hood or work locations. Some children had been approached by much older men—a boy accompanying a 57-year-old baker in a Brisbane street told police that the man had been taking him to the pictures for the previous two years, and in the same year a 65-year-old Brisbane church organist was convicted of gross indecency with a choir boy (*Courier-Mail*, 14 February 1950: 5; *Courier-Mail*, 28 July 1950: 5). The organist had previously served prison sentences for offences against a number of boys in Sydney more than a decade before, as well as another term for indecent assault on an adult male (*Sydney Morning Herald*, 20 April 1939: 4; *Daily News* [Perth], 22 December 1944: 6). Stranger offences, whereby offenders were previously unknown to victims, appear rare but when accompanied by violence, or carried out against very young children, whether girls or boys, were likely to meet the harshest of sentences. At the 1891 September sittings of the Normanton (Qld) Circuit Court, for instance, a 28 year-old itinerant railway worker who snatched an 8-year-old girl from the company of her siblings in a small-town street in broad daylight was given penal servitude for life for his crimes, although he later escaped during his transit to prison (*Morning Bulletin* [Rockhampton], 24 September 1891: 5).

What we cannot know from this current sample is the prevalence of repeat offending—but the story of the church organist suggests the importance of more comprehensive study over time and across jurisdictions of these prosecutions for sex offences. Such inquiry is likely to uncover similar cases to confirm the anecdotal account that emerges from scrutiny of police records. The conviction in Bundaberg, Qld, in 1914 of a 33-year-old tinsmith for the rape of a 12-year-old girl was the start of a continuing criminal career that saw him convicted 10 years later under another name for buggery of a 5-year-old boy at Walgett, NSW (*Police Gazette*, NSW, 19 March 1924: 158). A notorious case that resulted in eventual deportation of an English immigrant from Western Australia in 1962 involved a man convicted of 14 sexual offences against children in Perth over an 18-month period; he had earlier been convicted in New South Wales in 1953 for offences against two other children, for which he had also been deported (*West Australian*, 11 June 1957: 3). These were cases involving predation of a kind that commonly triggered public scandal and condemnation, but which were relatively rare compared to the volume of offences arising from more familiar contexts. Even rarer in the historical record are cases implicating institutional contexts, for reasons we consider later.

The punishment of offending

Criminal justice responses to sex offences against children ranged as widely as the law and policing practices allowed. It would be imprudent to draw more than provisional conclusions about the patterns of disposition and their associated factors on the basis of our limited sample. All the same, the evidence considered here discloses that sentencing rationales ranged from revulsion to exculpation. Even very young children might be cast in the role of tempter or temptress. In an extraordinary outburst in Perth in 1911 during the sentencing of a 69-year-old man for the indecent assault of his step-granddaughter, a girl under 13, Judge McMillan, for instance, remarked that from his experience 'young girls … [were] often only too open to suggestions of that kind' (*Sunday Times* [Perth], 26 March 1911: 9).

Our sample of 220 cases of prosecuted child sex offences includes just one sentence of capital punishment. But that one case is striking for its exposure of an attitude perhaps more widely shared in the elite and middling cultures that dominated the courtroom. At the country sittings of the Victorian Supreme Court in April 1900, 23-year-old Ebenezer Miller was convicted on a charge of 'criminally abusing a girl under the age of 10' (*Argus*, 19 April 1900: 7). Miller had also been charged with buggery of two boys, a charge on which he was acquitted (*Horsham Times*, 30 March 1900: 2). In spite of the girl victim being only six, the judge in summing up noted that the child 'appeared to have been brought up among savages and knew nothing about God or religion'; it was no surprise to the judge then when the jury brought in a guilty verdict but with a recommendation to mercy in this capital case, on account (the foreman told the judge) 'of the loose surroundings and lax training the child got' (*Argus*, 19 April 1900: 7). Closer scrutiny of the case indeed reveals that this was a particularly ugly and violent family context; the whole proceedings were clouded by an almost contemporaneous hearing of a murder charge against a friend of Miller for the killing of his sister, who was also the mother of the child assaulted by Miller (*Horsham Times*, 3 April 1900: 4). These victim-blaming reservations by the judge and jury likely contributed to the commutation of Miller's death sentence to 15 years imprisonment. The penalty was less than it might have been, but the longest sentence of the cases in our 1900–1950 sample (*Bendigo Advertiser*, 9 May 1900: 3).

Declining use of the death penalty in the first half of the twentieth century (including its complete abolition in Queensland in 1922) is one factor likely to explain the low incidence of the heaviest penalty in child sex offences

cases. In the Queensland case study (1870–1930) for example, at least five death sentences were handed down before 1900 and one sentence of death recorded. But any study of the relationship of punishment to the crime must take account of the context of the charges preferred (including the level of aggravation). Less than half the cases in our sample from Victoria, Queensland and Western Australia in 1900 and 1950 received sentences of imprisonment after their trial. But since about two-thirds of the cases brought to trial resulted in conviction, the data suggests the significance of dispositions other than imprisonment. By 1950 it appears much more common for judicial discretion to be exercised in relation to less serious cases through release on bond, sometimes with directions to seek medical help or, in one case, advice to seek sex instruction from a minister of religion (*Courier-Mail*, 16 February 1950: 7). The release on good behaviour bonds in the 1950 cases might reflect the fact that a good proportion of defendants were young males convicted of carnal knowledge with a girl under the age of consent but where there had been a relationship for some time; but suspended sentences for sexual offenders were also increasingly common in Western jurisdictions in the first half of the twentieth century (Radzinowicz 1957: xxiv). Where offences involved violence or gross exploitation, imprisonment remained the preferred penalty.

Judicial and jury abhorrence of gross abuse of trust can be seen in outcomes of prosecution. Evidence of penetration was a significant factor when it came to calculating penalty for damage to victims, whether identified as physical harm to pre-pubescent children, gender inversion for boys or pregnancy for adolescent girls; unnatural behaviour (penetration of family members or any action against members of the same sex) was generally considered an aggravating factor justifying more severe punishment. The five longest sentences awarded, all of 10 years or more in the sample of 220 cases (1900–50), were for cases involving very young children (two cases of 6-year-old female victims), incest with female children (two cases) and a case of indecent dealing with a boy under the age of 14. There is some indication that sentences were shorter by 1950 in cases where the victim's age might earlier have justified very severe sentencing (e.g. a sentence of 7 years' imprisonment for attempted carnal knowledge by a 49-year-old man of a 2-year-old girl at Beaudesert in 1950, with release on bond after 5 years (*Courier-Mail*, 25 February 1950: 3)); 4 years for indecent dealing by a 64-year-old man with a 7-year-old girl in Brisbane in 1950, with release on bond after serving one year of the sentence (*Courier-Mail*, 3 March 1950: 5)—but further research on the trial evidence as well as longitudinal sentencing patterns is required to validate this assertion.

Silent and invisible

The data discussed here suggest a number of things about child sexual assault in recent history. First, we know that sexual offending against minors has long been the object of legal sanction. The extent to which this is the case has been obscured by scholarly focus on legislative amendment of age of consent laws without attending to the prosecution of sexual offences more broadly; a recent Special Report for the Australian Royal Commission on sexual offence and child sexual abuse legislation thus almost entirely ignores the widespread evidence of sexual offence prosecution before recent decades (Boxall, Tomison and Hulme 2014). From the middle of the nineteenth century, sexual offences against children could and did provoke complaint and subsequent prosecution. This is not to say that there were no significant changes in understanding of the child's innocence or vulnerability during this last 150 years (Bates 2012, Ferguson 2004, Jackson 2000, Robertson 2005, Smaal 2013b, 2013c). But investigation of the changing patterns of complaint and prosecution over this time is likely, we suggest, to confirm the seriousness with which criminal prosecution was pursued as a response to sex offending against children.

Second, in Australia sex offences against children were historically an object of policing, primarily by way of complaint of victims and their close associates, typically mothers, sometimes fathers, direct to police. Third, child sexual abuse has been the object of punishment through judicial processes, with the heaviest sentences for severe breach of trust reserved for fathers charged with incest with daughters, offences against very young children, and unnatural offences against boys. In all these matters, however, preferences reflecting or expressing deeply felt norms and values affecting age, gender, culture (class especially, expressed in terms of abhorrence of a way of life) and race have inflected criminal justice outcomes in ways that are very familiar in the social histories of contemporary Australia and like societies.

But if policing and prosecution patterns highlight the things we know, they also remind us of the behaviour and responses that never made it to the record, the matters that remain silent and invisible. This is not only because of a familiar thesis about criminal prosecution—that it remains only an index of a larger 'dark figure' of crime—but also because the labour of discovery of the policing and prosecution record proceeds in the face of archival losses or severe restrictions on access to the records that survive. Evidence about abuse and criminal activity in institutions is especially subject to both

these conditions, with the under-reporting of sex crime being affected by the circumstances and regulation of institutional life and extant case files sheltered in organisational archives. Given the current focus on institutional sexual abuse, we want to conclude this chapter with some reflections on the conditions of disclosure and risk arising in the life of institutions. We offer these suggestions around three kinds of institutions relevant to Australian conditions in the nineteenth and twentieth centuries: Aboriginal missions and reserves; clubs and associations (e.g. Scouts and youth clubs); and finally, the churches.

Aboriginal life in Australia from the late 1890s was governed by increasingly intrusive surveillance and control that has been well and widely documented (Broome 2005, Haebich 2000, Rowse 1998). One jurisdictional effect of the 'protection' system in its various guises was to segregate those Indigenous people controlled in reserves and missions from those exempted from administrative control—a process particularly well documented in Queensland (Kidd 1997). Another was an intense management and oversight of Aboriginal lives (Blake 2001, Haebich 1992). These two effects come together in a way that we suggest both enabled sexual maltreatment of children to become visible to state authorities and for the state to respond to at least some of this offending by administrative rather than criminal justice mechanisms. Files from the Chief Protector's office in Queensland demonstrate the enlivening of concern expressed over the vulnerability of some children on missions, with an administrative response limited to managing the identified offender by removal to another place, typically Palm Island (Memorandum, Chief Protector, 26 January 1922, Correspondence Aboriginal and Torres Strait Islander, Crimes and Offences 1922, Queensland State Archives [hereafter QSA], A/58701). We note here another kind of effect of the different jurisdiction created by 'protection' legislation: in 1950 the defence asked for and was granted dismissal of a carnal knowledge charge in Brisbane involving an Aboriginal defendant and complainant because 'under the Aboriginals' Protection Act, if a girl had reached puberty, the question of her age was not material'. An otherwise assiduous police prosecutor of sex offenders in Brisbane did not contest this statement of law and policy (*Courier-Mail*, 27 January 1950: 4).[2] For

2 The relevant provision was enacted in 1901 by amendment to the principal act of 1897*: Aboriginals Protection and Restriction of Sale of Opium Acts 1901* (2 Edw. VII, No. 1), s. 14. This provided for a defence to a charge of sexual offences against a girl under age (*Criminal Code* [Qld], 1899, No. 9, ss. 212–215) that 'such girl had developed a state of puberty; and such proof shall be an absolute rebuttal and avoidance of any

Aboriginal children, the long-term consequences of such separate legal and administrative domains are arguably still being played out in contemporary Australia (Douglas and Finnane 2012, McGlade 2012).

The conditions that enabled reporting of sex offences against children in Aboriginal communities under the 'protection' systems did not apply in some other institutional settings. In community associations for example, like the Scout movement or youth clubs, self-regulation probably diminished the possibility of criminal justice intervention. The breach of trust that was evident in offending by teachers is also apparent in cases involving voluntary associations such as the Scouts. While there were no specific criminal law provisions targeting adult workers in such settings (unlike teachers in some jurisdictions), this did not mean an absence of recognition that abuse of children was a risk for organisations. At the Imperial Headquarters (London) of the Boy Scouts Association in 1924, for instance, the chairman warned Scout commissioners of a two-fold risk of immorality affecting Boy Scouts as well as the reputation of the movement. One was the danger of unsuitable men being nominated for warrants as scoutmasters; the other was the threat from undesirables, with reports of recent cases 'where people of good position have enticed boys to their places and behaved indecently'. The warning came in the wake of earlier confidential advice from the Chief Scout regarding procedures to be followed 'where immorality is suspected'. The Boy Scouts Association's approach to these issues was discussed with the Director of Public Prosecutions [England and Wales] and with police who were to be consulted on the background of those seeking contact with the movement (Chairman, Boy Scouts Association to Commissioners, December 1924, Papers Presented to and Report of the Committee of Enquiry Regarding Sexual Offences, 1924–49, QSA, JUS/121). These precautions operating from the top suggest a significant degree of awareness of risk of abuse of children both within and without institutions. There was good reason for such cognisance—offences against boys in Queensland in the 1930s and 1940s included a scoutmaster convicted of abusing a cub (i.e. junior scout) in 1947, an athletics coach in Rockhampton convicted of assaulting students and later charged with assault on sea scouts, a clerk assaulting a boy at Holy Trinity Boys' Club in Fortitude Valley in 1946 and numerous complaints against the founder of the Brisbane Boys Patriotic Club, which came to light

averment as to her age'. The provision was re-enacted in 1939 (*Aboriginals Preservation and Protection Act*, 3 Geo Vi no. 6, s. 36). It should be noted that this defence might be utilised by non-Aboriginal accused and indeed was inserted in 1939 into Part V of the statute, dealing with 'Offences by Persons other than Aboriginals'.

during an inquest into his suicide in 1942 (*Truth* [Brisbane], 7 December 1947: 3; *Truth* [Brisbane], 13 June 1943: 16; *Courier-Mail*, 7 October 1947: 6; Inquest file 1942, Depositions and findings in coroners' inquests, QSA, JUS/N1112). We hazard the suggestion that in terms of institutional abuse, the voluntary sector remained more open to complaint and possible police action given the limited jurisdiction exercised by such bodies over their personnel and indeed over the boys involved in such associations.

It is by now well recognised that the conditions that facilitated some levels of disclosure of abuse within voluntary institutions have been almost absent from totalising institutions such as children's homes, including dormitories on Aboriginal missions and reserves, and especially church schools and congregations. Even so the first two of these three types of institution have histories of occasional policing and prosecution of especially notorious offenders like the 'evangelical' ex-Salvationist governor of Brisbane's Wooloowin Boys' Home (*Truth* [Brisbane], 4 February 1906: 5; *Brisbane Courier*, 19 February 1906: 4). The position of the Catholic Church, in respect of its schools, seminaries and congregations, appears quite otherwise. The current Australian Royal Commission is considering the matter yet again, but the practices and cultures that have enabled both high levels of offending and very limited possibilities of disclosure are well known by now from the Irish, US, Canadian and various other Australian inquiries (Daly 2014a, Terry et al. 2011). The achievement of what might be called a 'religious settlement', in which historically the Catholic Church secured a high degree of institutional autonomy from state control and accountability, to match its comprehensive jurisdiction over the personal lives and loyalties of practising believers, deserves a great deal more research (Coldrey 2004, Ferriter 2009, Keenan 2012, Marr 2013, Parkinson 2013). Its implications for silencing and rendering invisible the violence and harm done to many in its care are self-evident and demand continuing historical reflection.

Conclusion

We argue here that criminal law has long been used as a response to child sexual assaults. The volume and scale of prosecutions—perhaps more than 15,000 cases across the main Australian jurisdictions over 50 years—indicates that crimes against children constituted a significant proportion of the courts' concern with sexual offences. This was the case, notwithstanding changes across time and between jurisdictions bringing with them shifting definitions of offending, mutable rules of procedure, evidence and

corroboration, as well as fluctuating sentencing regimes. Once a case was brought to trial, defendants were more likely to be convicted than acquitted, with the most severe sanctions usually reserved for offences against young children and 'unnatural' crimes: indecent assaults on boys and incest between fathers and daughters (and to a lesser degree between brothers and sisters). While family structures posed possible dangers for children, they also provided safeguards and oversight, with mothers especially, as well as siblings, recognising and responding to harm by taking their complaint to police.

The position in total institutions was quite otherwise. The absence of parents and friends, the removal of oversight and the absence of access to mechanisms of direct and indirect complaint rendered their child inmates especially vulnerable. The closed management of church and state establishments removed children from the protections conferred by the public policing of wider community norms; consequently the prosecution of offenders was rare. Finally there appears some evidence in the historical record that the voluntary sector, which has limited control over its members, was more open to complaint and potential police action. Certainly, drawing on evidence from the administration of the Scouts as long ago as the 1920s, the protection of children in their care was partially informed by self-interest and a concern for public reputation, to a degree absent from the regimes of totalising institutions.

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Chapter 2

SEXUAL ASSAULT BY TEACHERS

Historical legislative, policy and prosecutorial responses

Andy Kaladelfos and Lisa Featherstone

In 1947 a leading psychiatrist, Dr John McGeorge, explained to the New South Wales Department of Justice that men who abused children were 'the most dangerous sex offenders'. These men, he went on to assert, were 'often in a position of trust, [such as] a schoolteacher or scoutmaster' (Report of Department of Justice, Attorney General's Department, 12/1351.1, State Records NSW [hereafter SRNSW]). McGeorge thought that laws dealing with sexual offenders needed to be more stringent in order to take account of this class of offender. His recommendations took account of the potential for the sexual abuse of children in institutional settings and in scenarios that involved an abuse of trust between an adult and a child.

This assessment is an important starting point in an historical examination of sexual assaults because it dispels popularly held beliefs about the treatment of the sexual offences against children in the past. Far from being a hidden offence, sexual offences against children were the majority of sexual assault cases heard in Australia's higher courts from the late nineteenth century onwards. Historically lawmakers, judges, medical experts, women's organisations, parents' groups and members of the community at large recognised that the sexual abuse of children was a problem that the state needed to address better. The problem of the sexual abuse of children was routinely, often daily, reported in the press; it was regularly dealt with by parliament; and it was frequently discussed by community members who used letters, petitions and public meetings to pressure justice departments to address the problem. Most of these public responses to sexual offending positioned

strangers as the most likely abusers of children, and public debates tended to consider methods of punishing sexual offenders after the fact rather than dealing with the prevention of sexual abuse (Chenier 2008, Kaladelfos 2010).

However, the widespread silencing of sexual abuse in institutional settings, so vividly revealed by the testimony given to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2013–17), did not arise from the historical misconception that abuse could not be perpetrated by those who cared for children. State recognition of the potential for institutional abuse had been enshrined in Australian legislation from as early as the 1880s, when states enacted clauses criminalising teachers' sexual offences on their pupils. Instead of examining how abuse was overlooked, this chapter focuses on the limited number of cases of institutional sexual abuse from Australia's past that did result in a criminal prosecution. Examining these rare cases—how they came to notice and how authorities dealt with them—can help clarify the reasons why other cases were never reported or prosecuted.

Historical research on child sexual abuse

Research examining historical responses to sexual abuse is a growing field in Australian history (Smaal 2013b, Smaal 2013c). Feminist studies from the 1980s and 1990s drew our attention to the gendered nature of sexual abuse and the entrenched historical origins of victim-blaming at criminal trials (Allen 1990, Bavin-Mizzi 1995, Hetherington 1991). In Aboriginal history, scholars have documented the widespread sexual abuse of Aboriginal women and children brought about by the policies and practices of colonialism (Haskins 2004, Human Rights and Equal Opportunity Commission 1997, McGlade 2012) More recently, historians have examined patterns in the state's prosecution and punishment of sexual offenders and the failure of legislative reform (such as incest provisions) to bring about meaningful change in the treatment of those cases at trial (Kaladelfos 2010, Smaal 2013a). The historical prosecution of institutional sexual abuse at criminal trial, however, has yet to be investigated.[1] This chapter provides the first analysis of the state's early legislative recognition of the potential for sexual abuse within institutions (schools) and examines the prosecution of these cases from the late nineteenth century to the mid-twentieth century.

1 Steven Angelides has provided analyses of the prosecution of contemporary cases involving teacher–student relations and has contributed a substantial body of work theorising contemporary responses to paedophilia in culture, media and law (Angelides 2009a, 2009b, 2010, 2008, 2005; see also Salter 2013a, Potts and Donoghue 2007).

Legislation on teachers' sexual offences

From the late-nineteenth century onwards, legislators across Australia acknowledged the potential for institutional sexual abuse committed by male schoolteachers on female students by criminalising sexual relationships between them. The criminalisation of teachers' relationships with students was a distinctly Australian provision and, unlike other legislation, had not been imported from English criminal law. Offences of this nature were specified under discrete sections of statute that provided a higher age of consent and/or a higher maximum penalty for such crimes, recognising the unique power dynamics in such offences and the seriousness of the offence as regarded by law. Part of the impetus for legislation seems to have been a high-profile case of abuse by a schoolteacher in NSW in 1882, soon after the introduction of compulsory education in that state (New South Wales Parliamentary Debates 1882: 213–29). The wider context of compulsory education was an important political and social context that gave rise to the implementation of teacher-specific sexual offences.

New South Wales was the first state (1883) to criminalise the offence. The New South Wales section covered sexual offences committed by men in relations of power with female minors: it covered fathers, teachers and schoolmasters.[2] The section provided a higher age of consent (16 compared to 14 for other sexual offences, later increased to 17 compared to 16 for other sexual offences) and an increased maximum penalty for penetrative sex and attempted penetrative sex between male teachers and female pupils. The clause, explained a leading criminal law manual from the time, meant 'the abuse of the position of authority is here met with more severe punishment' (Hamilton and Addison 1902: 82). The New South Wales offence (*Criminal Law Amendment Act 1883*, No. 9a, s. 43) was subsequently replicated in three Australian jurisdictions: South Australia (*Criminal Law Consolidation Amendment Act 1885*, No. 358, s. 11), Victoria (*Crimes Act 1891*, No. 1231, s. 5[1–2]) and Western Australia (*Criminal Law Amendment Act 1892*, No. 24, s. 7) The criminal codes in Queensland (Criminal Code, 1899, s. 280) and Tasmania (Criminal Code, 1924, s. 50) did not include a clause of this type.[3]

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2 South Australia had originally created a separate section for sexual assault by fathers in 1876, subsequently adding teachers to its statute after the NSW amendment.

3 In fact these criminal codes legalised the 'domestic discipline' exhibited by parents and schoolmasters towards children as long as the force was 'reasonable' ([Tas.] *Criminal Code*, 1924, No. 2, s. 50) and the Queensland section included masters' force

New South Wales legislation stood out from the other states in making the most explicit connections between multiple types of abusive power relations between adults and children by placing male teachers' abuse of female pupils alongside fathers' abuse of their daughters. In effect, teachers were *in loco parentis* to their female students in a cultural sense and in the law's criminalisation of breaches of their de facto paternal power. In other Australian states, 'father' did not appear explicitly in the section relating to teachers, where it was replaced by the word 'guardian'. The Western Australian parliament added to that state's legislation in 1918 with additional criminalisation of relations between employers and girls under the age of consent. The criminalisation of such relationships had been an addition that the Social Purity Societies (conservative religious organisations that focused on social morals) had originally advocated in the late nineteenth century (*South Australian Register*, 6 September 1883: 6).

In South Australia, the Social Purity Society was at the forefront of their local amendments. South Australia was the leader in sexual offence reforms in Australia, being the first to raise the age of consent from 13 to 16 in 1885. In advocating for the criminalisation of teachers' offences, the Social Purity Society petitioned the state legislature for the creation of misdemeanour offences for male teachers' 'seduction' of female pupils and masters' 'seduction' of servants (*South Australian Register*, 6 September 1883: 6). The term 'seduction' in this context did not denote a romantic courtship. Rather, it held connotations of sexual relations by deception and the unwanted impregnation of young women, and was often deployed as a code word for sexual assault. Like their counterparts in other states, the South Australian Social Purity Society's concerns related to men's sexual relations with girls. These concerns were inscribed in s. 11 of the state's Criminal Law Consolidation Act (1885) that criminalised any 'guardian, teacher, or schoolmaster' having or attempting to have a sexual relationship with girls under 18. In the final legislative amendments, the South Australian parliament (*Criminal Law Consolidation Amendment Act 1885*, s. 9) went beyond what the Society advocated, supplementing the teachers clause with a unique section that created a male age of consent (the first of its kind in Australia) and criminalised any sexual dealing with both male and female children under the age of 18 by guardians, teachers or schoolmasters.[4]

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towards apprentices ([Qld], *Criminal Code*, 1899, No. 9, s. 280). This section was also implemented in Western Australia. Other states retained a common law right to discipline but did not itemise this in statute.

4 The section stipulated that 'No child under the age of sixteen years shall be deemed capable of consenting to any indecent assault, and no person under the age of eighteen

An important political context for the development of Australian criminal offences relating to teachers was the introduction of compulsory education in all states by the late-nineteenth century. In 1872 Victoria became the first state to introduce free, compulsory, secular education, and all other states had some form of the system by the early 1890s (Campbell and Proctor 2014, ch. 3). The development of compulsory schooling led to social concerns over the behaviour of male teachers and their potential for immoral conduct with female students, especially outside urban centres. Newspapers and those who petitioned government argued that only female teachers or married men should be sent to regional areas because the potential for single men's sexual misconduct with female pupils was too great.

In one instance, a regional newspaper reporting on the criminal conviction of a teacher for the abuse of a 14-year-old girl expressed the view that only women should be appointed in country areas (*Colac Herald*, 20 October 1891: 4). Another paper reported that complaints against male teachers occurred with 'alarming frequency' and proposed that if female teachers were employed it would abolish 'all fears of tampering by male teachers'. This editorial referenced a Victorian case in which a teacher from a 'moral' and 'respectable' background had been convicted of the abuse of young female pupils. The paper opined that 'when one seemingly so unlikely to commit an offence proves utter depravity it is high time to take steps to provide safeguards as preventatives for future offences' (*Riverine Herald*, 3 March 1882: 2). In a later example, the New South Wales Minister of Education reported that 'sending unmarried male teachers into lonely localities, where there was a number of girls' was dangerous. The minister later clarified that there had only been isolated examples where girls were 'tampered' with by male teachers, but parents were naturally concerned by the risk unmarried male teachers posed (*Sunday Times*, 15 June 1900: 5).

In fact, from the earliest days of compulsory education, government departments had been investigating the alleged immorality of teachers. The first Victorian Education Commission in 1882 heard testimony that there had been dozens of cases of teachers' inappropriate conduct towards their pupils. Here the commissioners were just as concerned with drunkenness among teachers and other poor conduct as they were with indecent assault. The commissioners asked members of the Education Department to prepare a report of every case of immoral conduct investigated by the department's inspectors. The commissioners expressed their dismay that departmental

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shall be deemed capable of consenting to any indecent assault committed by the guardian, teacher, or schoolmaster of such person'.

punishments for misbehaving teachers seemed to be too light and that teachers who were unfit for the classroom were simply moved from one school to another instead of being dismissed ('Education Commission: First Report', *Victorian Parliamentary Papers*, 1882: 15, 20, 39, 46–7, 61).

Departmental policy in dealing with pupil mistreatment cases was to conduct an internal investigation first, then to proceed to other state authorities. At least part of the justification for the internal investigation appears to have been the belief that vindictive students would create false accusations against teachers. In Tasmania in 1910, a local scandal erupted when a Methodist minister accused the state department of covering up abuse allegations against teachers. One of the examples involved a male teacher accused of having sexual relations with a 12-year-old girl who was allowed to resign from his position and leave the state instead of being punished or turned over to authorities (*Daily Herald*, 6 September 1910: 5; *Mercury*, 13 September 1910: 3). The Tasmanian Attorney-General denied the allegations, telling the parliament that there had not been enough evidence to pursue the allegations under criminal proceedings, mentioning the lack of corroboration in one case and possible false accusations in another (*Mercury*, 8 September 1910: 2, 6).

These governmental policies and investigations of men who were placed in charge of children clearly shows that the potential for abuse in these settings has been recognised for more than a century. The potential for abuse has been enshrined in legislation, in education department policy and in social concerns over a long period. The last two sections of this chapter examine the impact of the legislation and policies described above on long-term prosecution patterns as well as examining case studies of allegations that resulted in criminal prosecution.

Offending and prosecution patterns

Overall, teachers convicted of the sexual assault of pupils represented no more than 1.5 per cent of sexual assault convictions (*Police Gazette*, Tasmania, 1865–1910; *Police Gazette*, Victoria, 1864–92).[5] Further, while the law acknowledged institutional abuse, there were very few prosecutions under

5 The Tasmanian *Police Gazettes* between 1865 and 1910 identify only one teacher convicted of sexual abuse of a pupil of the more than 500 sexual assault convictions itemised in the gazettes. Records from the Victoria *Police Gazettes* from 1864 and 1892 identify only seven teachers convicted of sexual abuse of pupils of the more than 450 sexual assault convictions itemised in the gazettes. The *Police Gazettes* named occupations of those convicted of criminal offences. Thanks to Hamish Maxwell-Stewart for providing the *Police Gazette* databases.

the specific sections it provided. On our estimates, those charged with the teacher-specific sections represented 1 per cent or less of all sexual assault charges laid in the New South Wales higher courts (Supreme Court, Register of Criminal Indictments, 1883–1919; Supreme Court, Registers of Cases Heard Before the Central Criminal Court 1886–1937; Quarter Sessions, Registers of criminal cases tried at Sydney Quarter Sessions, 1883–1921; New South Wales Country Quarter Sessions, Registers of criminal depositions received, 1883–1947; New South Wales Supreme and Quarter Sessions, Criminal Transcripts 1950–59).[6] Many teachers were charged with regular sexual assault provisions rather than under the specific teacher section, a pattern that followed indictment practices for offences in the family (Featherstone and Kaladelfos 2014). For example, in our examination of 462 New South Wales court transcripts from the 1950s decade (Featherstone and Kaladelfos 2016), we found no instances of teachers charged under the available teacher-specific section but we did find seven teachers who were charged under general carnal knowledge provisions and a further four men in guardianship roles who were charged for sexual assault of those in their care.

Across a period of five decades in New South Wales, we have identified only 24 defendants who were charged under the teacher-specific section.[7] In addition, we have identified at least another 39 teachers who were charged with sexual assaults of children under their care.[8] All 63 defendants were male. A high proportion of these cases involved multiple charges of abuse. We uncovered detailed charge data for 42 of the 63 identified defendants. Of these, 26 were indicted on more than one charge of sexual assault; a small number being indicted on as many as 10 charges. Further, 17 of the defendants were indicted for the sexual assault of more than one complainant.

Most of the cases that appeared before New South Wales courts were offences on female children. Male complainants appeared in only 13 of the 62 cases where we can identify the gender of the complainant. Only one defendant was indicted for the sexual assault of both male and female children. The age of complainants ranged from 6 to 15 years old, the mean age being 11

6 We have examined register details for every criminal charge laid in New South Wales higher courts using the identified record series. Thanks to the SRNSW for the provision of the country quarter sessions database.

7 These defendants were identified from official indictment records.

8 These defendants were identified from searches conducted in Trove, the National Library of Australia's digitised newspaper collections using keyword and Boolean searches to identify prosecutions of teachers for offences against children in their care. We excluded cases where a defendant's occupation was given as a teacher and the charge was sexual assault but we could not verify that the abuse occurred on a child in their care.

years. The fact that the average age was 11 tells us that these charges were not generally used as a means to prosecute sexual relationships with older girls that would have otherwise been legal under general age of consent provisions. We have identified conviction outcomes for 48 of the 63 defendants. Thirty-two of these defendants were convicted on at least one count of sexual assault of their pupil, and 13 were found not guilty at trial (a relatively low acquittal rate of 28 per cent).[9]

There were a number of social commonalities in prosecuted cases of abuse by teachers. First, most cases that resulted in a prosecution occurred outside the capital city, with at least 56 of the 63 defendants being charged with assaults that took place in regional or rural New South Wales. In these communities, male teachers were often newcomers to the district, and parents and police seem to have been more forthcoming in bringing allegations against men in such circumstances. Second, nearly all cases involved public schoolteachers (we found only two instances of a private tutor being charged, two instances from private schools and no instances involving religious schools). Another common occurrence, especially in cases that involved multiple complainants, was parental confrontation of the defendants and an attempt to remove them from the district. This removal was usually first pursued through contact with the education board and thereafter subsequent contact with police. Pregnancy was a further factor in bringing a small number of these cases to court.

Investigation of other Australian jurisdictions indicates similar prosecution trends. In Victoria, from 1871 to 1959, we have identified 34 schoolteachers who were charged with the sexual assault of a pupil.[10] The charges were predominantly indecent assaults on females or males. Our records show no cases in Victoria where men were charged under the teacher-specific section, but rather all defendants were indicted on generic sexual assault charges.[11] Most Victorian defendants were charged with multiple offences: of the 35 defendants, at least 79 charges were laid. Only seven defendants were indicted on a single charge. In similar data to New South Wales, the age of the complainants ranged from 5 to 15 years, with a mean age of 10 years, and the majority of charges involved assaults on female children. Like New South Wales, in Victoria many of the sexual assaults that came to court were from regional areas. The increased surveillance over

9 The Crown Prosecutor entered a *nolle prosequi* in the remainder.

10 See note 8 for method of identification.

11 However, it is possible that the specific nature of the indictment was not recorded in newspaper reportage.

rural teachers—living directly in the community—might have helped to identify, police and prosecute abuse. Unlike New South Wales, in Victoria we found no instances where pregnancy was the impetus for prosecution. Most cases came to light when a child reported the assault to her mother or when another child witnessed the assault and reported it to an adult.

Most cases in Victoria, as in New South Wales, involved defendants who worked in the public schools. In part, this fact reflects the high proportion of children in public schooling. It seems that there was greater reporting and prosecution of criminal activity in public schools, or perhaps simply a greater chance of assault being revealed to parents when children were day students, as opposed to boarders. It is possible that the systems put in place for departmental review of allegations also aided the pursuit of criminal charges. The Victorian sample revealed only one defendant who worked in a Catholic school, and three defendants who were employed in private schools and colleges, including one defendant in a German school.

In both the New South Wales and Victorian cases, rural communities offered a more conducive atmosphere to report abuse and for police to pursue such charges. This could be because complainants' families were known community members whereas the teachers were often newcomers to the district. The correlation between the introduction of the teachers' sexual assault sections and the introduction of compulsory education, which was a change that increased mobility of teachers within and between states, gives further weight to this hypothesis. Further, in rural districts the status of the complainants' family (especially when complaints were made by her father) could override entrenched gendered norms that tended to suspect girls of making false accusations.

Case studies: Institutional sexual assaults on girls and boys

With the exception of South Australia, legislation created in Australian states specifically criminalised offences committed by male teachers on female pupils, not abuse that involved male teachers and male students. Correspondingly, and in line with child sexual abuse overall, the majority of the prosecutions that we identified involved male teachers and female complainants. However, the legal preclusion of abuse of male students did not limit judges' abilities to deal with these cases as evidence of an abuse of power. Some judges noted the differences between these cases and other types of men's abuse of boys, identifying abuse within school as

worse than other forms of abuse (*Dubbo Liberal and Macquarie Advocate*, 4 February 1899: 2; R v. Graham, Quarter Sessions, Criminal Transcripts, 1955, SRNSW).[12] In the final section of this chapter, we examine four cases of prosecuted institutional abuse, two involving female complainants and two involving males. Of these four instances, three involved abuse by schoolteachers, while the final case involved an even rarer prosecution for abuse that occurred at an Aboriginal state children's home. These case studies illustrate barriers to reporting, prosecution and conviction.

A New South Wales country court heard an offence typical of those prosecuted under the teachers' section in the late-nineteenth century. In 1890 Benjamin Innisford, a public school teacher in the Tenterfield district, a rural area north-west of Grafton, NSW, was indicted on a number of charges relating to the abuse of young female pupils (R v. Benjamin Innisford, Supreme Court, Papers and Depositions, Armidale, 1890, SRNSW). Innisford was accused of assaulting four female children in his class aged between nine and twelve. Like other cases found in our sample, Innisford's abuse occurred in view of witnesses; it took place after school in front of other female pupils. The complainants in these cases testified as corroborating witnesses of Innisford's abuse of their classmates, as well as testifying as principal witnesses to their own experiences of abuse.

Innisford's crimes attracted the longest penalty of all defendants we have identified as charged under the teacher-specific section. He was sentenced to 14 years' hard labour for the charge of attempted carnal knowledge of a child under ten and five years (concurrent) on the charge of carnal knowledge of a pupil. In this case, the father of one of Innisford's complainants confronted him about the abuse. The complainant's father accompanied police upon arresting Innisford and told him that he was turning him in for the indecent assault of his daughter and other girl pupils. But before telling the police, this father had confronted Innisford separately and told him to 'clear out' of town; otherwise the police would be around. Parents, especially those in rural settings, regularly confronted abusers of their children before contacting authorities; this circumstance is indicative of historical social practices employed in resolving abusive behaviour outside the realm of the state (Kaladelfos 2010, ch. 5).

Another case, in fact the first defendant indicted under the New South Wales teachers' section, occurred in much more unusual circumstances. In 1889 Ralph Johnston, a teacher at a public school near Bathurst, NSW, was

12 All defendants have been given pseudonyms. The year given is correct.

charged with carnal knowledge of his pupil, the 14-year-old complainant (R v. Ralph Johnston, Supreme Court, Papers and Depositions, Bathurst, 1889, SRNSW). Police arrested Johnston after receiving a complaint from the complainant's mother. The original charge laid against Johnston was rape. In her deposed statement, the complainant stated that she used to do jobs for Johnston, including scrubbing and washing. One Saturday she was in his house when he grabbed her, making her cry. Johnston said that he would not 'hurt' her; she testified that she had 'resisted' the first time he had sexual intercourse with her. After months of similar instances, the complainant fell pregnant. Her mother, upon finding out, confronted the accused about the 'condition' of her daughter (meaning her pregnancy). He offered to send the complainant away to give birth to the child. Her mother refused, stating that the complainant was only a child herself; she told him she would sue him for maintenance of the infant. The case of Johnston was discontinued after a marriage was brokered between the accused and his 14-year-old complainant, an arrangement that was sanctioned—and indeed sought—by her mother.

The case of Johnston was the only case in our study in which marriage was the resolution of the sexual abuse. In interpreting this case, it is instructive to examine Stephen Robertson's study of child sexual assault in New York in this period, which has shown the widespread use of 'forced marriages' as a working-class solution to the crime (Robertson 2002). In the case of Johnston, the girl's family framed the harm caused to her in terms of pregnancy, which was harmful because of her future as an unwed mother at a time when that status was associated with strong social stigma and significant levels of poverty (Swain and Howe 1995). Her mother's actions in this case might well have been an attempt to protect her child from the social disgrace of an illegitimate birth, seen, at least for this family, as a fate worse than sexual assault.

The final two case studies involved the abuse of boys in schools and children's homes where they lived away from their parents. The first case involves the prosecution and conviction of headmaster Sebastian Reeves in 1925 and his assistant, the teacher Charles Hammons, in 1926. They had been charged with the abuse of boys at an elite private boarding school, Hunter College, in Mayfield, Newcastle, NSW, that had opened in 1919. Reeves pled guilty to the offence and was sentenced to five years' penal servitude for indecent assault on a male (the maximum penalty), for which he served four years (*Police Gazette*, NSW, 24 July 1929). Hammons pleaded guilty to two charges of indecent assault on a male and was sentenced to two

cumulative sentences of three years' imprisonment, for which he served four years (*Police Gazette*, NSW, 11 August 1930; *Police Gazette*, NSW, 29 May 1935).[13]

The newspaper reports of these two convictions illustrate the difficulties of identifying sexual abuse within an institutional context, especially abuse of boys. The charges and convictions against Reeves and Hammons were widely reported in the press: 22 separate newspapers, with local, state and interstate coverage, published at least 40 reports on the offences. But the level of detail told to readers varied widely. Most reports left it up to the reader to surmise the details of the offence, in contrast to offences on female students, where newspaper reports often directly addressed the nature of the offence. Reeves was named in every report and Hammons in most, with all reports identifying their occupations as either school master or teacher and most identifying that they had been convicted of an 'indecent assault'. However, the fact that the offence occurred against a male was explained only through euphemisms. In the case of Reeves, the press reported Judge Cohen's comment that his offence was 'an abominable one and he was sorry that the law had not given him power to pass a longer sentence' (*Barrier Miner*, 19 December 1925: 1). In Hammons' case, local newspapers claimed that police character evidence found that he 'professed to be a devout churchman, associating himself with religious bodies—but he was a hypocrite' (*Maitland Weekly Mercury*, 6 February 1926: 9).

Only a small proportion of reports identified that the offences had been committed upon boys. Even fewer addressed the fact that the offences had been committed upon boys whose care had been entrusted to Reeves and Hammons. One local paper that did identify the relationship—the *Singleton Argus*—also published information that Hammons some years before had been accused of the abuse of boys in Tasmania when he was a schoolmaster there, and had been given the option by a rector, presumably at the school, to enlist in the army during World War I or have charges pressed (*Singleton Argus*, 9 February 1926: 1; *Sydney Morning Herald*, 6 February 1926: 12).[14] The most detailed reports on the circumstances of Hammons' case came from the sensational Sydney newspaper, *Truth*. *Truth*'s report outlined the details of the offence, explaining how Hammons groomed the young boy by offering him a camera. The paper explained the role of parents in reporting

13 In 1935 Hammons was convicted of indecent assault upon a male person (age unknown), sentenced to two years' imprisonment, and declared a habitual criminal (*Police Gazette*, NSW, 29 May 1935: 239).

14 The local paper reported that Hammons decided to enlist.

the offences and the fact that police had carried out undercover surveillance of Hammons' behaviour with one of the boys. No newspaper named the complainants in any of their reports, although the press regularly named complainants in other instances.[15] One explanation for this could be the fact that the boys came from an elite private school in the region, as provisions for the protection of privacy of victims were some decades away.

Another case of the abuse of boys highlights the complex interactions that occurred when men in positions of authority abused children in institutional settings. Many cases of institutional abuse were never reported or prosecuted; only in rare instances would such cases come to court. In cases that involved the abuse of Aboriginal children, prosecutorial evidence is even more rare. Therefore it is important to examine those cases that did come to light in detail. One example was the highly unusual prosecution of a white male manager of Kinchela Boys' Home in the 1950s. Kinchela was a state-run institution for Aboriginal boys removed from their families as part of governmental policies associated with the Stolen Generations.[16] In theory, the inmates of Kinchela were supposed to be given social welfare and education with the aim of 'assimilating' Aboriginal children into white society. Aboriginal men who lived at Kinchela have since testified that physical and sexual abuse were common at the Home (Human Rights and Equal Opportunity Commission 1997: 145).

The existing records tell us little about the circumstances surrounding the reporting of this case and the impetus to prosecute it, especially why this case came to light given the widespread sanction of abusive treatment of Aboriginal girls and boys in state facilities. What we do know is that in 1951, a Quarter Sessions judge and jury in Kempsey heard allegations that Patrick Jennings, manager of Kinchela, had committed indecent assaults on at least four boys under the age of 14 in the home (R v. Jennings, Quarter Sessions, Criminal Transcripts, 1951, SRNSW). Police laid charges for the abuse of one of these boys. The complainant, an Aboriginal boy, alleged that he had been assaulted in Jennings' home while his wife was away from the institution and at a time when he had been acting as Jennings' house-boy (or domestic servant). In response to the allegations, police reported that Jennings had said the complainant was 'worthless' and called another of the boys a 'liar'. Jennings' lawyer relied upon racial

15 The complainants were named in the *Police Gazette* reports of the offences.

16 Aboriginal girls removed from their families were sent to Cootamundra Girls' Home whereas the boys were sent to Kinchela.

stereotypes in cross-examination, suggesting that Aboriginal boys like the complainant possessed 'peculiar cunning', a quality 'not uncommon to their race'. Upon cross-examination, the defence alleged that boys at the home had themselves engaged in the practices of mutual masturbation, that they had concocted the story in order to get Jennings fired, and that he had previously disciplined them for sexual practices.

The Kempsey jury took only 20 minutes deliberation to find Jennings not guilty on the charge. The outcome of this case is predictable given the racial segregation of towns like Kempsey and the social context of race relations at the time. What is unusual is that the police pursued this charge at all, and after Jennings was acquitted, they laid another charge against him for abuse of another boy (a case for which records have not been found). To date we have found no newspaper reportage of Jennings' prosecutions. The outcome of Jennings' trial and his defence's depictions of sexual abuse are illustrative of the historical treatment of sexual crimes against Aboriginal children that occurred in state institutions.

Conclusion

By examining the commonalities in cases of sexual abuse in institutional settings that were heard in court we can better understand some of the factors driving the reporting and pursuit of these cases and thereby infer the barriers to others. Location and circumstance (including pregnancy and the social standing of complainants' families among their communities) appear to have held importance in bringing these cases to notice. Most notably, instances of abuse were most commonly reported, policed and prosecuted in rural and regional areas and were also more commonly investigated and prosecuted when cases took place in state schools, rather than private and religious schools. We can speculate that smaller communities provided environments more conductive to reporting and policing offences by male teachers. In these communities, teachers were outsiders to the district, while parents might have been better informed of happenings in their children's school and police seemed more willing to put forward the charge. However, few cases were prosecuted overall, compared to other child sexual offences.

The relative lack of sexual assault prosecutions in institutional settings is illustrative of a wider disjuncture between the legislative apparatus around sexual offending and the prosecution of cases. The law provided a means for prosecution and an appreciation of the relational power between teacher

and student, yet few cases were brought to trial. Further, from the late nineteenth century onwards there has been documented debate about sexual assault in schools. These debates include policy from various state education departments, activism by purity and feminist groups and others, as well as widespread media coverage reporting not only on individual crimes but also of the broader need to protect children, particularly from single male schoolmasters. These examples provide convincing evidence that there was substantial knowledge that children could be vulnerable to sexual assault from teachers. Information about institutional child sexual assault was not hidden or unspoken, but rather a matter for the public record. The inability of the state to deal with the problem rested more on barriers to reporting than on legal barriers to prosecution.

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Chapter 3

NARRATIVES OF INNOCENCE AND SEDUCTION

Historical understandings of child sexual abuse in Australia

Shurlee Swain

In an influential article published in 2005, Steven Angelides (2005: 273) drew attention to what he described as the emergence of the paedophile, a category as new and as powerful in reshaping discourses around sexuality as had been the homosexual more than a hundred years before. The 'perverts' or 'sex fiends' of earlier decades were now replaced by a new identity constituted as a figure of 'abhorrence and horror' (Angelides 2005: 276). Although it was the (re)discovery of sexual abuse within the home that lay at the base of the feminist campaign that Angelides identifies as central to this discursive shift, the articulation of sexual abuse as the core transgression of childhood innocence has also provided a vocabulary through which people who grew up in out-of-home care can articulate the multiple failings of the system within which they were confined. While not without sympathy for some of Angelides' concerns, this chapter seeks to understand the silence around child sexual abuse before the 1980s and the ways in which this both exposed children to danger and protected their abusers, before looking at the challenges this silence poses to those seeking to bring justice to the victims.

Angelides' chronology of the emergence of the paedophile is evident in the series of Australian inquiries into the legacy of past child welfare practices. The series begins with the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, which arose in

response to evidence from the Royal Commission on Deaths in Custody of the impact of child removal on Australian Indigenous communities. Its terms of reference made no mention of sexual abuse, but in the evidence presented there were more than 502 instances noted, earning the phenomenon its own section within the final report released in 1997 (Human Rights and Equal Opportunity Commission 1997: 162–7). The next two Commonwealth inquiries, *Lost Innocents* (Senate Standing Committee on Community Affairs, 2001: 75–80) and *Forgotten Australians* (Australian Senate Community Affairs References Committee, 2004: 103–5), followed a similar trajectory, with sexual abuse absent from the terms of reference but singled out for special treatment in the subsequent reports. In the report of the inquiry into abuse in Queensland institutions completed in 1999 (Forde 1999: iv, 87–91), sexual abuse was clearly identified as one of four forms of abuse that were found to be endemic in the system. By the time South Australia instigated its inquiry early in the new century (Mullighan 2008) the focus had narrowed, with sexual abuse being positioned alongside deaths in care as the core subjects for investigation. The inquiries in Victoria (Parliament of Victoria 2013) and New South Wales (Cunneen 2014), which were the immediate precursors to the Royal Commission into Institutional Responses to Child Sexual Abuse, focused even more specifically on sexual abuse in religious organisations. Internationally a similar pattern prevails. Anne-Marie McAlinden (2012: 5–6) classifies Irish child welfare inquiries into three distinct periods. From the 1930s to the 1970s the focus was on the lack of basic care in institutional environments, from the 1970s to the 1990s attention turned to abuse within the family and the failure of child protection services, but from the late 1990s the paedophile priest claimed centre stage.

The testimony given before these inquiries provides the core source material for this chapter. The written submissions and oral evidence constitute a valuable archive that provides insight into the ways in which victims/survivors seek to make sense of their own experience, but its use poses particular challenges for the historian. It is the reliance on testimony that distinguishes these inquiries from earlier official investigations. Dislodging professionals and other officials from the expert speaking position, they gave victims/survivors pride of place, a mark of what Ahmed and Casey (2001: 1) have described as the 'testimonial culture' that is reshaping the way in which the past is being remembered. For historians, testimonies, like oral histories, are primary sources constructed in the present and hence structured by contemporary concerns and discourses (Kennedy 2004: 49). Testimony, Bain

Attwood (2009: 236) has argued, deals with 'the past's residue in the present' rather than the 'pastness of the past'. However, it is this very characteristic that renders the archive open to a discursive analysis around both the silence and the articulation of child sexual abuse. Constructed at a particular point in time and with the intention of making public a hidden past, testimonies can be used to trace the shifting discourses that lay at the base of the current focus on paedophiles as the destroyers of the innocence of children.

There was, Fiona Hill (2005–06: 5) has argued, 'no previous era of unblemished innocence'. Sexual abuse might not have been identified and labelled until the 1980s, but sexual interaction between children and adults was not unknown in earlier years, and much of this interaction was non-consensual. Although it did not go unnoticed, it was a practice to be avoided or prevented rather than being brought into discourse. In the very earliest days of the British child migration schemes, for example, Lord Shaftesbury was well aware of the dangers facing girls sent to colonies, such as Australia, in which there was a marked sexual imbalance, and suggested that they could best be protected by being sent out 'before the ages to which the least suspicion [of sexual experience] could attach' and be confined on arrival in small industrial schools where they could be trained in 'not less than a year to become useful servants and eligible wives' (quoted in Eekelaar 1994: 487). The earliest Scottish legislation governing regulations for out-of-home care included a specific clause prohibiting any member of staff from committing 'an act of sexual immorality' with children in their care (Shaw 2007: 60). Ted Mullighan's South Australian inquiry (2008: xiii) concluded that sexual abuse occurred in every type of care, as did Tom Shaw's Scottish investigation, which produced evidence of numerous inquiries dating back to the 1940s. The core difference was that such inquiries constituted the problem as local and specific, which corresponds with Angelides' (2005: 278) conclusion that until the 1970s child molesters were seen as 'pathetic and innocuous' individuals, more the victim of the circumstances in which they found themselves than of their own psychological makeup.

In the 1970s and 1980s feminist scholarship reinterpreted the meaning of adult–child sexual encounters in order to reverse this tendency to blame the victim and pity the aggressor. Introducing the notion of power and powerlessness into the analysis, this shift reshaped contemporary understandings (Angelides 2004: 148). Theorists writing in the wake of this reinterpretation find its absoluteness disquieting, denying children the status of sexual subjects and reifying the notion of childhood innocence (Gooren 2011: 30–2). However, the feminist critique of past assumptions does provide

useful tools for exploring the blurred boundaries around adult–child sexual interactions that created the space in which abuse could thrive. Assumptions about class, power and innocence structured both the policies introduced to control such interactions and the memories of victims seeking to make sense of behaviour that is now clearly understood as sexual abuse.

In the nineteenth century it was commonly assumed that what was described as 'immorality' was endemic among the lower classes (Koven 2006: 4). 'Modesty and decency', Lord Shaftesbury (quoted in Wade 1902: 274) observed, 'are well-nigh impossible in overcrowded dwellings. From infancy the boys and girls are inured to indecency.' In his view, the children of the poor simultaneously constituted a moral danger while calling to be rescued from it, justifying a reformatory practice that was designed to be harsh in order to be transformative (Ferguson 2007: 132). This view was also accepted in the colonies. Thomas Brodribb (*Camperdown Chronicle*, 3 November 1883: 4), the Victorian chief inspector of schools, for example, employed this explanation in 1883 to dismiss claims that immorality was widespread in the new coeducational state schools. The problem, he said, had been isolated to a school 'situated in a very low locality' attended by 'children of the very lowest class'. In a variant of this explanation, in the following year, charges brought against an Adelaide man for carnally knowing his stepdaughter were dismissed because the girl was illegitimate, the imputation being that she was therefore already tainted (*Evening News*, 13 October 1884: 8).

Similar assumptions persisted well into the twentieth century with managers of children's institutions seeing vicious habits and homosexual behaviour as unfortunate by-products of bringing tainted children together. In the files of the Victorian Society for the Prevention of Cruelty to Children, the sexually abused child was seen as the sexualised child, too knowing and complicit in its own fate and hence no longer a child. The solution lay in practical steps designed to prevent the working class reverting to what was seen as their inherent behaviour. Families were ordered to find accommodation that provided separate bedrooms for boys and girls; and fathers on their own were told to move an adult female into the house. Only if they did not follow such advice was the child removed and charges laid (Scott and Swain 2002: 69–71). Within institutions the tendency to rely on such practical rather than legal recourses was also apparent. These prematurely, or perhaps inherently, tainted children could not be restored to the sanctity that was supposed to mark middle-class homes. The best that could be hoped for was to 'mitigate … some of the worst effects of the evil' (Wade 1902: 274–5). Ted Mullighan (2008: 33), for example, documented

frequent incidents of 'sexual misconduct', particularly in boys' institutions, which were managed by a mix of punishment and relocation, rather than applying the law.

Implicit in such management or preventive practices was the assumption that institutionalised children exercised some agency in their sexual interactions with staff or older residents. Where middle-class children abused in the family home were constituted as victims of violent or disturbed adults, the child separated from family and living in an institution was more likely to be seen as knowing and therefore tainted, an assumption that left them more open to abuse. In 1910 South Australian ward Florence Wright had to fight to defend herself from the sexual approaches of her employer's nephew, who had said, 'I have a right to come when I like' (Barbalet 1983: 92). In an incest case reported in a Rockhampton paper in 1946, the judge accepted a plea of clemency arguing that the boy had been led astray by his sister, recently returned from an orphanage, who appeared to be 'a sexual child' (*Morning Bulletin*, 20 February 1946: 8). Some former residents of children's homes recognise themselves in this image, although their descriptions are usually couched in terms of the layer of shame that accompanied their realisation that the behaviour in which they had engaged was stigmatised. For Peter Brownbill (*Forgotten Australians* 2004–07, submission 321), who was in a New South Wales institution in the 1950s and 1960s, mutual masturbation and oral sex, with both younger and older boys, were part of a 'secret game played against management', which he only later came to consider as potentially harmful. For John Lloyd (*Forgotten Australians* 2004–07, submission 210), who went through a series of boys' institutions before 'graduating' to prison, the trajectory was in the opposite direction; a fear of exposure and ridicule that prevented him forming relationships with other boys in his early years, being replaced first by a 'fugitive embrace' and later by an active seeking out of sexual partners, based on an acceptance that 'sexual activity is and ever will be an irresistible feature of life in such places'. Charles Candon (*Forgotten Australians* 2004–07, submission 405) remains a fierce defender of the Ashley home in Tasmania, arguing that although he was 'the recipient of an older boy's sexual desires', he 'hungered for a cuddle' and considered this attention far less abusive than what he had experienced in his earlier placements.

This hunger for affection is invoked by several survivors in attempting to explain why they were receptive to their abuser's advances. Having been removed from her sexually abusive family in the 1980s, Trish Read (*Forgotten Australians* 2004–07, submission 332) remembers welcoming the attention

of her social worker 'because I felt he really care[d] and all I wanted was love', something she now describes as 'the thinking of a very naive abused child'. For many years, Lewis McCabe (Parliament of Victoria 2013b) felt 'defiled and worthless' as he thought he 'might be partly to blame for the abuse' he suffered at the Salvation Army home at Bayswater in the 1970s, because he had accepted the interest and the privileges he was offered, offers that he now understands were part of his grooming. Approached by one of the Christian Brothers at St Augustine's in Geelong, Bryan Glanville (*Forgotten Australians* 2004–07, submission 129) thought he 'had a friend and as I had never been shown affection by another human being that I could remember, I welcomed it'. This marked the beginning of a long period of grooming during which the Brother schooled Glanville in sexualised behaviour while rewarding him with special treats. Initial feelings of disquiet were replaced by a more calculated acceptance. 'I got to the stage where I thought, stuff it, I get a smoke and a drink of plonk. All I've got to do is whack him off.'

Such admissions of agency or culpability are rare, with survivors preferring to focus on the innocence that they believed was lost through such sexual encounters. A need for love and companionship, New South Wales care leaver Ray Flett (*Forgotten Australians* 2004–07, submission 20) recognises, left him 'at the mercy of any sexual predator', but it does not excuse their behaviour. He was, after all, an innocent child. The trope of innocence is deployed in multiple ways in attempts to understand child sexual abuse, at its height rendering all child–adult sexual interaction as transgressive. If children were by definition innocent, the child who showed an awareness of 'the mysteries supposed to be unknown to children' was no longer a child (*Empire*, 21 August 1860: 5). Innocence taken was thus constituted as the worst of crimes, bringing about in the child a change that could never be reversed. Care leavers who have spoken before the various inquiries work hard to position themselves as ignorant and therefore, by implication, innocent at the time of the assault. Abused at the Salvation Army Boys' Home in Box Hill in the 1960s, Brian Cherrie (Parliament of Victoria 2103b) presents himself as 'too young at the time to realise what was even happening'. In more colourful language, Bryan Cronin (*Forgotten Australians* 2004–07, submission 290) describes himself as a 'pore [*sic*] defenceless child, an infant, fresh meet in a meet market [*sic*]'. Vincent Dromi (*Forgotten Australians* 2004–07, submission 371) now understands himself as having been 'fed to the lions' at St Vincent's, South Melbourne in the 1970s, adding, 'I was just seven.'

Yet innocence did not preserve victims from the long-term impact of abuse. 'From that moment, I was no longer who I had been', writes Margaret

Davidson (*Forgotten Australians* 2004–07, submission 419), who had been abused by her foster father in the 1960s. Assaulted at the Ballarat Orphanage in the 1970s, Deborah Findlay (*Forgotten Australians* 2004–07, submission 449) reports feeling 'violated. I had my innocence taken away from me. Felt shame of my body.' Elizabeth Behrendorff (*Forgotten Australians* 2004–07, submission 239) talks of being 'robbed of my childhood. I don't know why I can't get some of the terrible things he did to me out of my head. They loom in the shadows of my life and haunt me.' Survivors live with a legacy of guilt. Wayne Laird (*Forgotten Australians* 2004–07, submission 15) writes in terms of shame, recalling 'I was scared and felt dirty'. Linda Eldridge (*Forgotten Australians* 2004–07, submission 470) reports 'the humiliation stayed with me for many years. Now I am saddened that a vulnerable child can be so easily taken advantage of because at the age of 12 I had no one who gave a damn.'

Such emotions support the arguments made by both Angelides (2004: 142) and Egan and Hawkes (2009: 392) about the dangers of equating childhood with innocence, removing the possibility of any discussion of child sexuality and positioning child and adult as binary opposites rather than positions on a continuum. The erasure of childhood sexuality can lead to difficulties in accepting the sexualised self later in life, spreading the very stigma it was initially invoked to avoid. The vulnerable, unknowing child has now grown into a humiliated adult, still struggling to deal with the acts that haunt his or her life.

The testimonies also give some insight into the ways in which contemporary constructions of childhood limited the speaking positions available to children, making it all but impossible to complain. In a society in which children were not given access to knowledge about sexuality, even those who remained with their families struggled to articulate concerns about sexual advances. A 13-year-old Western Australian girl, for example, told the court that despite being molested by her father for two years after her mother's death, she realised that his conduct was criminal only after reading an account of a similar case in her local newspaper (*West Australian*, 18 August 1893: 6). Institutionalised children had even less knowledge. To raise the alarm, a child first had to have the awareness that the behaviour was wrong, rather than normative for 'children like them'. They also needed to have the language to describe the behaviour that they wished to complain about. David Forbes (*Forgotten Australians* 2004–07, submission 94) found himself 'trapped in a world [he] did not understand', unable to name, let alone condemn the abuse that he endured. Isolated in foster care, Helena

Dam (*Forgotten Australians* 2004–07, submission 237) was ill-equipped to deal with her abuser. 'I had never seen a naked male before in my life. I didn't know what was happening. I was telling him, "Get away, get away." He didn't listen.'

Institutions for children were saturated with sexuality, the presence of which was suppressed or, more often, completely denied. Naked bodies were exposed to staff and other residents, but any child who responded in a way that could be read as sexual was reprimanded and the temptations that this offered to staff were routinely ignored. At St John's, Goulburn, a former resident (*Forgotten Australians* 2004–07, submission 330) remembered, there 'were always inspections in the showers, [yet] to look at yours or another body was a sin, and you only touched it if you went to the toilet … [However], the nuns had no problem touching us to hit us, or to look at us in the showers.' Steve's experience (*Forgotten Australians* 2004–07, submission 510) at the Salvation Army Home in Box Hill was similarly confusing. 'Abuse … started when I was being bathed' with the staff member taking 'a lot of time washing my private parts'. Regular discipline provided a further opportunity for gratification. Rona Seabrook (*Forgotten Australians* 2004–07, submission 505) recalled an incident at Queensland's Queen Alexandra Home in the 1940s when the cottage father would watch the girls having their baths, then take their pants down and 'smack their bare bottoms'.

Yet to complain was to confess to being a knowing child, automatically a threat to the 'innocence' of those among whom he or she lived and, all too often, constituted as a temptation to the adults charged with providing them with 'care'. Hence a complaint would lead not to assistance or recognition but rather to punishment and ultimately to removal to an institution designed to reform the fallen, institutions in which the residents, as now publicly acknowledged damaged goods, were even more vulnerable to abuse. Accounts of abuse are framed by a language of fear, not only of the return of the abuser but also of the interrogation and harsh punishment that they knew would follow a complaint. Steve (*Forgotten Australians* 2004–07, submission 510) told no one about his experiences because he was scared 'no one would believe me as I was only a child and they were trusted officers'. Abused by her foster father and his teenage sons, Dorothy Ashby (*Forgotten Australians* 2004–07, submission 262) was told that unless she kept the secret she would be returned to the orphanage. As a result she 'learned not to tell well'. Robert Hadaway (*Forgotten Australians* 2004–07, submission 462) was raped by a builder's labourer working at Burn Brae in the 1940s but told no one as he was convinced that he 'would receive even worse punishment from

those in charge'. Children in 'care' lived constantly in fear of a worse place, the convent or reformatory to which they knew those of their number who were no longer 'innocent' were despatched, never to return.

The threat of such institutions was part of the disciplinary repertoire of all children's homes. The testimonies of those who, courageously or naively, did complain confirm that such fears were not unfounded. At St Vincent's, Nudgee, Rosemary Beggs (*Forgotten Australians* 2004–07, submission 202) testified, the few children who did speak out were 'beaten and called liars. We accepted it was their right for we knew nothing else. Nobody from the State Children's Dept cared what was happening to us.' Repeatedly abused during her time in care in the 1960s, Joan Burton (*Forgotten Australians* 2004–07, submission 341) shared this sense of abandonment: 'I felt the need for someone to protect me from the type of people who abused my vulnerability and innocence. I was so suppressed I just thought I didn't have the right to say how I felt.' Internalising the message of their own culpability and failure, fear turned to shame, and most children remained silent.

A different kind of silence prevailed among authorities who conducted, or were responsible for supervising, institutions for children. Leneene Forde (1999: vii, 102) writes of a societal ignorance—a reluctance to abandon the belief that trusted religious organisations and good, upstanding citizens could not be a risk to children. An unwillingness to name behaviour as abusive, or even to recognise its existence, meant that the possibility that staff might be sexually attracted to children was not raised in training or supervision sessions, and no protocols were developed to manage the problem should it occur. In the absence of a literature around the psychology of abusers and the long-term impact of sexual abuse on children, authorities interpreted incidents that were reported in terms of the threat that they posed to the reputation of the organisation, turning for advice to lawyers and insurance companies (Blake 2006: 82). In Christian organisations, a belief in the efficacy of repentance, forgiveness and redemption diverted attention from the illegality of the act and the entitlement of the child victim to redress (Parkinson 2002: 14–15, Hill 2005–06: 6). Police colluded in this process, citing the unreliability of child witnesses and the potential damage to the reputation of the accused individuals and organisations as a reason for seeking to resolve the issue without resorting to the courts (Fox 1997: 52).

The impact of these strategies on institutionalised children was summarised by Frank Golding (Parliament of Victoria 2012: 12) in his appearance before the Victorian Inquiry:

> The lack of follow-up in these instances led to further abuse because the abusers understood they could get off scot-free … We have systemic blindness, where the crimes are rarely recorded … so the systemic patterns of crimes against children were unnoticed … we have institutional non-cooperation. They say … 'The perpetrator is old and frail; leave him in peace'. By contrast there is no regard for the peace of mind of the old and frail survivor.

Isolating and individualising strategies meant that the silence was perpetuated, and too many perpetrators were left free to move to another institution where they had access to a new set of victims. Silence also functioned to disguise the endemic nature of abuse and, more importantly, the factors that created the space in which such abuse could occur (Hawkins and Briggs 1997: 42). Care leaver advocates now insist that the system as a whole was abusive, sexually, physically and emotionally. Despite its rhetoric, it had such a low regard for the children in its care that it did not see such abuse as problematic (*Forgotten Australians* 2004–07, submission 22). At this point advocates share the concerns of sexuality scholars that the exclusive focus on the paedophile and the transgression of childhood innocence could be perpetuated in current inquiries. The essential question, they would suggest, is not how to prevent children, innocent or otherwise, from being preyed upon by evil, damaged or disturbed individuals, but rather to ask why environments in which sexual abuse and other forms of deprivation and punishment were normative, were allowed to develop and persist, and what steps need to be taken to make some reparation for the damage that so many have experienced.

The Royal Commission (2014–17) is charged not only with discovering the extent and causes of institutional child sexual abuse in the past but also with identifying best practice 'so that it may be followed in the future both to protect against the occurrence of child sexual abuse and to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims'. In order to fulfil this objective, it must challenge the constructions of childhood, and particularly the status of poor and 'othered' children, that continue to render them vulnerable to abuse at the hands of adults. In meeting this challenge it needs to be acknowledged that children can be sexual without being sexualised and hence rendered available for the fulfilment of adult desires.

Chapter 4

FINDING CHILD SEX ABUSE IN THE ARCHIVES

The treatment of sexually offending clergy in the Church of England, 1871–1960

Timothy W. Jones

Child sex abuse in Christian institutions emerged as a matter of major and continuing social concern in the USA from the early 1980s and in the UK and Australia in the early 1990s. Its exposure in media investigations, feminist criticism and government inquiries led to churches developing institutional policies for handling allegations of sexual abuse. In 1997 the Australian Catholic Church also founded a clinical treatment centre for clerical sex offenders, Encompass Australasia. It treated more than 1100 clergy, both Catholic and Protestant, before closing in 2008. These church policies and procedures for treating sexually offending clergy are not well understood beyond individual religious institutions and have been repeatedly judged by experts, government bodies and clerical child sex abuse survivors as unsystematic, inadequate and often inappropriate (Ellis and Ellis 2014, Parkinson 2014). Nonetheless, in more recent government inquiries, the various religious institutional procedures established since the 1990s for responding to allegations of abuse and providing avenues for redress for child sex abuse survivors have been represented as a major turning point in the history of the churches' treatment of sexually offending clergy. Before that point, it is frequently claimed that church authorities did not know about the extent or seriousness of clerical sexual offending, but that since that point they have been attempting to respond appropriately.

In fact, the major Christian churches were aware of abuse and have had long-standing practices for the treatment of clerical sexual offenders. However, these practices have not been 'visible' because child sex abuse did not emerge as a particular offence until relatively recently. Sex with minors was the subject of periodic social and political concern, particularly in the 1880s, 1910s and 1950s in the West (Jackson 1982, Robertson 2005). However, it did not become an enduring social concern in Australia or internationally until it was reframed through debates about sex, gender and power in the 1970s (Angelides 2005, Olafson and Corwin 1993). For example, although it had addressed children's rights since 1924, the League of Nations and its successor, the United Nations, did not address child sex abuse until the Convention on the Rights of the Child (1989). A greater openness in sexual attitudes following the sexual revolution, feminist critiques of patriarchy including domestic violence and sexual assault, and a new legal discourse of children's rights created conditions in which child sex abuse could be articulated as a wider social problem (Scott and Swain 2002). After sex with minors was formulated as 'child sexual abuse', the issue came to dominate media, government agendas and child protection services. The 'paedophile' came to be identified as a distinct, abhorrent pathological psychic identity to be treated as an *a priori* criminal (Angelides 2005, Ashenden 2002). Initial child sex abuse politics focused on treating incestuous abuse, and early child sex abuse scholarship was preoccupied with tensions in the relationship between public and private, of simultaneously safeguarding individual rights and family privacy in treatments of child sex abuse. However, from the late 1980s concerns about child sex abuse shifted to non-familial threats: child pornography, homosexuals as potential paedophiles, paedophile networks, alleged Satanic ritual abuse and finally the clerical sexual offender (Jenkins and Maier-Katkin 1992, Jenkins 1998).

Before the privileging in the 1980s of the categories 'paedophilia' and 'child sexual abuse', the law, medicine and church authorities often grouped sex with minors with other forms of illicit sex, such as consensual adult homosexual sex, sex in public, adultery and fornication. Carol Smart has observed that the impact of the legal framing of child sex abuse has been underestimated in historical and feminist scholarship (Smart 1999). Since the 1880s, legal categories of sexual offences have changed to reflect changes in the age of consent (from 12 to 16 in Australia and the UK by the early twentieth century), and changes in the governance of male homosexual acts, as well as developing understandings of sexual consent more broadly, reflecting nuanced understandings of capacity and agency. Medical

understandings of child sex abuse also changed dramatically over the period. While sex with minors was framed in terms of mental illness from the late nineteenth century, psychiatrists and psychoanalysts saw the problem as rare and relatively trivial. In the mid-twentieth century child sex offenders, along with homosexuals, transsexuals and other sexual 'deviants', were treated with a range of psychological and psychosurgical therapies, including chemical and electric aversion therapies (Dickinson et al. 2012). Their offences were regarded as symptomatic of a constitutional psychic weakness: uncommon personal failings 'to be pitied rather than punished' (Jenkins 1998: 102). From the 1970s, when 'child sex abuse' began to be identified and addressed, dedicated treatment centres were established. In order to uncover the treatment of clerical child sex offenders before the reframing of child sex abuse in the 1970s and 1980s, a broader category of sexual offence needs to be examined that attends to these changes in the histories of sexuality and medicine.

How these historical medical paradigms interacted with religious understandings of sexual offences varied greatly between religious traditions and institutions. In all Christian churches, however, particular religious ideas have shaped understandings of clerical child sex abuse, most prominently notions of offences as 'sin', but also the spiritual role of the clergy. As Marie Keenan notes, 'clergy represent a relatively distinct and atypical group of child sexual offenders whose offending must be considered in relation to the situational and contextual circumstances of their lives' as ministers of the church (Keenan 2012: 73). Historical understandings of clerical sexual offenders and their treatment can therefore be understood only in relation to their changing medical and theological contexts. These contexts give rise to alternative paradigms through which clerical child sex abuse has been understood: sin and illness. Each paradigm has its own implicit politics of treatment: salvation and rehabilitation. The various historical medical and spiritual 'treatments' of clerical sexual offenders exist in a dynamic and constitutive relation to each other and cannot be understood separately. As will be seen, they also direct responses to sex offenders to the reformation of the offender and do not promote justice for victims of offences.

Records of how Christian churches treated sexually offending clergy and how they negotiated these religious and medical paradigms before the 1990s are scarce. While some churches, such as the Roman Catholic Church, have long held mandated procedures for the documentation of clerical sexual offenders in dioceses, as evidence emerging from the Australian Royal Commission into Institutional Responses to Child Sexual Abuse is showing, compliance varied significantly. Furthermore, in other denominations,

records were neglected, lost or destroyed, sometimes as a matter of policy. The Church of England is a noticeable exception to this picture of archival silence. Perhaps because of its status as the established Church in England, central records of its bishops' deliberations on the treatment of sexual offenders have survived and are accessible for the period from 1871 to 1960. In what follows I detail the bishops' management of clerical sexual offenders in this period. By attending to differences in historical categories of clerical offences, it is possible to make visible the Church's systematic treatment of clerical child sex offenders far earlier than the emergence of the current international controversy from the 1980s.

The Church of England has an episcopal system of governance; that is, it is organised into dioceses, each of which is governed by a bishop. Dioceses are organised into provinces, headed by an archbishop or metropolitan, but the archbishop's position is one of first among equals. Their pre-eminence is grounded in seniority and respect, but not political authority. Anglican bishops are in effect the Church's highest political authority and are responsible for the discipline of clergy in their diocese. The various democratic bodies of church government that evolved from the mid-nineteenth century—such as diocesan convocations, church assemblies, national synods and international Lambeth conferences—have not superseded episcopal authority (Jones 2013: 11–12). There are various formal and informal avenues for a bishop to exercise clerical discipline. Bishops may admonish clergy guilty of misconduct or institute formal proceedings. The form that discipline takes is dependent on the gravity of the misconduct, the discretion of the bishop and the legal status of the cleric. Formal processes of discipline were governed by the *Church Discipline Act* UK 1840 and the *Clergy Discipline Act* UK 1892. These were superseded in 1963 by the Ecclesiastical Jurisdiction Measure, supplemented in 2003 by the Clergy Discipline Measure (Evans 1998, General Synod Working Party 1996).

Significant differences exist in the Church of England between the formal discipline of beneficed clergy and of clergy who operate by bishop's licence. Clergy who are beneficed may not be removed from office or penalised in any other way unless they have been convicted of an offence in a court (either an ecclesiastical court, or a secular court where a sentence of imprisonment is passed). Clergy who are licenced, on the other hand, may simply have their licence revoked by the bishop if the bishop is satisfied that the cleric has committed misconduct. Theoretically, then, the records of diocesan ecclesiastical courts should be illuminating of the discipline of beneficed clergy guilty of sexual offences.

Ecclesiastical, or consistory, court records do not, however, shed much light on the church's discipline of clergy guilty of sex offences in general, let alone of sex offences against children. This is partly because consistory court records have not been well preserved. They are also largely held in local government archives and are poorly catalogued. A search of the records of the consistory court of the diocese of London, held in the London Metropolitan archives, revealed only four trials of clergy for sexual offences between 1856 and 1963. None of these were evidently offences involving minors. Similarly, a search of the records of the appellate ecclesiastical court of the province of Canterbury—the Court of Arches—revealed few cases of clerics on trial for sexual offences. There were 17 cases between 1802 and 1920. Again, the age of the victims/accomplices in the clerics' offences is not apparent from the trial records. Notably, all of the cases above were presented as cases of heterosexual sexual misconduct, most of them involving consensual activity. Gillian Evans' study of clerical discipline in the Church of England cites four additional cases to those mentioned above, one of which involved homosexual misconduct (Evans 1998). The absence of trials of clergy for child sex abuse in the records of the London Consistory Court and the Court of Arches may be because clergy guilty of these offences were convicted in secular courts and were subsequently removed from office without the necessity of a consistory court trial. It is also, of course, possible that clergy suspected of such offences could not be tried because of the high evidentiary standards of the consistory court (similar to the standards of criminal law), because their offences never came to light, or because they were dealt with informally: protected or persuaded to resign quietly.

More information about clerical child sex offences can be derived from records of the secret, informal systems of discipline and governance that were developed by the Church of England's bishops. From 1871, Anglican bishops from England, Wales and Scotland met biannually or triannually in what was called the Bishops' Meeting. This was a secret, advisory meeting at which matters of common concern were discussed. A standing item in the minutes of the meeting was the maintenance of a 'cautionary list'. This was a list of names of clergy who had committed an offence against their office. The list was compiled and updated at the meeting and circulated to diocesan bishops for their information. At various times they discussed establishing a committee to manage the list, but through this period it remained the responsibility of the Archbishop of Canterbury and his legal secretary or

chaplain.[1] It was repeatedly emphasised that the Archbishop 'was not in any sense a court which either pronounced or remitted sentences. He was merely a clearing house of information' (Bishops Meeting records, Lambeth Palace Library, Archbishops Archives, London [hereafter BM], vol. 11, 15/1/1940: 62). The list was purely for the advice of the bishops and had no formal authority. A bishop was at liberty to appoint whomever he wanted, but should consult the list before making any appointment. It was frequently emphasised in the minutes that the very existence of the list should not be known outside the bishops' meeting (BM vol. 11, 30/6–1/7/1941: 131). The fact that this was repeated, however, suggests that bishops did not keep it secret and perhaps used it, or the threat of it, in their dealings with errant clergy.

The Bishops' Meeting records contain much information about the kinds of offences for which clergy were disciplined, as well as the range of responses the bishops could deploy in their treatment of offending clergy. The offences for which a cleric could be placed on the list varied greatly. Offences mentioned in the period varied from drunkenness, drug addiction, misappropriation of church funds, adultery, bigamy, remarriage after divorce,[2] the marriage of a clergyman to his deceased wife's sister, unnamed immorality, the capacious category of 'unnatural offences' and offences 'calculated to bring scandal on the Church' (BM vol. 12, 14/4/1945: 2). Clergy on the list were marked either 'C' or 'P'. A mark of 'C' meant that 'caution and enquiry are advised before a person whose name is placed against it is allowed to officiate' (Davidson Papers, Davidson, Randall Thomas (1848–1930), Baron Davidson, Archbishops' Papers, Lambeth Palace Library, London, Archbishops' Archives [hereafter Davidson Papers], 300, f. 16). In 1924 Michael Furse, bishop of St Albans, 'pointed out what a vast range of men this description covered' and that 'no stigma need rest on a man marked "C"' (BM vol. 8, 24–4/10/1924: 43). A cleric marked 'P', on the other hand, had committed a more serious offence. P meant that 'in the opinion of the Archbishop of Canterbury at the date when the list is edited after revision … the person against whose name that letter is placed ought not to be allowed to officiate, even on probation' (Davidson Papers, 300, f. 16). As Archbishop

1 However, in 1947 for the first time an 'Advisory Council on the Treatment of Offenders' is mentioned and bishops nominated to it (Lambeth Palace Library, London, Archbishops' Archives, Bishops' Meetings Records [hereafter BM] vol. 12, 13–14/10/1947: 168).

2 But not necessarily for getting divorced (BM vol. 13, 2–3/7/1951: 29; BM vol. 14, 20–21/1/1959: 239), nor for conducting the marriage of divorcees (BM vol. 12, 12/10/1948: 12).

Lang stressed in 1941, 'those with entry "P" against their names ought in no circumstances to be in any way employed without consultation with the Archbishop of the Province' (BM vol. 11, 30/6–1/7/1941: 131). Names were not left on the list in perpetuity. The bishops regularly revised the list, adding names of new offenders and removing names of men who had died, or 'where the nature of the caution deserved reconsideration' (BM vol. 11, 15/1/1939: 9). During this period, five years was commonly referred to as the minimum period of suspension for clergy marked 'P'.

A complete set of the cautionary lists has either not survived or is not publicly accessible in the central Church of England archives. However, the list in use in 1903, papers used in its revision and the new list published in 1904 have survived in the personal papers of Archbishop Davidson held in Lambeth Palace Library (Davidson Papers, 300, ff. 1–41). The list in use in 1903 was 24 pages long and contained the names of 508 clergy, 162 of whom were marked 'C' and 294 of whom were marked 'P' in the hand-written revisions. The revised list produced in 1904 was 33 pages long and contained the names of 495 clergy, 208 of whom were marked 'C' and 287 of whom were marked 'P' in the printed text. In the 1904 edition, more information was also provided about the offences of selected clergy who had been deprived of their office or deposed from the priesthood. Of these, 11 had been deposed, 40 had been deprived of their position and declared incapable of preferment (but remained ordained priests), one had their licence removed, two were suspended from their office (for two years and five years respectively), one was listed as convicted of 'moral offences' and jailed for 12 months and another as having been jailed for fraud (both presumed deposed or deprived) and two were listed as having relinquished the priesthood after having been deprived of their office. Of those listed as having been deprived, four were cited for adultery in divorce proceedings, two were convicted of a felony, one of stealing, one of bigamy and one was subject to a bastardy order. In addition, 47 ordination candidates were listed on a separate cautionary list. Again, there is insufficient information in the cautionary list to know whether any of the priests under discipline had committed offences against children.

Handwritten notes regarding clergy in the diocese of York, filed with the revised lists in the Davidson Papers, reveal more information about the proportion of offences against children (Davidson Papers, 300, ff. 36–41). Of the 47 men listed in these notes, 37 have a short description of their offence against their name. Of these 37, 17 (45 per cent) had committed some kind of sexual offence, including 5 (13 per cent) whose offences were

clearly described as being against children. All of these five were marked 'P' on the central list, but only one was recorded as having been deprived of office through formal proceedings. This handwritten cautionary list from the diocese of York is the only diocesan list in the archives. It represents a subset of the clergy in the lists produced and held by the Archbishop of Canterbury described above. If the breakdown of offences enabled by the more detailed annotation on the York list was reflected in the central lists, it would indicate that bishops were aware of a significant number of clergy who had committed sexual offences against children. How they understood these offences is less clear. All five of the York clergy listed as having committed child sex offences were prohibited from holding office, yet only one of them was listed as having been formally deprived of office and none of them were listed as having been deposed from the priesthood.

While the bishops display an awareness of the law and their legal responsibilities and liabilities throughout the period, legal responses to clerical offenders are not prominent in the archive. It is evident that the bishops received legal advice in relation to offending clergy. In 1924 Archbishop Davidson reassured the bishops that 'privately and unofficially they had had the unfailing help of [Dean of Arches] Sir Lewis Dibdin'.[3] In 1925, mindful of the potential legal harm to which confession might expose clergy, he 'warned the younger bishops as to the peril of allowing incriminated clergy to make confession of wrong-doing to them without first insisting on an explicit understanding that the Bishop would not be bound to silence with regard to what was in such circumstances told to him' (BM vol. 8, 8–9/7/1925: 61). It was also proposed that on the repeated confession of 'sin of special gravity involving others', a condition of absolution should be that the priest 'be willing to acknowledge [his] sin openly to his Bishop and take the consequences: provided always that the bishop ought in dealing with any such penitent to have regard solely to what would best conduce to his spiritual restoration' (BM vol. 12, 14/4/1945). The minutes include instances where the bishops gave evidence over to police to aid in the prosecution of clergy. One instance appeared to be in relation to financial impropriety, for which the priest was deposed (BM vol. 14, 17–18/1/1955: 3; BM vol. 14, 18–19/10/1955: 26). Another was a case of bigamy, where the police refused to take action (BM vol. 12, 11/1/1950: 333). There was also discussion of bishops' liability for legal expenses when dealing with offending clergy (BM vol. 13, 8–9/7/1952: 178).

3 BM vol. 8, 21–2/5/1924: 29. The Dean of Arches is the judge who sits at the ecclesiastical court of the Archbishop of Canterbury. It is a joint appointment to the equivalent Chancery Court in the archdiocese of York.

The most frequent discussion of the law and clerical discipline in Bishops' Meetings after 1920 was in relation to homosexual offences. It appears that these offences were a growing part of the bishops' disciplinary work in the early twentieth century. Archbishop Davidson remarked in 1924 that, 'whereas forty years ago drunkenness was the commonest offence among the clergy, unnatural offences were now much more common, and he believed that the increase of this type of offence was observable in the community generally' (BM vol. 8, 12–2/5/1924: 29). A 1929 'Report on Homosexuality in relation to the Ministry of the Church' recommended that men guilty of homosexual offences should not be ordained or allowed to continue in ministry (Archbishops' Committee on Spiritual Healing, 1929, in BM vol. 9: 261–2). This finding was repeated by a 1945 report of the Episcopal Committee on Discipline to consider 'the treatment of men guilty of homosexual offences', which recommended that 'the proof or admission of a homosexual crime committed by a clerk in holy Orders shall involve his final and irrecoverable deposition from such Orders' (BM vol. 12:16–17). Homosexuality *per se* was not grounds for deposition, but the commission of homosexual conduct punishable by the law 'ought to be held to constitute a permanent disqualification for any further exercise of ministry, in any circumstance, in the Church' (BM vol. 12: 16–17). Ten years later a further report was commissioned into homosexuals in training for the ministry. In discussion of the report, Archbishop Fisher said that 'cases which never reached the courts were sometimes as bad as those which did. Were these men also to be forbidden to officiate again?' (BM vol. 14, 18–19/10/1955: 35). The report discussed the possible screening of candidates for ordination to exclude homosexuals. The ten doctors consulted remarked that they 'had little experience "spotting" homosexuals' (Council on Training for the Ministry, n.d., in BM vol. 14, appendix). It was concluded that the only reliable method to screen candidates would be to obtain from them a written declaration. Yet 'to extract written or oral admissions about homosexual incidents is, in the present state of the law, to obtain confession of crime. If a doctor can communicate this to a Bishop, is he not bound also to inform the police?' (Central Advisory Council on Training for the Ministry, n.d., in BM vol. 14, appendix). The bishops agreed that, on these legal grounds, it would be inadvisable to inquire into the homosexual tendencies of their ordinands (BM vol. 14, 18–19/10/1955: 40).

A striking element of the bishops' discussion of sexually offending clergy, particularly in regard to homosexual offences, was their resort to medical advice and treatment. The relationship between medicine and the church

was evident throughout the period, although it was not always smooth. Archbishop Davidson, for example, 'mentioned the difficult position in which he was placed when psychotherapeutists minimized the responsibility of clergymen who had committed immorality and suggested that the cure of these men depended at least in part on their being allowed to continue at work' (BM vol. 8, 26–7/5/1925: 75). On the whole, it appears that the bishops highly valued medical advice. In the mid-twentieth century, medics were involved in the selection and training of ordinands, and bishops were warned of 'the danger of ordaining a psychopathic man' (BM vol. 12, 11/10/1949: 305). On occasion, the meeting also discussed the dangers of 'mentally unbalanced clergy' and even bishops (e.g. BM vol. 12, 4–5/7/1950: 337). In discussions of confession and the discipline of the clergy, frequent reference was made to the value of expert and psychiatric help (BM vol. 11, 9–10/10/1944: 392–5). In the 1950s a list was maintained of 'institutions and of individual psychiatrists skilled in dealing with homosexuals' (BM vol. 14, 18–19/10/1955: 35). Archbishop Fisher remarked that it was his personal practice to send men in his diocese under discipline for sexual offences to a psychiatrist and ask for a full report (BM vol. 14, 18–19/10/1955: 35). Throughout the period they explicitly framed homosexual offences in terms of sex, crime and disease. In the 1955 'Memorandum on Homosexuals' it was remarked that homosexuality was unlike 'other psychological maladjustments on which doctors report, as it is in fact widely regarded as a moral defect, and as the law stands lays a man open to suspicion of a crime' (Central Advisory Council on Training for the Ministry, n.d., in BM vol. 14, appendix). The 1945 Episcopal Committee on Discipline report was written by three bishops and advised by Dr E.A.H. Pentreath of the Mickleover Mental Hospital, Derbyshire, and Mr Justice Vaisey. The recognition of homosexuality as a medical condition without cure in this report meant that clergy guilty of homosexual offences could not be reinstated. This was not regarded as a penalty but 'as a necessary protection of the Church against a moral risk too serious to be rightfully taken … no exceptions ought to be made to the application of this principle' (BM vol. 12: 16–17). It was recommended that clergy deposed for these reasons should be helped spiritually, financially and psychologically, possibly through the newly inaugurated services of the National Health Service.

In addition to referring men to secular psychological and psychiatric services, the church treated men under discipline for sexual and other offences directly through a number of in-house channels. In 1924 the bishops discussed what was to be done with clergy guilty of 'unnatural offences'.

Archbishop Davidson remarked that the problem of these 'black sheep' was terrible and that he had been examining how the Roman Catholics dealt with them (BM vol. 8, 21–2/5/1924: 29). Archbishop Lang observed that their segregation in 'Homes' would be undesirable and suggested that they could be billeted out to clergy with large vicarages. By 1932, they had established a method of dealing with clerical offenders that operated at least for the next 30 years. Men with drug or alcohol addiction were referred to Caldecote Hall, a Church of England Temperance Society retreat in Warwickshire. Most clerical sexual offenders and clergy disciplined for other serious offences were sent to be cared for and rehabilitated by officers of the Church Army. The Church Army was founded in 1882 as an evangelistic and social work organisation within the Church.[4] It provided spiritual guidance as well as material care for clerics and their families. These treatment avenues were reviewed periodically, particularly when the Church Army officer responsible for clerical offenders retired. One such discussion in 1955 reveals the limits of their practice. Bishop Mortimer of Exeter explained that on coming out of prison, clerics guilty of homosexual offences 'went for a period to a Religious Community, after which they worked in a parish on probation' (BM vol. 14, 18–19/10/1955: 35). He lamented that 'all too frequently these men broke down again, because they had received no real curative treatment' and suggested that such men should not be allowed to officiate again, or 'alternatively that a residential centre should be established for these priests where psychiatric treatment could be given to them' (BM vol. 14, 18–19/10/1955: 35). The Primus of Scotland, Thomas Hannay, similarly criticised the placement of men in religious communities because of the lack of available psychiatric help there. Nevertheless, the bishops regarded that a dedicated treatment centre would be too expensive and continued sending men to the Church Army for supervision, rehabilitation and care.

There is almost no mention of child sex abuse in the bishops' discussions of the cautionary list and associated discussions of clerical discipline. This is not because clergy did not commit offences against children. It is rather because bishops did not distinguish offences against children from offences involving adults. This elision of child and adult offences is illustrated most vividly in the bishops' discussion of same-sex offences in correspondence

4 From the 1920s until 1946, Captain Spencer, a senior officer of the Church Army, was charged with the care of clerical offenders. He was succeeded by Prebendary Hubert Treacher, Chief Secretary of the Church Army, who continued in the role in his retirement to St Botolph's Bishopsgate, relinquishing these duties only in 1957. He was succeeded by Canon Frederick Hood.

with the Boy Scouts Association. In 1947 the bishops instituted procedures to be followed for 'clerical scouters who had been convicted of an offence, or whose behaviour is indiscrete, foolish or unsuitable' (BM vol. 12, 14/1/1947: 128–9). They were to have their warrants as scouting officers refused, and their diocesan bishops were to be informed. There was continuing correspondence between the Scouts and the bishops on the issue. The Scouts asked for assurances that 'before allowing a priest to resume his ministry after an offence the Bishop concerned would require an undertaking that he would not apply for or accept any position in the Scout Movement' and nominate someone else to manage the scouts in his parish (BM vol. 12, 5–6/7/1954: 354). Launcelot Fleming, bishop of Portsmouth, noted that 'Scout policy was that the police should be at once informed' if offences against boys were suspected. They 'did not feel that any exception to this could be made in the case of a clergyman'.[5] In 1956 and 1957 the bishops further tightened their regulation of clerical scoutmasters by making the appointment of clergy to scouting positions an episcopal responsibility. This meant that bishops could check the cautionary list and thereby 'never approving the appointment of any clergyman who at any time was known to be guilty of homosexual misconduct' (BM vol. 12, 16–17/10/1956: 79). Even in this very obvious case of child sex abuse, the offences were categorised as 'homosexual misconduct'.

Despite the near total absence of reference to clerical child sex abuse in the Church of England's archives, it is possible to identify child sex offenders in records of church discipline and construct a general picture of how clerical child sex offenders were treated by church authorities. By reading their treatment of all kinds of clerical offenders through the changing historical frameworks of offence and pathology, we can see how sex with minors was knowingly elided into other categories of offending. From at least 1870, the primary form of treatment for child sex offenders, along with other clerical offenders, was the surveillance of offending clergy through the maintenance and circulation among the bishops of a cautionary list. The cautionary list enabled bishops not to appoint, or to restrict the duties of, men guilty of serious offences. A key purpose of the list was to prevent men banned in one diocese from moving to another area to gain employment. Men guilty of sexual offences were commonly prohibited from exercising duties for a period, or could be deposed from the priesthood. Throughout the period,

5 Archbishop Fisher noted that these arrangements had been in place since 1947 but not needed until 1952 (BM vol. 12, 5–6/7/1954: 354).

psychological and psychiatric advice and treatment was indicated. From at least 1932, bishops referred sexual offenders to officers of the Church Army, who assisted in their rehabilitation. This could include assistance in housing, employment and psychological treatment. The bishops also cooperated with the legal prosecution of offenders, although in all treatments the bishops were 'to have regard solely to what would best conduce to [the penitent's] spiritual restoration' (BM vol. 12, 11/1/1950: 333). The bishops' first consideration in their treatment of clergy was for the salvation and rehabilitation of the offenders and for the wider reputation and mission of the church. There is no mention in this archive of their care or responsibility for survivors of clerical abuse.

Part 2

Recognising and responding to abuse

Chapter 5

PREVENTING CHILD SEXUAL ABUSE

A place-based approach

Stephen Smallbone and Nadine McKillop

Child sexual abuse encompasses a very diverse range of problem behaviour, including exposing children improperly to sexual conversation, acts or materials; production, distribution and possession of child pornography; grooming, trafficking and other sexual exploitation; and 'hands on' offences ranging from sexual touching through to violent sexual assaults causing physical injuries and occasionally even death. Some children experience sexual abuse as a single incident, whereas others are abused repeatedly—sometimes over a period of years and often in the context of other forms of maltreatment. Offenders are generally adolescent and adult males; may be relatives, caregivers, peers, acquaintances or (less often) strangers; and range from the psychologically ordinary to the dangerously psychopathic. Many offenders apparently desist after they are caught, and others develop a highly persistent pattern of sexually abusive behaviour that seems resistant to criminal justice and therapeutic intervention.

This heterogeneity among offenders, victims and the circumstances in which specific incidents occur presents serious challenges to the task of understanding and preventing sexual abuse. Researchers have proposed numerous typological schemes to reduce this heterogeneity, usually by identifying more homogenous offender subtypes. These range from complex schemes based on offenders' presumed motivations (Knight and Prentky 1990) or diagnostic features (Seto 2008), to simple categorisations based on victim gender (Prentky 1999) or the offender's relationship with their victim(s)

(Williams and Finkelhor 1990). Although the simpler schemes have proved useful for research and clinical purposes, both the simple and more complex schemes have been criticised on methodological and conceptual grounds (Studer and Aylwin 2006, Marshall, Smallbone and Marshall 2014). For example, Marshall, Smallbone and Marshall (2014) noted that while differences have been observed in the offending profiles of familial and non-familial sexual abusers, there is no consensus about how these groups are defined and operationalised. Some studies require a biological relationship to qualify as familial, for instance, whereas others include non-biologically related offenders such as stepfathers and stepsiblings in this category; some studies include strangers in the non-familial category, whereas others place stranger offenders in a separate category.

Marshall, Smallbone and Marshall (2014) recently proposed a new classification of 'affiliative' versus 'non-affiliative' sexual abusers. In this scheme, true stranger offenders are classed as non-affiliative, meaning that no family, social or other (e.g. professional) relationship existed between the abuser and victim before the first abuse incident. All other sexual abusers, whether familial or non-familial, are classified as affiliative. The behaviour of this latter group is distinguished by a process of grooming that typically precedes and accompanies the abuse—a feature not usually seen in the less common non-affiliative offending. Marshall, Smallbone and Marshall's affiliative–non-affiliative categorisation shifts the focus away from the presumed stable psychological characteristics of individual abusers to the relationship context in which abuse occurs.

An important limitation of Marshall, Smallbone and Marshall's scheme is that a great deal of heterogeneity remains, particularly within the affiliative group to which as many as 95 per cent of sexual abusers may belong. It is well known, for example, that familial abusers (albeit variously defined) tend to abuse one or two children, usually girls, repeatedly over a lengthy period until they are caught, after which they are unlikely to be arrested for further sexual offences (Smallbone, Marshall and Wortley 2008). Non-familial abusers on the other hand are more likely to be serial offenders, abusing either boys or girls (or both), and are more likely to abuse again after they are caught (Hanson and Bussiere 1998). Marshall, Smallbone and Marshall concluded that these differences between familial and non-familial affiliative abuse might be the result of the kinds of opportunities afforded by the different settings in which the abuse occurs, rather than differences in the psychological characteristics of the abusers themselves. For example, nuclear family settings usually include a relatively small number of children, and in

these settings repeated, protracted offending against one or two children is possible, whereas serial offending is not. By contrast, organisational settings such as educational, recreational and pastoral care settings typically include large numbers of children who come and go over the course of days, weeks and years. In these very different environments, sustained abuse of individual children may be more difficult, but greater opportunities for serial offending become possible.

In this chapter we build on Marshall, Smallbone and Marshall's (2014) ideas by examining child sexual abuse in terms of the settings in which it occurs. We consider four distinct types of setting: domestic, organisational, public and 'virtual', and summarise available findings concerning who is involved, and where, when and how various kinds of sexual abuse occur in each setting. For each setting we consider how a place-based approach might inform particular kinds of prevention strategies.

We begin by establishing the case for why the setting in which sexual abuse occurs (or is more likely to occur) is of fundamental importance to understanding and preventing the problem.

Why settings matter

According to routine activities theory (Cohen and Felson 1979), for any crime to occur three minimal elements must converge at a specific time and place: (1) a motivated offender, (2) a suitable target and (3) the absence of a capable guardian. This simple 'chemistry of crime' was later reconfigured as the so-called crime triangle (Clarke and Eck 2003), the points of which are represented by (1) the offender, (2) the target or victim and (3) the specific crime location. Clarke and Eck (2003) expanded the original concept of guardianship to include three types of 'crime controllers': third parties who may exert a preventive influence by dissuading or otherwise restraining the offender (labelled by Clarke and Eck as 'handlers'), by protecting the victim (labelled 'guardians'), or by watching out for undesirable behaviour within the specific setting (labelled 'place managers'). For simplicity we use the generic term 'guardians' here to refer to all three types of crime controller. Settings may present criminal opportunities because of the physical absence or inattentiveness of guardians, because the design and layout of the setting militates against effective guardianship (e.g. by the presence of blindspots, or 'out-of-the-way' places), because potential guardians do not recognise the signs of problem behaviour, or because they are reluctant or feel unable to intervene.

In practical terms, focusing on crime settings allows crime prevention resources and activities to be directed to specific crimes in specific places. This is a very different approach from offender-centred approaches that seek to reduce general criminal propensities (or more specific sexual proclivities) in individual offenders. Situational or place-based crime prevention aims to make specific places safer for everyone who encounters them, rather than to make selected individuals less prone to committing crimes. This is made possible by the fact that specific crimes tend to cluster in particular places and at particular times—so-called hot spots and hot times. Indeed, crime is much more predictable according to its location than by the identity of individual offenders. As Sherman (1995: 36–7) questioned in the mid-1990s, 'Why aren't we thinking more about wheredunit, rather than just whodunit?'

There is now an extensive catalogue of successful place-based prevention initiatives targeting many types of crime, ranging from car theft to residential burglary to robbery and public violence (Guerette and Bowers 2009, Wortley and Mazerolle 2013). Place-based approaches to understanding and preventing sexual abuse have been much slower to emerge. The emphasis in sexual abuse research has instead tended to remain on the presumed unusual characteristics of sexual offenders, with an applied focus on managing and treating detected offenders rather than on preventing sexual abuse before it might otherwise occur. Ten years ago Wortley and Smallbone (2006) outlined a situational prevention approach to sexual abuse, and although these ideas have had some influence, particularly on efforts to create safer organisational environments for children (see Brown and Saeid-Tessier 2015, Erooga 2012, Kaufman, Hayes and Knox 2010, Terry 2015), there has unfortunately been little by way of systematic evaluation of place-based sexual abuse prevention. Nevertheless our present analysis focuses on relevant research concerning sexual abuse in domestic, organisational, public and virtual settings.

Domestic settings

Domestic settings are private dwellings inhabited by families, single persons or groups of unrelated persons living together. In Australia, 72 per cent of households are family households, 24 per cent single-person households and just 4 per cent unrelated-group households (Qu and Weston 2013). Families may be classified as couple families (with or without children), lone-parent families (a single adult with one or more children), or groups of related individuals residing in the same household but who cannot be classified as couple or lone-parent families (Qu and Weston 2013). Children will reside

in one or more domestic settings and, particularly as they grow older, will visit others, with increasing independence. Age-related routine activities generally dictate the circumstances in which children encounter and interact with other children and adults, in their own or others' homes.

It is within the domestic setting (typically the victim's or offender's home) that most physical-contact sexual abuse occurs (Colombino et al. 2011, McKillop et al. 2015b, Smallbone and Wortley 2000, Snyder 2000). This is true for both youth-perpetrated and adult-perpetrated sexual abuse (Kaufman et al. 1996, McKillop et al. 2015a). Sexual abuse within domestic settings almost always involves male 'affiliative' abusers. Most typically perpetrators within these settings have a familial relationship (e.g. biological or stepfathers; stepbrothers; grandfathers; uncles and so on) with the child. Others, however, have no familial relationship to the victim and may include family friends, babysitters, foster children or neighbours. Colombino et al. (2011) reported that about half of the non-familial offenders in their sample first encountered their victims in a domestic setting. Some abusers may deliberately cultivate relationships with caregivers for the specific purpose of engaging a child in sexual abuse; however, it seems much more typical that the abuse first occurs after the offender and child have already known one another, often for many months or years (Smallbone and Wortley 2000). Rarely do strangers ('non-affiliative' abusers) perpetrate abuse in this setting (Colombino et al. 2011, McKillop et al. 2015b).

Girls tend to be at greater risk of sexual victimisation in domestic settings. Abuse incidents themselves tend to coincide with victims' routines. For instance, afternoons and early evening (3pm–9pm) tend to be the most common times for sexual abuse to occur in this setting (McKillop et al. 2015b, Snyder 2000), although this varies somewhat according to the children's ages. Younger children tend to be at more risk for sexual abuse within the home and in the earlier hours of the day, compared to older children and adolescents, whose risks of abuse outside the domestic setting and during later hours of the day increase with age (McKillop et al. 2015b, Snyder 2000). Sexual abuse incidents themselves tend to occur predominantly in private areas of the home (e.g. bedrooms and bathrooms, rather than communal living areas) and for short periods (on average 5 to 15 minutes; McKillop 2012, Smallbone and Wortley 2000), oftentimes when others are nearby (e.g. in other areas of the house; McKillop et al. 2015b).

Those who sexually abuse in this setting are likely to be, or to have previously been, involved in adult intimate relationships, primarily with women, and identify as heterosexual (Holmes and Slap 1998, Jenny, Roesler

and Poyer 1994, McKillop 2012). Only a small proportion of individuals who perpetrate abuse within these settings report stable paedophilic interests (Smallbone and Wortley 2000). However, they tend to report insecure adult attachment and a history of interpersonal and intimacy problems (Marsa et al. 2004, McKillop et al. 2012, Sawle and Kear-Colwell 2001, Stirpe et al. 2006).

For the most part, domestic sexual abuse appears to emerge in ordinary circumstances in which the victim (and the victim's family) has an established emotional tie to a well-known and trusted adult or adolescent before the enactment of sexual abuse (Elliot, Browne and Kilcoyne 1995, Kaufman et al. 1998, Leclerc, Wortley and Smallbone 2010, Paine and Hansen 2002, Smallbone and Wortley 2000). Adult abusers report that these incidents arise often in the absence of prolonged or compulsive sexual thoughts or motivations concerning children in general, often only becoming cognizant of such thoughts shortly before the first sexual abuse incident (McKillop et al. 2012). The abuser often first abuses in middle adulthood or later (McKillop et al. 2012, Smallbone and Wortley 2000), with these first incidents often coinciding with significant changes in life circumstances (e.g. marital stress or breakdown; death of a partner) that may prompt sexual or emotional 'neediness' (Marshall Serran and Marshall 2006). Once detected, offenders (particularly in the case of parental sexual abuse) tend not to be rearrested for further sexual offences, and they rarely abuse children other than their own (Goodman-Delahunty and O'Brien 2014).

While domestic settings usually serve as a front line of protection for children, they also unfortunately present conditions that are conducive to sexual (and other) abuse. From the abuser's point of view, abusing within their own home provides ready access to a child or children and access to and control over familiar places in which abuse can occur without others directly observing it. Abuse in domestic settings therefore requires little effort and entails little or easily manageable risk (Cleary 2004, Felson 2008). Children's dependence on adults, particularly their primary caregivers, also fosters compliance and militates against victim disclosure (Kaufman et al. 1998). Abusers' exploitation of these circumstances and the abuse occurring in the context of otherwise positive nurturing behaviour (physical affection, giving attention, bathing or putting the child to bed) makes the problem difficult for others to detect and therefore easier for the abuser to conceal (Finkelhor, Omrod and Chaffin 2009, McKillop 2012, Smallbone and

Wortley 2000). Indeed, children abused by close family members are among the least likely to disclose sexual abuse (Paine and Hansen 2002).

The dynamics that make domestic settings conducive to the perpetration of sexual abuse also make it the most challenging setting within which to implement prevention strategies. There are, however, some strategies aimed at enabling self-protection and extended guardianship in these settings that may help prevent sexual abuse or promote early detection. For familial abuse, establishing rules such as 'open door' policies, designing communal play areas that have direct line-of-sight, and requiring privacy when older children are bathing are some potential measures. To prevent non-familial abuse in these settings it may be helpful to limit or supervise the involvement of friends, neighbours, acquaintances, casual intimate partners and so on in routine, intimate care-taking activities such as bathing, dressing and preparing for bed. Careful reference checks on tutors, babysitters and so on have also been suggested as prevention measures (Kaufman et al. 2006).

Universal education programs that promote awareness of the contexts and dynamics (the who, when, what, where and how) of sexual abuse, and that engage and upskill the wider community to share the responsibility for child safety, seem sensible. It is important that these programs avoid promulgating popular but unhelpful stereotypes based on the worst and least likely scenarios. Targeted early intervention programs (e.g. home visiting and nursing programs; parent support programs; Holzer, Higgins and Bromfield 2006) aimed at increasing resilience in at-risk families by creating safe environments and that foster secure attachments, parental availability and regular, effective, open communication, may also be considered.

Organisational settings

Organisational settings usually comprise a defined set of buildings and grounds that serve as a location for a circumscribed range of specific activities (e.g. work, recreational, educational, entertainment, religious, commercial activities). The kind of organisation of most concern for our present purposes are child- and youth-serving organisations (e.g. schools, churches, residential institutions, out-of-home care, sporting clubs), since it is these places in which groups of children are supervised and cared for by a smaller number of unrelated adults, away from the direct care of parents and primary guardians. In terms of routine activities theory (Cohen and Felson 1979), child-serving organisations might therefore present convergence settings for potential abusers and potential victims.

For the most part, individuals who perpetrate abuse within these settings are affiliated with the organisation in some way and include both youth and adults—usually but not always males. Youth-perpetrated sexual abuse in organisational settings seems to occur most commonly in school and residential care settings where routine activities bring children of varying ages into contact with one another for regular and sustained periods, with varying degrees of adult supervision. In these settings youth sexual abusers tend to abuse younger children (Finkelhor, Omrod and Chaffin 2009, McKillop et al. 2015b). Adult abusers tend to be either paid employees or volunteers.

Some adult abusers admit to seeking involvement in youth-serving organisations at least partly for the purpose of gaining access to and sexually abusing, children (Leclerc and Cale 2015, Sullivan and Beech 2004). However, it is probably much more common for abuse-related motivations and behaviour to arise for the first time in the course of the person's involvement within the organisation, often in the context of their routine interactions with a specific child or children (Erooga, Allnock and Telford 2012, Smallbone and Wortley 2000).

Organisation-related abuse often occurs at locations away from the organisation itself, such as the offender's or victim's home, school camps or excursions, or in vehicles. In Leclerc and Cale's (2015) study, more than half of organisational offenders abused the child in their (the abuser's) own home, with only about a fifth abusing the child within the organisational setting itself. Some abusers may take the child away overnight as a strategy to build connection and trust (Erooga et al. 2012, Leclerc, Proulx and McKibben 2005), or with the explicit intention of engaging in abuse itself (Sullivan and Beech 2004).

Compared to domestic settings, organisation-related sexual abuse seems more often perpetrated against prepubescent children and against boys. Abusers in organisational settings are also more likely to abuse multiple victims (Leclerc and Cale 2015, Marshall et al. 2014, Sullivan et al. 2011). Some organisational abusers admit to noticing and exploiting particular vulnerability in children (e.g. loneliness, emotional neediness, problems at home; Erooga, Allnock and Telford 2012). Some abusers in Leclerc and Cale's study (2015) said that they abused children who they knew or perceived to have prior sexual knowledge (e.g. through previous sexual contact or through attending classes on sex and sexuality), were less assertive, less likely to talk to peers or family about inappropriate behaviour, or not well supervised.

In some important respects, the relationships between abusers and victims in organisational settings are analogous to those in domestic settings. One important difference is the absence in organisational settings of the deep parental attachment that may otherwise inhibit the sexualisation of the relationship. In youth-serving organisations particularly, children are exposed to unrelated adults who assume temporary caretaking roles that at times may involve unsupervised contact, and many perpetrators hold positions of authority and power that provide significant influence over the child. Often these roles involve a degree of physical or emotional intimacy (e.g. counselling, pastoral care or coaching roles), sometimes with particularly vulnerable children. Similarly to domestic settings, sexual abuse in organisations involves exploitation of the deference and trust established through these relationships (McAlinden 2006).

Some of the worst and most extensive cases of organisational sexual abuse have been associated with so-called 'closed' institutions—orphanages, residential institutions, some religious institutions and the like—where the usual regulation and oversight has been diminished or obstructed (Forde 1999, Terry 2008). Even when incidents have come to light internally, in many cases the organisation's leaders have resisted the involvement of outsiders by not reporting the abuse to authorities or by being uncooperative during investigations (Nunno 1999 cited in Gallagher 1999). Bullying, disadvantaging and reprimanding whistleblowers have been reported (Davidson and McNamara 1999). Following numerous media reports, formal inquiries and investigations, in recent years much has been done to change the organisational dynamics that allowed these endemic problems to go unchallenged. Nowadays, in developed Western countries at least, prolonged widespread abuse involving multiple abusers may be less likely than in the past. Ongoing vigilance is nevertheless required to prevent abuse by individuals or groups.

Whereas primary prevention in domestic settings may to a large extent rely on indirect intervention (e.g. by educating and informing parents and others), organisational settings allow for a much more direct level of control over the design and use of the particular space. In this respect organisational settings are especially conducive to place-based prevention.

Most child-serving organisations are now required to screen new or prospective employees and volunteers with criminal history and sometimes additional background checks. These schemes are likely to identify previously convicted offenders. However, as many as 80 per cent of convicted sex offenders have no prior record of sexual offences, so new abuse incidents are

probably much more likely to be committed by yet-to-be-detected offenders, rather than the more stereotypical but less common predatory serial offender. Screening will not detect active offenders who have not yet been caught, nor those who might have some propensity but have not yet committed their first sexual offence. Nor will such checks identify otherwise ordinary people whose motivations to sexually abuse arise for the first time during the course of their involvement with the organisation. Finally, employment screening does not apply to children themselves and therefore will have little impact on youth-perpetrated abuse, which in some organisational settings such as schools could be much more likely than adult-perpetrated abuse.

Given that employment screening will not detect the majority of future abusers, it is necessary to design and operate organisations in ways that minimise risks that those already in the organisation may abuse or be abused. For adults, this may be achieved by well-designed and functional policies (i.e. policies based on valid concepts and evidence and that are universally understood, endorsed and observed); careful recruitment and induction; clear, sensible codes of conduct; training in the identification and reporting of concerning behaviour; good supervision systems and practices; and a culture in which reporting of concerns is expected and rewarded. Building resilience in children, 'cocooning' those with particular vulnerability and maintaining a culture in which children are personalised, valued and feel encouraged to report concerns, may minimise risks of victimisation. Older children may benefit from responsible relationships education and bystander training.

The physical environment is an often overlooked but crucial element of a comprehensive prevention strategy. An open environment that allows easy line of sight to all activities involving children, through the routine movements of responsible adults, facilitates natural surveillance and extended guardianship. An environmental audit may be helpful to identify weak spots such as closed or out-of-the-way places. Such an approach must balance risk reduction with maintaining a friendly, nurturing environment for children and a pleasant environment for adults. Extreme approaches such as 'no touch' policies, or inadvertently creating a culture of suspicion, may significantly reduce the amenity of the organisation's environment and possibly even cause other problems for children. The term 'child safe, child friendly' nicely captures the idea that it is the wellbeing of children, and not just controlling risks, that is the central aim of prevention.

Many child-serving organisations are now subject to mandatory reporting laws and regulations, with most schemes requiring a reasonable belief that

sexual abuse has occurred or may be occurring to trigger the report. This is important to prevent the covering-up of known incidents. However, making such judgements can be very complex and difficult, and waiting until abuse has occurred is obviously problematic for the children involved. Inquiries into organisational sexual abuse (e.g. in Australia, the current Royal Commission into Institutional Responses to Child Sexual Abuse) very often uncover a history of small concerns, none of which alone signalled a serious problem. Implementing a system whereby the reporting of small concerns is encouraged, and that allows a pattern of small incidents to be connected, may be an important element of an organisational prevention strategy.

Public settings

Public settings are communal, social spaces that are open and accessible to the community at large. Sexual abuse in public settings is much less prevalent than in domestic and organisational settings (Colombino et al. 2011, McKillop et al. 2012, Smallbone and Wortley 2000). As in other settings, abusers are generally adult and adolescent males. Unlike in domestic and organisational abuse, however, the public setting is the domain of the stranger or non-affiliative offender, especially for adult abusers. Abuse incidents are therefore less likely to involve emotional involvement or protracted grooming (with the possible exception of 'online' grooming) and more likely to be abrupt.

Although stranger offending in public settings may be more likely than in other settings to involve abduction, such extreme cases are thankfully rare. Rather, stranger abuse incidents are often short in duration and, although varying in degree of intrusion and physical harm, involve single sexual acts such as indecent exposure or touching. Many are attempted rather than completed sexual acts (Gallagher, Bradford and Pease 2008), presumably because public places are not conducive to protracted abuse. Victims are often in the company of other children when these incidents occur, but may also be alone. Gallagher, Bradford and Pease (2008) reported that incidents involving lone children were likely to be more intrusive (e.g. touching, rather than indecent exposure) than when other children are nearby.

As in other settings, children who appear emotionally and physically vulnerable may be at a somewhat increased risk. In Gallagher, Bradford and Pease's study (2008), more than a quarter of those sexually abused in public settings had been a previous victim of attempted or completed sexual abuse. Birkbeck and LaFree (1993) suggested that physically attractive children

who are less well guarded and with high exposure to stranger adults may be particularly vulnerable to being sexually abused. Boys seem to be at greater risk than are girls of being sexually abused by strangers and therefore may be especially vulnerable targets in this setting (Richards 2011, Tarczon and Quadara 2012).

Proportionally small numbers of convicted adult abusers report having offended in such places as parks, playgrounds, shopping centres, swimming pools and so on (Smallbone and Wortley 2000). Public places of this kind allow a high level of control in terms of design and formal guardianship and in these respects are highly conducive to place-based prevention. However, because of the vast number of specific places and the low overall prevalence of public sexual abuse, place-based prevention efforts face something of a 'needle in a haystack' problem. Public 'hot spots' for sexual abuse may exist, and indeed a few such places have been identified for adolescent peer-to-peer sexual abuse (see for example Tilley et al. 2014). Except for the opportunities in these apparently unusual situations to focus prevention efforts on specific places and times, a more generic approach may be necessary. Designing out secluded or 'private' areas may help to reduce opportunities (e.g. location and design of amenity blocks). Utilising place managers (e.g. park maintenance employees, swimming pool supervisors, security guards), improving natural surveillance (e.g. lighting and visibility), and CCTV surveillance in such places as playgrounds, shopping centres, swimming areas and public amenities, may all be useful. Such measures will be more difficult to implement in fields and parklands and other more deserted public spaces where sheer vastness of these spaces make them difficult to supervise. Ultimately prevention of sexual abuse in public settings may rely on the ordinary guardianship of parents and the vigilance of ordinary citizens.

Virtual settings

With the advent of the internet, virtual settings represent a relatively new setting for the sexual exploitation of children. Internet-related offending includes the production, distribution (or trading) and acquisition and viewing of sexually abusive material. The internet is also used as a mechanism for meeting and grooming children and adolescents for the purpose of exchanging sexual material (e.g. having the child share naked photos) or to arrange personal meetings to facilitate physical-contact sexual abuse. Trends in the prevalence of internet-related offending parallel greater consumer demand in internet use. Recent statistics indicate that 83 per cent of

(7.3 million) households in Australia are now connected to the internet, with the highest proportion (96 per cent) of users being households with children younger than 15.[1] Almost all users (81 per cent) access the internet daily, with 15–17-year-olds comprising the highest proportion (97 per cent) of internet users, exposing children and adolescents to opportunities for exploitation on a daily basis. Ybarra and Mitchell (2005) identified high exposure to general pornography in adolescents (14 years and older), although the rates of exposure to child pornography are less clear. Victims of internet-related exploitation tend to be older adolescents (14–17 years), predominantly girls (see Wolak et al. 2008).

Unlike in other (domestic, organisational and public) settings, the virtual setting is a largely unregulated space and is relatively autonomous and depersonalised. This limits usual social control mechanisms present in real-world settings, particularly guardianship, resulting in unfettered ability to view and exchange large volumes of sexually exploitative material, resulting in some individuals succumbing to temptations that might otherwise have been adequately restrained (Babchishin, Hanson and Herman 2011).

As with the other settings for sexual abuse, abusers within the virtual setting are overwhelmingly male. The majority of detected offenders (more than 90 per cent) are adults, but tend to be younger than 'offline' abusers (Babchishin, Hanson and Herman 2011); many (about a third) of detected offenders are married, with a fifth to a third living with children (under 18) when the offences were detected (Wolak, Finkelhor and Mitchell 2011). They tend to be employed and well educated. The evidence concerning a direct link between viewing child pornography and physical-contact sexual abuse is not consistent. In most cases the link seems weak at best (Seto, Hanson and Babchisin 2011). Violence and abduction are uncharacteristic of abusive behaviour in this setting (Wolak et al. 2008). Recidivism among detected internet offenders appears to be lower than for physical-contact sexual abusers (Wortley and Smallbone 2012).

While the virtual setting facilitates the distribution and acquisition of child exploitation material, it is important to acknowledge that this material is usually originally produced in the context of physical-contact sexual abuse, often in domestic settings. Oftentimes the abuser is a family member, close family friend or someone with social connections to the child(ren) concerned (Wortley and Smallbone 2012), and the original abuse is characterised

1 Australian Bureau of Statistics. 2014. 'Household Internet Access.' *8146.0—Household Use of Information Technology, Australia, 2012–13*. Canberra: ABS. <www.abs.gov.au> (retrieved 25 November 2015).

by dynamics similar to those associated with domestic and organisational settings. Preventing the production of child pornography may therefore be best approached by focusing on the prevention of physical-contact abuse in real-world settings.

The rapid development and innovation in technology makes the implementation of prevention strategies particularly challenging in the virtual setting itself. Prevention strategies can include targeting the key features of the setting that facilitate sexual abuse and exploitation material and may help to reduce the volume of material available. Wortley and Smallbone (2012) suggest a number of strategies directed at reducing the availability and consumption of child pornography in particular, by increasing the effort to obtain images (e.g. removing images from the internet and deregistration of site domains) and by increasing the actual and perceived risk of detection (e.g. publicising arrests; utilising warning messages; monitoring known offenders).

At a universal level, the internet can be used to promote education and awareness of the risks pertaining to both perpetration and victimisation. Wolak et al. (2008) suggest that it is the interactive nature of the online environment that increases vulnerabilities associated with victimisation. For example, sharing personal information may not in itself increase risk, but sharing this information with strangers increases risk of victimisation. As such, education programs directed at increasing awareness of interactive risks are important. While parent education and training should be included as a prevention strategy for extending guardianship, Wolak et al. (2008) suggest that the focus should be on educating adolescents about the risks associated with interacting online and how young people may help each other to avoid risky behaviour. Of course, the biggest challenge is the implementation of prevention responses that can contend with rapid technical changes that enable new avenues for offenders to anonymise themselves and their behaviour.

Implications

Although much can be gleaned from the existing research literature about the place characteristics of child sexual abuse, researchers and practitioners have generally been slow to directly embrace a place-based approach to understanding and preventing the problem. Much of the precise detail needed to inform place-based prevention efforts—the 'who, what, where, when and how'—is therefore not yet well understood and the evidence base for the

effectiveness of place-based prevention not yet well established. Our present commentary, while based on established concepts and available evidence, is therefore necessarily speculative with regard to practical prevention strategies. Indeed, particularly with respect to child sexual abuse, place-based approaches raise a number of practical challenges. We conclude with some thoughts about what we see as the most pertinent of these challenges.

By all accounts domestic settings are the most common places for sexual abuse to occur. However, in many respects domestic settings may also be the least conducive to place-based prevention. This is because homes are for the most part intensely private places. Unless child protection or other authorities are already involved with a family where abuse has occurred or is suspected, domestic settings are likely to be closed to external scrutiny and intervention. For primary prevention, then, a key challenge is how to better enable adult domestic residents themselves to act as capable and effective guardians of their own children and others within their sphere of influence (e.g. extended family; their children's friends). Merely further raising awareness about sexual abuse would seem to have limited potential. In an evaluation of a community education campaign concerning sexual abuse (Chasan-Taber and Tabachnick 1999), it was found that residents were already very aware of and concerned about the problem but that they had little knowledge about how or where sexual abuse occurred or what they might do to better protect children. The challenge here, then, is to find ways to provide universal education about the dynamics of sexual abuse. It is important that such approaches aim to equip parents and others with accurate and useful information and at the same time to avoid creating undue anxiety, suspicion or over-reaction with respect to limiting children's social activities.

Although precise figures are not available, it seems clear that a significant proportion of sexual abuse incidents occur in organisational settings. Organisational settings are especially conducive to place-based prevention because there is often considerable scope to influence their design and operation and because those in charge have the authority to dictate and oversee the expected standards of behaviour of employees and volunteers, as well as of children themselves. We see two primary challenges here. The first is a conceptual problem, namely how an organisation's leaders and employees might move beyond the popular stereotype of the adult, predatory, determined 'paedophile' to understand that organisational abuse may also be opportunistic or situational (see Wortley and Smallbone 2006). While some sexual abusers certainly do fit the popular stereotype, focusing solely on

these extreme cases risks overlooking the potentially more likely scenario of abuse by someone known, trusted and perhaps liked by their colleagues and friends. The risk of abuse by young people themselves may also be overlooked. The second challenge, much like that in domestic settings, is how to inform those in the organisation of the dynamics of sexual abuse and at the same time avoid inadvertently creating a culture of suspicion. As we noted earlier, the idea of the 'child safe, child friendly' organisation is important to keep in mind, so as to avoid making the organisation's environment an unpleasant or unhealthy one for children and adults.

The key challenge for place-based prevention in public settings is, as we have noted, the 'needle in the haystack' problem—public settings encompass a vast array of specific places, and while there are usually public authorities who can exert significant control, the prevalence of abuse in any individual setting is likely to be extremely low. We do think there are likely to be some specific places where the prevalence of abuse is high enough to warrant targeted prevention activities, but because sexual abuse remains a largely hidden, secretive problem, discovering where such places are and exactly what is occurring there is problematic. Nevertheless steps might be taken to improve the supervision of children in public places such as swimming areas, shopping centres and so on.

Virtual settings would appear to present considerable scope for place-based prevention. A key challenge here is to focus research and prevention activities on specific aspects of the problem, each of which may involve specific aspects of the virtual environment and related technology. Existing research on 'online' sex offending tends to make few empirical distinctions within what is a highly diverse set of problems. Research is often focused on 'online' offenders. Leaving aside the problem that these offenders are unlikely to be representative (because so few are apparently ever caught), such research typically groups together those who have been arrested for downloading child pornography with those who may have produced and/or distributed the material, those who have used the internet to engage in sexual conversations or exchange sexual images with a child, those who have used the internet to arrange to meet a child for sexual purposes and so on. Moreover, this research seems preoccupied with the presumed stable and unusual characteristics of the offender, of which few if any have in fact been observed. What is needed instead is research on the offending—for example how, when and where child abuse images are first encountered; the emotional and environmental triggers for such behaviour; what search strategies are employed; the ways in which risk is perceived and responded

to; and so on. Details of this kind are needed to inform counter-strategies focused on various aspects of the internet itself.

Conclusion

Our aim in this chapter is to outline a place-based approach for understanding and preventing child sexual abuse. Our approach was to summarise the available findings concerning who is involved and where, when and how sexual abuse occurs in domestic, organisational, public and virtual settings and to propose potential place-based prevention strategies based on these findings. The place-based approach raises the prospect of both designing out potential risks (e.g. modification of physical settings to increase risk of detection) and designing in protective mechanisms (e.g. increasing informed and capable guardianship) to fit the problem at hand. A place-based approach recognises that strategies that may be applicable to familial sexual abuse in a domestic setting, for example, are likely to be fundamentally different from strategies used to prevent abuse in organisational, public or virtual settings. The prevention task, as we see it, is to reduce the risk of child sexual abuse occurring in the first place (the ultimate prevention goal), as well as designing in mechanisms for early detection and appropriate responses when sexual abuse unfortunately does occur.

Chapter 6

CHILD SEXUAL ABUSE IN THE CATHOLIC CHURCH

Karen J. Terry

Media reports on child sexual abuse in the United States have focused primarily on abuse within organisations and institutions since the early 2000s. Although several high-profile cases in recent years have emerged in schools (e.g. Horace Mann, Poly Prep), universities (e.g. Penn State), sports (e.g. USA Swimming, USA Hockey) and social organisations (e.g. Boy Scouts of America), no institution has come under more scrutiny than the Catholic Church. The impetus for this attention, which peaked in 2002, was John Geoghan, a serial predator from Boston who was accused of abusing more than 150 boys over three decades. Although he was not the first priest accused of being a serial sexual abuser—there was Gilbert Gauthe in 1985 and James Porter in 1993 before him—Geoghan's actions led to widespread and sustained media attention on the issue of sexual abuse by priests. The *New York Times* published front-page stories for 45 consecutive days on sexual abuse within the Catholic Church, and the *Boston Globe* published more than a thousand articles on the topic (*Boston Globe* 2004, Maniscalco 2005).

In June 2002, at the height of this flood of reporting, the United States Conference of Catholic Bishops (USCCB) created a Charter for the Protection of Children and Young People (hereafter the 'Charter') that aimed to understand and address this problem. Among other things, the Charter called for empirical studies of the sexual abuse of minors by Catholic priests.[1]

1 Unless otherwise indicated, the term 'priest' in this chapter includes both diocesan and religious clergy. Other than having a higher prevalence of abuse, diocesan priests did not differ from religious priests in characteristics of offending. As such, statistics presented about priests combine both groups of abusers into a single category.

The Office of Child and Youth Protection and the National Review Board, two entities formed as a result of the Charter, commissioned researchers at John Jay College to conduct two studies: the Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons: 1950–2002 (hereafter the 'Nature and Scope' study) and the Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010 (hereafter the 'Causes and Context' study). The John Jay College research team released a report of their descriptive Nature and Scope findings in February 2004 and a supplementary report in 2006. The Nature and Scope study provided information about the extent of the abuse crisis, the distribution of offenses nationally and over time, the priests against whom allegations were made, the minors they abused, the Church's response to the allegations and the financial impact of the crisis (John Jay College Research Team 2004, John Jay College 2006). The Causes and Context study, released in May 2011, analysed the conditions that permitted abusive behaviour in the Catholic Church to persist, integrating research from socio-cultural, psychological, situational and organisational perspectives (Terry et al. 2011). This chapter provides an overview of what is known about child sexual abuse in the Catholic Church in the United States, drawing from the data in these studies.

Early studies on sexual abuse by priests

Before 2002 few researchers had empirically studied the problem of child sexual abuse by priests. The studies that did exist focused on a range of topics, from prevalence of abuse by priests to the impact of abuse on victims. Most had limited generalisability owing to small or non-representative samples, yet they provided some insight about clergy offenders and those they abused.

Several early studies looked at who clergy abusers targeted for victimisation, although they provided conflicting results. For example, Ukeritis (2005) found that approximately 62 per cent of abusive clergy victimised adolescents between the ages of 14 and 18, while in Fones et al.'s study (1999) only 39 per cent of their sample of priests had offended against adolescents. Sipe (1990) focused on the percentage of priests sexually preoccupied with minors, concluding that 2 per cent of priests engage in paedophiliac behaviour and 4 per cent are sexually preoccupied with adolescent boys or girls. He also found that 20–40 per cent of priests engage in sexual misconduct with adults, which is similar in scope to the findings by Loftus and Camargo (1993). Kafka (2004), in his critical review of the literature, stated that the typical child sexual abuser in the Catholic Church is a diocesan priest who

is an ephebophile (primarily attracted to adolescent males). However, much of the information for his study was derived from the small clinical samples in the earlier US studies, the validity and reliability of which varied greatly.

Some studies of sexual abuse in the Catholic Church focused primarily on the prevalence of clergy abuse in an effort to understand how widespread the problem was in the United States. Extrapolating from data presented by the St Luke Institute (a treatment centre for Catholic clergy), Plante (2003) estimated that 3,000 priests committed sexually abusive acts against 24,000 victims over the past 50 years (although he noted that this figure may contain men from various religions). Several investigative journalists also attempted to identify the prevalence of sexual abuse by clergy. Two of the most thorough reports were published by Jason Berry (1992) and Laurie Goodstein (2003). On the basis of the publicly available records between 1984 and 1992, Berry (1992) estimated that 400 priests and brothers had sexually abused children during that time and the Catholic Church spent nearly $400 million in legal, medical and psychological expenses. Also using publicly available records, Goodstein (2003) estimated that by the end of 2002, more than 1,205 clerics had abused 4,268 victims. She found that 43 per cent of clerics abused children younger than 12 and that 80 per cent of victims were boys. She stated that half of the priests who had been investigated had multiple victims and that 16 per cent had five or more victims. She also reported that the abuse occurred most frequently during the 1970s and 1980s. Although based only on publicly available data, Goodstein's (2003) findings about victim and offender characteristics were similar to those later identified by the John Jay College studies.

The Nature and Scope study

The early studies of sexually abusive clergy provided some insight into clergy abusers and victims, but none provided a thorough accounting of national data on child sexual abuse by Catholic clergy. The mandate for the Nature and Scope study was to determine the extent of the sexual abuse of minors by Catholic priests nationally from 1950 to 2002. The John Jay College research team developed three separate surveys and sent them to all dioceses (districts of the Catholic Church that are supervised by bishops) and eparchies (Eastern Rite districts that are similar to dioceses) in the United States, as well as 140 religious orders of men. The first survey requested information about the diocese, the second requested information about every priest with an allegation of sexually abusing a minor, and the third requested infor-

mation about each victim who was abused and the abuse incidents. Identities of all priests and victims were confidential, and the researchers employed a double-blind procedure to ensure the anonymity of priests with allegations of abuse and the victims/survivors. Overall, 97 per cent of all dioceses and eparchies (representing 99 per cent of all diocesan priests) and 63 per cent of all religious communities (representing 84 per cent of religious priests) responded.

The results of the Nature and Scope study showed that the total number of priests with allegations from 1950 to 2002 was 4,392, which was equivalent to 4 per cent of priests in ministry during that time. The number of individuals who made allegations of sexual abuse was 10,667. Abuse incidence peaked in the 1970s and early 1980s. This distribution was consistent across all regions of the Catholic Church in the United States, as well as in dioceses of all sizes.[2] Figure 6.1 shows the abuse distribution from 1950 to 2002.

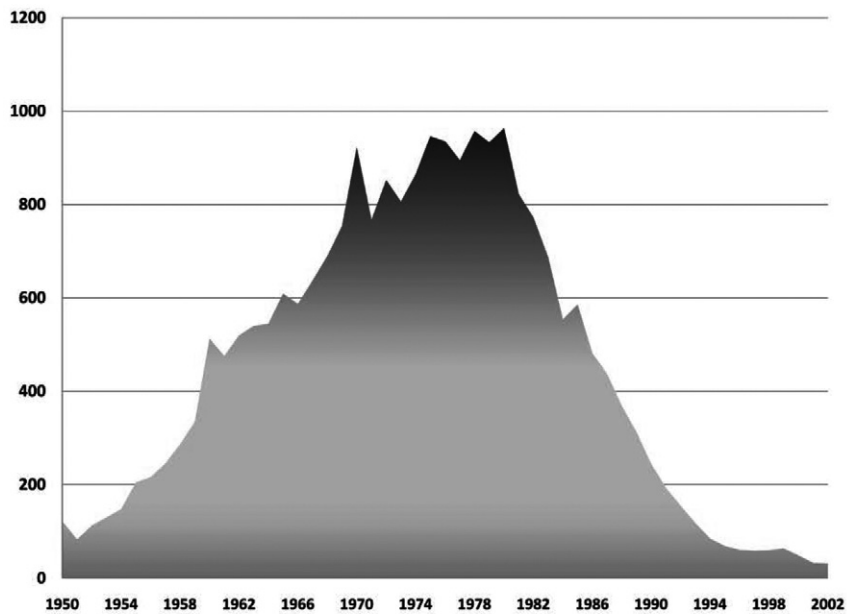

Figure 6.1: Distribution of abuse incidents, 1950–2002

2 The US Catholic Church is divided into 14 regions, averaging just over a dozen dioceses per region.

Subsequent data collected by the Center for Applied Research in the Apostolate (CARA) indicate that this distribution of events from 1950 to 2014 has remained the same, peaking in the 1970s and early 1980s, even though the number of cases reported has increased. Presently, CARA data indicate that 5 per cent of priests active in ministry during this time have allegations of sexual abuse against minors.

The Nature and Scope data showed that there was a significant delay in reporting of offences and that many victims waited decades to report their abuse to the dioceses. In the years of the high-profile cases of abuse that were published in the media—Gauthe in 1985, Porter in 1993 and Geoghan in 2002—reports increased, with the largest number of reported cases occurring in 2002. Figure 6.2 shows the distribution of reports from 1950 to 2002. Although many reports are still being made today, most of the abuse reported occurred decades ago.

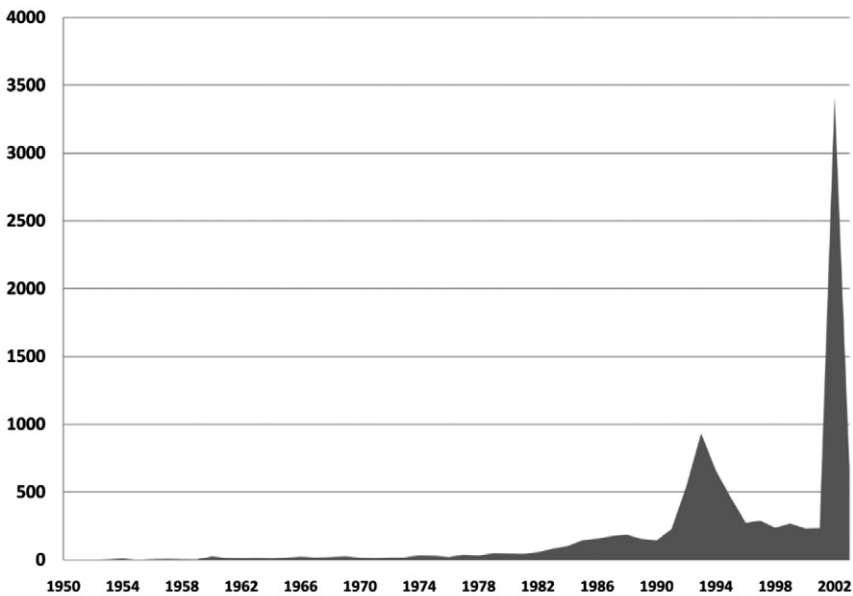

Figure 6.2: Distribution of reports of abuse incidents
3399 reports of abuse were received in 2002.

For all cases of abuse reported to the dioceses and religious orders by 2002, the majority of abusers (69 per cent) were diocesan priests, and most were either serving as a pastor (25 per cent) or associate pastor (42 per cent) at the time of the abuse. This is important in that pastors and associate

pastors generally have high levels of discretion in their parishes, have little direct supervision of day-to-day activities and usually live alone in a parish residence. The priest-abusers committed numerous and often multiple types of sexual offences, ranging from touching outside the clothes to penetration. Abuse occurred most often in the home of the priest (41 per cent), although it also occurred in the church (16 per cent), the victim's home (12 per cent), in a vacation house (10 per cent), in school (10 per cent) and in a car (10 per cent).

The majority of priests with allegations of abuse (56 per cent) had one victim (often with multiple incidents of abuse), although 3.5 per cent of abusers were responsible for abusing 26 per cent of the victims. These 'career criminals' were unique in their number and types of victim as well as the duration of their abusive careers. The priests with 10–19 victims abused over a mean period of 18.0 years, and those with 20 or more victims abused over a mean period of 22.5 years. They began abusing within the first year after ordination and continued abusing children throughout much of their time in ministry.

As indicated by early studies on sexual abuse by priests, the majority of victims (81 per cent) were male. Victims were most commonly (51 per cent) between the ages of 11 and 14, and 40 per cent of all known victims were males between 11 and 14 years of age. Figure 6.3 shows the gender and age distribution of the victims.

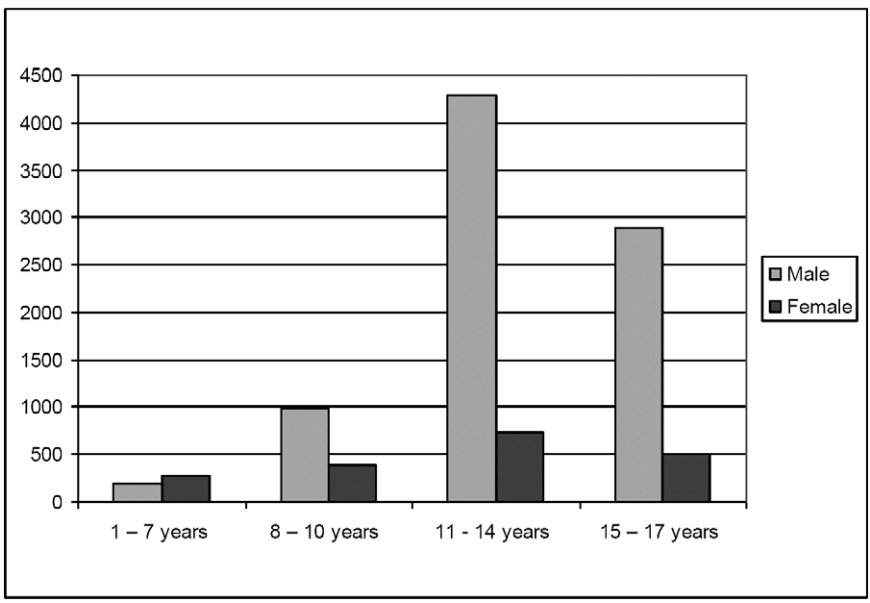

Figure 6.3: Distribution of victims by age and gender

Leaders in the Catholic Church responded in a variety of ways to allegations of sexual abuse by priests. The most common response was evaluation and treatment of the abusers. Data show that 1,624 priests received treatment between 1950 and 2002 for sexually abusing minors and that most of those priests received more than one type of treatment. There was a rise in the use of treatment in the 1980s, particularly with specialised treatment programs for sex offenders, which is consistent with the response to sex offenders in the general population.

Treatment was not the only action taken, though, and in many instances multiple actions were taken with an individual abuser. Of importance is the change in response by decade. Before 1980, a reprimand and return to duty was as likely as a referral for evaluation by a professional. From the 1980s forward, the likelihood of a reprimand and return to duty decreased and the likelihood of being placed on administrative leave or suspended increases.

Few cases of child sexual abuse by priests were reported to the criminal justice system. Data indicate two primary reasons for this: (1) bishops were more likely to take action to help the abusers (such as with treatment) rather than report them to civil authorities, and (2) there was a substantial delay in the reporting of most offenses. Many abuse cases were reported after the statute of limitations had expired, and often decades after the abuse occurred. Traditionally, statutes of limitation in most states were approximately five to seven years after the incident occurred, or a limited amount of time after the abused child has reached the age of majority. Therefore, rather than being reported to the police, most responses were decisions taken internally by the dioceses.

The Causes and Context study

While the Nature and Scope study provided a snapshot of the problem of sexual abuse of minors by Catholic priests, it did not explain what factors were associated with clergy sexual abuse or explain the surge in abuse incidents in the 1970s and early 1980s. The Causes and Context study provided a unique opportunity to collect robust, rich and multifaceted data from a variety of sources on the sexual abuse of minors over a 60-year period.

The researchers began by analysing existing longitudinal data sets of various types of social behaviour (such as crime, divorce, and pre-marital sex) over the period to provide historical context (see Gfroerer and Brodsky 1992, Goldstein 1999, Hofferth, Kahn and Baldwin 1987, Norton and

Mooman 1987). This allowed the researchers to see what other types of social trends increased and decreased in patterns similar to clergy sexual abuse. The researchers then collected new data from the following sources:

- Seminary documents outlining the history and development of a curriculum on human formation (including personal formation as a priest, with an emphasis on sexuality and preparation for celibacy).
- Surveys of groups within the Catholic Church including bishops and other diocesan leaders, vicars general, victim assistance co-ordinators (VACs) and a group of "priests with integrity" who served in some capacity to assist victims of abuse.
- Surveys and interviews with priests with allegations of abuse and a comparison sample of priests in active parish ministry who had no allegations of abuse (the 'identity and behavior' survey).
- Raw data from a 1971 survey of the psychology of American Catholic priests. These data, collected by researchers at Loyola University, is based upon a representative sample of 271 priests (who were not known to be abusers) in ministry in 1970. The Loyola researchers have published reports based upon this data (see Greeley 1972 and Kennedy and Heckler 1971); however, the John Jay researchers received the raw data to conduct original analyses. These data served as a normative baseline for understanding the psychological characteristics of men in the priesthood around the peak time of incidence of sexual abuse of minors.
- Clinical data from files at three treatment centers. Data collected by the John Jay researchers included psychological history and testing data, as well as information from in-depth clinical interviews (for a more detailed description of the clinical data and findings, see Calkins et al. 2015.) Data were collected for four groups of priests: those with allegations of abuse against minors; priests with allegations of other sexual misconduct; priests with behavioral or mental health problems; and, a normative sample.

The findings from our analyses of these data indicate that there is no single cause of clergy sexual abuse but instead it was caused by a complex interaction of individual, cultural, organisational and situational factors. Consistent with literature about sex offenders in the general population, the Causes and Context data show that priests who sexually abused minors constituted a heterogeneous population.

Social trends

As shown in figure 6.1, sexual abuse of minors by Catholic priests increased in the 1960s, peaked in the 1970s and decreased by the mid-1980s. During this period in the United States, many social changes occurred, including the confrontation with social activism, racial segregation, divorce, the rise of feminist and gay liberation movements and an increase in sexual liberation generally (D'Emilio and Freedman 2008). For the Causes and Context study, the social indicators most relevant to the modelling of the change in incidence of sexual abuse in the Catholic Church were divorce, use of illegal drugs, and crime. The incidence of each of these factors increased by 50 per cent between 1960 and 1980 (Gfroerer and Brodsky 1992, Goldstein 1999, Hofferth, Kahn and Baldwin 1987, Norton and Moorman 1987). If the data for the annual divorce rate is compared to data for the annual rate of homicide and robbery, the time series lines move in tandem. From stable levels in 1965, the rates increase sharply to a peak at or soon after 1980, then begin to fall (Greenberg 2001). This pattern is indicative of the period effects that can be seen in the Nature and Scope data on the incidence of sexual abuse by priests.

Social factors unique to the Catholic Church, such as an exclusively male priesthood and the commitment to celibate chastity, were invariant during the increase, peak and decrease in abuse incidents. As such, they are not 'causes' of the phenomenon. Greeley (2008) supports this observation, noting that the majority of men who have sexually abused children in society generally are not celibate and celibacy should not therefore be considered a cause of the sexual abuse of children.

Individual factors

One purpose of the Causes and Context study was to determine whether there are differences between priests who sexually abused minors and those who did not. The clinical data provided an opportunity to study the population of priests who were referred for treatment for a variety of problems (including the sexual abuse of minors). The data indicate that priests with allegations of sexually abusing minors were not significantly more likely than other priests to have personality or mood disorders and that there was no significant differences in IQ between abusers and others who were treated (all groups of priests in the sample had above average intelligence). The clinical data also showed that few abusers were driven by sexual pathologies; in the two clinical samples with sexual disorder data,

5 per cent of the priests with allegations of abusing children were diagnosed with paedophilia (Terry et al. 2011).

The clinical history data as well as the identity and behaviour survey and interview data indicate that the priests' personal vulnerabilities, in combination with situational stresses and opportunities, increased the risk of abuse. Many of the abusers had poor psychosexual development or other weaknesses (such as emotional congruence with children or adolescents), intimacy deficits (including few close peers and weak family bonds), experienced increased stressors from work (e.g. having recently received more responsibilities, such as becoming a pastor) and had opportunities to abuse (such as unguarded access to minors in their role as pastors; Terry et al. 2011).

The Nature and Scope study and the Causes and Context data showed that most priests who sexually abused minors were 'generalists' rather than 'specialists', exhibiting behaviour that was sexually indiscriminate in regard to age and/or gender of the victims. In fact, most priests (80 per cent) who abused minors also had participated in consensual sexual behaviour with adults. This finding contrasts to that of Kafka (2004), who stated that the typical child sexual abuser in the Catholic Church is an ephebophile and has a primary sexual attraction to adolescents rather than adults. Kafka also stated that priest offenders differ significantly from offenders in the general population (on the basis of clinical samples), yet the Causes and Context study found many similarities between the two groups. In particular, the identity and behaviour survey found that priests with allegations of abuse exhibit grooming behaviour (onset of abuse), techniques of neutralisation (persistence of behaviour over time) and internal and external desistance mechanisms. This is consistent with the literature on the sexual abuse of children by non-clergy members (Terry 2013).

The Causes and Context study also considered whether the preordination sexual behaviour and the sexual identity of priests had an effect on their risk to abuse. The issue of sexual identity and behaviour for Catholic priests is a complex one to measure, but the clinical files contained an extensive sexual history of all priests who were treated. These data indicate that priests who were sexually active before entering the seminary or while they were in seminary were significantly more likely to be sexually active after ordination, although their sexual partners were more likely to be adults than minors. Additionally, priests who, as minors and/or in a family context, were involved in discussions about sex as a 'taboo' subject, or who never discussed sex at all as minors or in a family, were more likely to participate in sexual behaviour

after ordination (although they were not significantly more likely to sexually abuse a child). In regard to sexual identity, the data show that homosexual identity did not increase the risk of a priest abusing a minor. Priests who had same-sex sexual experiences before ordination were significantly more likely to participate in post-ordination sexual behaviour, but with adults. The priests who had same-sex sexual behaviour before ordination who did abuse minors, however, were more likely to abuse male than female victims.

Situational factors

Opportunity is a critical factor in whether an individual will abuse and, if so, whom. Routine activities theory suggests that motivated offenders will abuse suitable (easily accessible) victims for whom there are no capable guardians. Data from the Nature and Scope and Causes and Context studies indicate that this theoretical framework is applicable to abuse within the Church as well. Priests abused the children to whom they had access and in locations where there were no capable guardians. Approximately 41 per cent of all abusive acts took place in the home of the priest, a place where there was no oversight of the priest, and the onset of abuse (approximately 11 years after ordination, on average) correlates with the time when many priests move into the parish residence (Terry and Ackerman 2008). Additionally, 18 per cent of abusive acts took place when the victim travelled with the priest, again with no oversight. Opportunity can also help to explain the gender difference in victims. Priests had more male than female victims, although they had access to more boys than girls until recently (parishes permitted girls to be altar servers only after 1983). When their access to girls increased, the ratio of girls to boys abuse increased.

Organisational factors

The decade of ordination was significant in patterns of abusive behaviour. The majority of abusive priests were ordained before the 1970s, and more abusers were educated in seminaries in the 1940s and 1950s than at any other period in the study. There was a significant expansion of seminaries in the United States in this post-war period. During this time and up to the 1970s, the curriculum had almost no human formation component and instead focused primarily on spiritual development. As such, seminarians were not adequately prepared to live a life of chaste celibacy. Human formation training evolved from the 1980s onward and, while a causal attribution

cannot be made between it and the decrease in reports of abuse of minors, it is consistent with the drop in reports of abuse.

Responses to abuse

Most of the abuse incidents that have been reported occurred decades ago. Although abuse does still occur in the Catholic Church, analyses show that it is at a significantly lower rate now than at its peak in the 1970s. Most of the incidents of sexual abuse of minors by priests that are reported today continue to fit into the distribution of abuse incidents concentrated in the mid-1960s to the mid-1980s.

The Causes and Context study assessed the diocesan responses to abuse from 1985 onward. It was in 1985 that the high-profile case of Gilbert Gauthe led to national discussions about sexual abuse, and by 1985 nearly every diocese in the United States had experienced cases of sexual abuse of minors by priests. The questions of how to understand the act of sexual abuse of a minor by a priest and how to respond to the victim, the family and the parish were presented for regular discussion in bishops' meetings from that point onward. Legal advisers and insurers counselled the development of explicit policies, but in many dioceses, there was not a thorough recognition of the problem or implementation of policies. On the basis of written documents from that time, the bishops were focused primarily on the wellbeing of the priests who had abused, not the harm they had caused their victims.

In 1993 US bishops endorsed the 'Five Principles' in response to the sexual abuse of minors. These principles stated that diocesan leaders should: (1) respond promptly to all allegations of abuse where there is reasonable belief that abuse has occurred; (2) if such an allegation is supported by sufficient evidence, relieve the alleged offender promptly of his ministerial duties and refer him for appropriate medical evaluation and intervention; (3) comply with the obligations of civil law regarding reporting of the incident and cooperating with the investigation; (4) reach out to the victims and their families and communicate sincere commitment to their spiritual and emotional wellbeing; and (5) within the confines of respect for privacy of the individuals involved, deal as openly as possible with the members of the community. The implementation of the principles was uneven among dioceses and was not taken up by most.

In response to the Causes and Context surveys, bishops who held positions through the early 1990s stated that they had made several efforts to remove abusive priests from ministry, but their efforts were often not successful.

In particular, they noted that some psychological treatments for abusive priests were not always effective at identifying who was at low risk to abuse in the future, the church had inadequate processes to help priests leave the priesthood, and the canon law processes for suspension were complex and took years to complete. The response of most bishops focused on canonical processes or on helping abusive priests overcome their personal struggles through rehabilitative processes rather than turning to outside sources such as reporting the abuse to the police. Generally, until the first decade of the twenty-first century, the abuse of minors was viewed by the Catholic hierarchy through the lens of human failure and sin rather than as a wrong that caused harm to a child. Those bishops who came to their positions after 2000 explained the prevalence of clergy sexual abuse and the church response to it by using a far wider and evolving framework. They were more likely to focus on societal issues, such as widespread access to pornography and on faulty seminary teaching and formation programs as contributors to clergy sexual abuse. They stated that dioceses primarily focused on protection and help for the priests who abuse than on the harm done to the victims of abuse.

Conclusion

The sexual abuse of minors is a serious societal problem and one that can lead to substantial and long-term harm to victims. Abuse is not uncommon in community-based institutions where adults form mentoring and nurturing relationships with adolescents, such as in schools, religious organisations, sports and social organisations (Terry and Litvinoff 2014). The studies on sexual abuse within the US Catholic Church may provide a framework for understanding not only the sexual abuse of minors by Catholic priests globally but also sexual victimisation of children in other institutions.

Data in the Nature and Scope and Causes and Context studies show that individual characteristics do not predict which priests will sexually abuse minors. It is not possible to identify most potential abusers with traditional psychological assessments, because very few priest-abusers were driven to commit their offenses by diagnosable psychological disorders and most did not 'specialise' in abuse of particular types of victim. The majority of abusers were 'generalists', or indiscriminate offenders, and these priests appear to have been influenced by social factors. Ultimately, it is the vulnerabilities, in combination with situational opportunities, that raise the risk of abuse.

Most abuse incidents occurred decades ago, and few reports about abuse were made contemporaneously with the abuse. Abuse peaked in the 1970s and early 1980s, yet a third of all reports made about sexual abuse by priests were made in 2002 (John Jay College Research Team 2004). All diocesan leaders were aware of the problem of sexual abuse of minors by 1985, when the issue was discussed for the first time in the National Catholic Conference. Diocesan leaders did respond to reports of abuse, but before 2002 their focus was primarily on priests and not on victims. Many bishops acted in good faith to help abusive priests, most often by sending the priest-abusers to treatment. There was no clear indication, however, of the bishops' or other diocesan leaders' understanding of the extent of harm resulting from sexual abuse. Although this lack of understanding was consistent with the overall lack of understanding of victimisation at the time, the absence of acknowledgment of harm was a significant ethical lapse on the part of leadership in some dioceses (Terry et al. 2011).

It is neither possible nor desirable to implement extensive restrictions on the mentoring and nurturing relationships between minors and priests given that most priests have not sexually abused, and are not likely to sexually abuse, minors. However, it is critical to implement prevention policies that are independent of a particular risk factor, be they social, psychological or developmental factors. Prevention policies should focus on three factors: education, situational prevention models, and oversight and accountability. Although some sexual abuse will always occur, knowledge and understanding of this kind of exploitation of minors can limit the opportunities for abuse while also helping to identify abuse situations as early as possible.

Chapter 7

COMMUNITY PROCESS AND THE IDENTIFICATION AND REPORTING OF SUSPECTED CHILD ABUSE AND NEGLECT

Suzanna Fay-Ramirez

The Royal Commission into Institutional Responses to Child Sexual Abuse has placed understanding how to prevent and respond to child sex abuse and child abuse in general, front and centre on Australia's social and legal agenda. Underscored by the mandate of the Royal Commission, as well as the nature of sexual and general abuse of children, is the issue of reporting abuse to authorities so that children can be protected from ongoing harm. Current sociological and social work literature on child abuse and neglect has been primarily focused on incidence, prevention and risk factors associated with abuse, particularly when that abuse is sexual (Elliott, Browne and Kilcoyne 1995, Brown et al. 1998). However, much less is understood about the complex nature of identifying and reporting suspected cases of abuse. For children, who might not be able to report their experiences early, understanding and increasing the awareness of outsiders to identify and report suspected cases of child abuse to authorities is critical to reducing the harm associated with early experiences of child abuse, sexual or otherwise.

All types of child abuse, including sexual abuse, suffer from problems with identification and reporting. Certain types of child maltreatment have few outwardly obvious signs of abuse, and children might be unaware of or unable to report their own victimisation (London et al. 2005). Hence the responsibility of correctly identifying suspected cases of abuse and reporting suspected abuse belongs primarily with caregivers, teachers and the

community at large. Understanding the ability and willingness of the wider community to report abuse is a critical part of improving prevention, and response to all types of child abuse and neglect include that of a sexual nature.

Risk factors for child abuse, including child sexual abuse, highlight important links to community characteristics of incidence and response. Child victims of all types of abuse tend to have risk factors that are also associated with social disadvantage, and some studies report geographic clustering of incidence rates of abuse known to authorities (Coulton et al. 1999). However, community characteristics associated with the willingness of community members to report suspected abuse have received far less attention even though social cohesion and trust remain important indicators of incidence as well as the focus of child abuse prevention (Schober et al. 2012). It is also evident that those who most often bring suspected cases of child abuse to the attention of the police or authorities are most likely to be members of a child's family, school community or neighbourhood (Queensland Government Department of Communities, Child Safety and Disabilities 2013), suggesting that it is important to understand mechanisms of reporting behaviour from a community context.

This chapter discusses the importance of the wider community in being able to identify and report suspected cases of child abuse, including child sexual abuse. Data from the Child Maltreatment and Wellbeing Project (Fay-Ramirez 2011) and the Australian Community Capacity Survey (Wickes et al. 2012) are used to assess what community characteristics are linked to the ability to identify child abuse as a community problem, what hinders people from reporting suspected abuse and what community characteristics promote or detract from the perception that community residents would do something—willingness to intervene—in suspected cases of child abuse and neglect. Implications for improving child abuse prevention as well as how these findings might help us understand child sexual abuse more specifically will be discussed.

Community context of child abuse risk factors

The Queensland Child Protection Inquiry (2013) highlighted the primary characteristics of children who enter the child protection system for child abuse and neglect in general. The most common group of clients to the child protection system are those with complex needs. These needs include parental incarceration or criminal history, mental health issues, domestic violence, and drug and alcohol abuse. All of these are social problems that have also

been linked to community characteristics and geographic clustering of social ills and therefore highlight the importance of a community framework for understanding the incidence, identification and reporting of the abuse of children.

In general, the link between the community and the wellbeing of children has broad social importance. Socially, emotionally and physically healthy children who have contact with their parents are important indicators of better overall community and individual resilience (Sugie 2012, Coakley 2013). For example, incarcerated offenders who have contact with their children during and after imprisonment are less likely to reoffend (Coakley 2013). Similarly, where child wellbeing is poor and rates of child abuse and neglect are high, community wellbeing is also typically poor (Norris et al. 2008). Incident rates for child abuse and neglect in general also point to patterns shaped by the community spatial context. Queensland's Child Protection Inquiry (2013) highlighted that the majority of cases that come to the attention of authorities are from disadvantaged communities in both the urban and rural context. In addition, the disproportionate rate of Indigenous children in the child protection system underscores the community nature of abuse. For example, in the state of Queensland, amid increases in the number of cases referred to and substantiated by Child Protective Services, Aboriginal and Torres Strait Islander (ATSI) children are more likely to have cases referred and substantiated by authorities and are more likely to be placed in care away from their family (Queensland Government Department of Communities, Child Safety and Disabilities 2013). These community correlates of child abuse and neglect suggest that community factors in regard to problem identification and reporting are important for understanding and reducing harm in regard to all types of child abuse and neglect.

Risk factors for child sexual abuse specifically are often thought to be distinct from the correlates of other forms of child abuse and neglect. However, many similarities exist and therefore reinforce the need to examine the ability of geographic and other types of communities to identify and report abuse. Although there might be differences between child sexual abuse and other types of abuse, Fontes et al. (2001) and Ramirez et al. (2011) both highlight that when sexual abuse is clustered, it is often clustered in the context of a geographic or social community, much like the cases of institutional child sexual abuse that are the focus of current Royal Commission. Church, school and organisational communities have all been identified as places where child sexual abuse has clustered under particular

conditions. Like trends in child abuse more generally, the disproportionate number of children in Indigenous communities who are victims of child sexual abuse underscores the community nature of child sexual abuse victimology (Stanley et al. 2003). In addition, McCloskey et al. (2000) point out the intergenerational nature of child sexual abuse, suggesting that a lack of early identification and reporting of suspected abuse allows for continued cycles of abuse in families and communities.

Existing child abuse prevention frameworks extensively consider these risks as precursors for child abuse incidence as well as ongoing child protection involvement for all types of child abuse and neglect (Brown et al. 1998). However, these correlates of abuse—domestic and family violence, substance abuse and parental incarceration—are also influenced by community processes. Wright (2011) shows that rates of domestic and family violence are best understood by looking at individual-level predictors as well as neighbourhood contextual predictors. The neighbourhood context of intimate partner or family violence has been supported by extensive research (Lauritsen and Schaum 2004), and Galea et al. (2004) finds that drug and alcohol abuse is more apparent in disadvantaged communities. In Australia, although we do not experience the extreme disadvantage seen in other parts of the world, a similar pattern of community disadvantage and low informal social control is linked to the same risk factors for child abuse, including that of a sexual nature (Vinson and Baldry 1999, Mazerolle, Wickes and McBroom 2010).

Community context of identifying and reporting child abuse

It is difficult to understand the extent and nature of child abuse and neglect across communities. Official statistics represent only those cases reported to police or child protection authorities. This limitation of official statistics does not allow for an accurate representation of the scope and nature of the incidence of child abuse and neglect across Australia. The dark figure of child abuse and neglect as well as child sexual abuse more generally is thought to be large (Bohm et al. 2014). In the case of child abuse and neglect, suspected cases may be even less likely to be reported to authorities owing to the (a) vulnerability associated with victimology of abuse, (b) the nature of children's understanding of their own victimisation and (c) the perception that family violence is a private rather than a public matter for intervention. Hence a greater understanding of the willingness to report suspected abuse

of children will enhance the overall understanding of incidence and prevention of abuse.

Children often do not have the means or knowledge to be able to report their own victimisation, or they might report in indirect ways that do not make abuse overtly apparent (London et al. 2005). Mandatory reporting laws that require particular community members to report suspected child abuse and/or neglect underscore that the responsibility for reporting and identifying suspected cases lies with adults who are responsible for a child's health and wellbeing. Therefore the role that community members, teachers, doctors and neighbours play in monitoring children becomes critical for understanding how child abuse and neglect is identified and whether or not it is reported.

Criminological research shows that in cases where victimisation may be considered a 'private' matter—such as domestic violence between husband and wife (Felson et al. 2002) and children within the family—community members might fail to report suspected cases of child abuse and neglect owing to not wanting to get involved in a private matter, fear of retribution or distrust of authorities. In close-knit communities with dense social ties, intervening in suspected cases of child abuse could jeopardise community cohesion and limit involvement in reporting cases (Baumgartner 1988). In communities where willingness to get involved is low, limited connection to other community members might explain why more reports occur in disadvantaged communities over others.

The context of reporting suspected cases of child sexual abuse is perhaps even more complex than incidence rates alone and reiterates the need to understand reporting mechanisms from a community perspective. The current literature on child sexual abuse reporting suggests that there are a number of barriers to children reporting their own victimisation. First, children might not understand how to disclose abuse (London et al. 2005) and might be too afraid of the perpetrator or the response of those close to them if they voice their victimisation (Smith et al. 2000). Second, other scholars have pointed out that children may deny their victimisation or delay reporting their abuse until they are much older (Bunting 2014, Tyler and Melander 2009). Bunting (2014) also finds that teenage victims of sexual abuse are the most disadvantaged by the delay in identifying and reporting their victimisation. This means that for child victims of sexual abuse, the ability and willingness to identify and report abuse falls on those in the child's social and geographic community.

The ability to identify and report suspected cases of child sexual abuse is important to understand from a community perspective because the context of community members being willing to report abuse might be driven by cultural norms and values. Where child sexual abuse is 'found in most cultures and is almost uniformly shrouded in silence and secrecy' (Fontes and Plummer 2010: 491), the ability to identify and report suspected cases of abuse depends on the cultural and broader community norms and values surrounding the victim. Fontes and Plummer (2010) indicate that religious and ethnic scripts around sexuality, virginity and the status of females in society all contribute to the ability of a child's support network to identify and report abuse on behalf of the child. For example, for victims in religious communities, religious values and beliefs can provide ways of understanding abuse as 'fate' or a lesson in overcoming adversity by the victim and by their support network (Fontes and Plummer 2010). Structural community barriers could also influence the likelihood to report and identify abuse where communities do not have sufficient resources to provide support for victims of abuse, particularly victims of ethnic minorities where language and cultural barriers can also influence levels of reporting. These problems of reporting suggest that understanding willingness to report abuse on behalf of children should be understood as part of a community context.

Theoretical context of the willingness to intervene in suspected cases of child abuse

Starting with the work of Sampson, Raudenbush and Earls (1997), the term 'collective efficacy' is defined as the willingness of residents to intervene when neighbourhood problems arise and has been demonstrated to mediate the effect of concentrated neighbourhood disadvantage on the occurrence of neighbourhood crime rates as well as other community problems. Sampson and colleagues (1997, 1999) argue that it is no longer the case that strong ties between community residents and engagement with the community are necessary for effective social control of behaviour. Instead, collective efficacy theory proposes that, although social ties and community engagement are still important, it is the shared beliefs in a neighbourhood's joint or collective capability for action to achieve an intended effect that lowers community rates of crime and deviance (Sampson et al. 1999). These neighbourhood influences on violent crime have also been demonstrated in the Australian context (Mazerolle, Wickes and McBroom 2010).

Violence and abuse occur in both public and private settings and therefore do not always elicit the same kind of response from those who witness it. Family violence, and in particular violence and abuse against children, happen out of public view and can occur over time without the knowledge of community residents. However, there is reason to believe that neighbourhood characteristics explain private incidences of violence and abuse. For instance, research has shown that intimate partner violence occurs much more often in neighbourhoods with higher levels of concentrated poverty, single-parent households and dependent children (Miles-Doan 1998, Lauritsen and Schaum 2004). Wright (2011) suggests that while criminologists have a good understanding of how neighbourhood collective efficacy influences violent crime in general, we know much less about its effect on different types of violence, such as that which occurs in private intimate settings within families, particularly for cases of child abuse and neglect.

In cases of child abuse and neglect, the reporting of this behaviour is paramount to the wellbeing of children who are unable or afraid to report it themselves as victims. In 2010 an Australian survey of a nationally representative sample of adult Australian residents revealed that the majority of survey respondents do not feel comfortable reporting suspected signs of child abuse and neglect to police or other appropriate authorities (Tucci, Mitchell and Goddard 2010). These findings suggest people may be less likely to intervene in cases of this type as opposed to public acts of violence that can be viewed on the street. The current literature on collective efficacy and crime has not addressed the neighbourhood context of reporting, willingness to report or the relationship of social capital and cohesion to incidences of child abuse and neglect. Therefore how and why community norms and values frame reporting behaviours is important for understanding why child abuse and neglect may be reported by some and not others.

The collective efficacy framework described in figure 7.1 shows the hypothesised neighbourhood- and individual-level processes that help understand differences between community reporting behaviour of child abuse and neglect. Community characteristics such as concentrated disadvantage, high immigrant concentration and residential instability promote low levels of collective efficacy at the neighbourhood level. Collective efficacy represents a community's cohesiveness and its ability to monitor and respond to problem behaviour within its community. Communities with high collective efficacy should be able to effectively identify and report problems such as child abuse and neglect. Where collective efficacy is low, behaviour could go unidentified and unreported. This neighbourhood process is linked

to a parallel individual process whereby community collective efficacy represents norms and values that shape individual expectations around how problems should be solved. These expectations then shape values towards the responsibility of children within the community, which in turn affect neighbourhood differences in reporting, attitudes towards reporting, and identification of at-risk children.

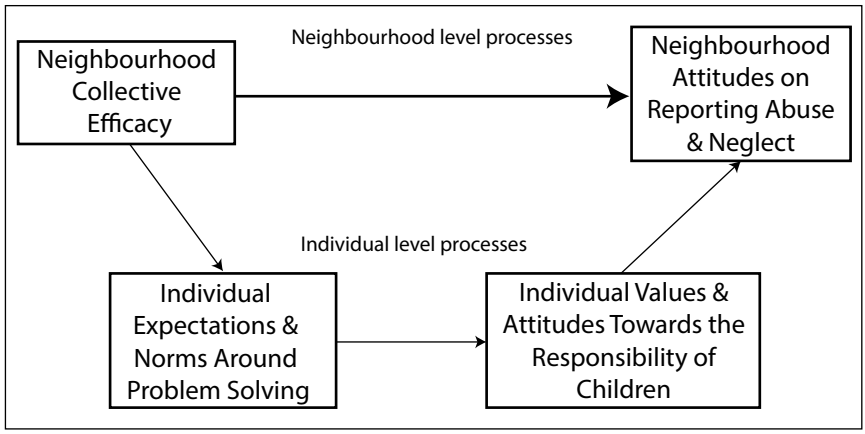

Figure 7.1: Conceptual model for understanding child abuse and neglect reporting behaviour in a community context

Research questions

Both child abuse, and child sexual abuse specifically, share risk factors linked to community characterises and dynamics. Risk factors for all types of abuse of children are clustered in disadvantaged communities and rely on members of the child's community to identify and report the abuse on their behalf. Given the overwhelming evidence of a dark figure of abuse, understanding why child abuse occurs is not enough to enable effective preventative frameworks or mechanisms to repair harm and support abuse victims. We must also understand how cases come to be identified, then reported to authorities. When the victim of abuse is a child, and who therefore relies on those around them for protection, understanding these mechanisms of reporting is critical to minimising harm and stopping abuse as early as possible.

The following results utilise survey data from the Child Maltreatment and Wellbeing Project in Brisbane to understand the community characteristics associated with identifying child abuse as an ongoing problem in their community, what community characteristics are associated with residents being willing to report abuse if they suspect a child is in danger, and what residents believe is the greatest barrier to reporting suspected cases of abuse.

Data and methods

The Child Maltreatment Project investigates community perceptions of child abuse and neglect problem identification and the willingness to intervene and report on suspected cases of child abuse and neglect. The child maltreatment survey module was attached to Wave 4 of the Australian Community Capacity Study (hereafter ACCS4; Wickes et al. 2012). This module was designed to measure whether survey respondents believed child abuse and neglect were problems in their community, what they have done to respond to it and what interventions they believe are effective. In addition, respondents were asked to identify potential reasons why fellow residents might not be comfortable in reporting suspected cases of child abuse and neglect. These measures were then combined with Australian Bureau of Statistics (2011) census data for 148 Brisbane suburbs and additional survey data from the ACCS4 that measured perceptions of informal social control and community cohesion. The survey includes approximately 4200 respondents across 148 Brisbane suburbs used to approximate the 'community'.

Three measures of child abuse and neglect perceptions are utilised in the analyses. First, to measure how much residents perceived child abuse to be a problem in their community, survey respondents were asked whether (a) children routinely being unsupervised or uncared for and (b) using physical force to discipline children was no problem, some problem or a big problem in their community. These two measures together represent respondents who indicated that these were 'some or big problems' as opposed to 'no problem at all' to create a single indicator for identification of potential child abuse problems in the community. Second, to measure the perceptions that members of the community were willing to intervene in suspected cases of child abuse, we asked respondents when a child in their community was showing signs of being a victim of child abuse or neglect, how likely is it that people in their community would do something about it (very likely to very unlikely). This measure treats respondents as informants for their community and allows a measure of the perceptions of informal social control around child abuse

and neglect. Third, survey respondents were asked about the main reason they thought community residents might not want to intervene in order to understand the perceived barriers to reporting suspected cases of child abuse.

A range of community-level characteristics was also included in the analysis to determine whether identifying child abuse as a problem and willingness to intervene were linked to community characteristics. These characteristics included the percentage of youth in the suburb, percentage of unemployment, percentage of single parents' homes, percentage of Indigenous residents, percentage of rental properties and a language heterogeneity index.

To measure community levels of collective efficacy, we follow the work of Sampson et al. (1997, 1999) and construct a collective efficacy scale from six survey items that measure informal social control and perceived community cohesion. For the informal social control component, survey respondents were asked whether they though that residents in their community were very likely to very unlikely to intervene if (a) if children were skipping school and hanging out on the street, (b) if children were spray-painting graffiti on a local building, (c) if there was a fight or someone was being threatened in front of their house and (d) if a child was showing disrespect to an adult. For the social cohesion component, respondents were asked to rate whether they strongly agree to strongly disagree that (a) people in the community are willing to help their neighbours and (b) people in the community can be trusted. These items were averaged for each respondent, then averaged for each suburb of Brisbane in the study, thereby creating an aggregated measure of community collective efficacy.

Individual demographics were also included in the model following the work by Sampson et al. (1997, 1999). Age of the respondent, whether the respondent was female, whether the respondent was Australian born, their marital status, number of dependent children, whether the respondents owned or rented their home and whether they were unemployed were all included in the analysis described below.

The findings below investigate whether (a) identifying child abuse and neglect as a community problem is linked to particular community-level characteristics and (b) willingness to intervene in suspected cases of child abuse and neglect is linked to community characteristics. These analyses utilise multi-level regression and multi-level logistic regression models of residents nested within the suburbs they reside. Finally, descriptive findings are offered to understand the reasons why survey respondents believe that some people might not want to get involved by intervening in suspected cases of child abuse and neglect.

Findings

Approximately 20 per cent of survey respondents believed that children routinely unsupervised and uncared for in their communities was some problem or a big problem, and approximately 10 per cent of survey respondents reported that the use of physical force to discipline children was some problem to a big problem. Of those who thought that child abuse and neglect was a problem for their community, only a small percentage reported that they had themselves intervened in some way such as reporting it to child protective services or the police. This highlights that different mechanisms could be at work when it comes to identifying the problem and reporting it.

The results in table 7.1 show the statistically significant individual- and community-level characteristics from multi-level regression results for two dependent variables: first, problem identification and second, perceived willingness of community residents to intervene. Results show that perceptions that child abuse and neglect are a problem in the community are driven by individual as well as community characteristics. Female respondents were 42 per cent more likely to view child abuse and neglect as a problem for the community than males, and respondents who were Australian born were 31 per cent more likely to view child abuse as a problem in the community than their foreign-born counterparts. Other individual characteristics such as age, marital status and number of dependent children were not significant predictors of identifying child abuse as a community problem. A number of community characteristics are also associated with reporting child abuse and neglect as a community problem. Neighbourhoods with higher percentages of youth and single-parent homes were 6 per cent and 9 per cent respectively more likely to say that child abuse and neglect was a community problem. Communities with higher rates of unemployment were 24 per cent more likely to report child abuse and neglect as a problem. Communities with higher levels of overall collective efficacy were significantly less likely to identify child abuse and neglect as a community problem.

These results suggest that where collective efficacy is high, the problem of child abuse is not evident to community residents. Identification of child abuse as a community problem is associated with risk factors such as unemployment, large numbers of youth in the community and single-parent homes. These are all risk factors expected to be associated with a higher incidence rate of child abuse and neglect. Certainly, communities with higher levels of collective efficacy are those that research in general suggests are more affluent, have higher rates of education, higher levels of

income and lower rates of unemployment; all of which are typically seen as protective factors for child abuse and neglect.

	Problem Identification			Willingness to Intervene		
	OR	SE	SIG	B	SE	SIG
Individual Level Variables						
Female	1.42	0.17	**			
Australian Born	1.31	0.16	*			
Community Level Variables						
% Youth	1.06	0.02	**			
% Housing Tenure > 5 Years				0.005	0.002	*
% Renters				-0.007	0.003	*
% Unemployment	1.24	0.1	**			
% Single Parent Homes	1.09	0.48	*			
Collective Efficacy	0.23	0.08	***	0.244	0.070	**
N	3800					
SIG = *<0.05, **<0.01** and ***<0.001						

Table 7.1: Multi-level logit regression result for problem identification and willingness to intervene

Note: Only significant predictors are shown. Models also controlled for age of the respondent, marital status, number of dependent children, home ownership or rental, type of employment at the individual level. At the community level, the model also controlled for percentage of Indigenous residents, language heterogeneity index and percentage of low-income homes.

The second analysis in table 7.1 shows the individual and community characteristics associated with resident perceptions that people in their neighbourhood would intervene if a child was a suspected victim of abuse. When community-level characteristics are taken into account, no individual-level factors are significant predictors of perceived willingness to intervene. However, community characteristics are important in explaining survey respondent perceptions of intervention. Communities that had higher rates of residents who had been living in the neighbourhood five years or more were more likely to perceive their fellow residents as willing to intervene. As the percentage of residents who are renting their homes increases in a community, the perception that residents would intervene in suspected cases

of child abuse went down. In addition to this, communities with higher levels of collective efficacy were also more willing to intervene.

These results suggest that collective efficacy might work as a protective factor for bringing suspected cases of child abuse and neglect to the attention of authorities. Stable communities that have low turnover of residents and high levels of cohesion and informal social control are those that have residents who are most willing to intervene in suspected cases of child abuse. Alongside the first set of results, it appears that communities where child abuse is perceived to be a problem do not have the protective factors—community stability and collective efficacy—to report abuse, but those that have such factors do not identify child abuse as a problem.

Lastly, survey respondents were asked to nominate the primary reason they thought was a barrier to intervening in suspected cases of child abuse and neglect. Figure 7.2 shows the distribution of potential reasons why respondents think others do not feel comfortable reporting or intervening in suspected child abuse and neglect. Approximately 40 per cent of respondents indicated that fear of retaliation is a primary reason why some individuals might choose not to intervene in suspected cases of child abuse and neglect. Approximately 24 per cent of respondents indicated they generally did not want to get involved. Respondents who indicated 'other' (approximately 20 per cent of respondents) typically provided responses which largely reflected an attitude that child wellbeing was a 'private matter' and people should mind their own business.

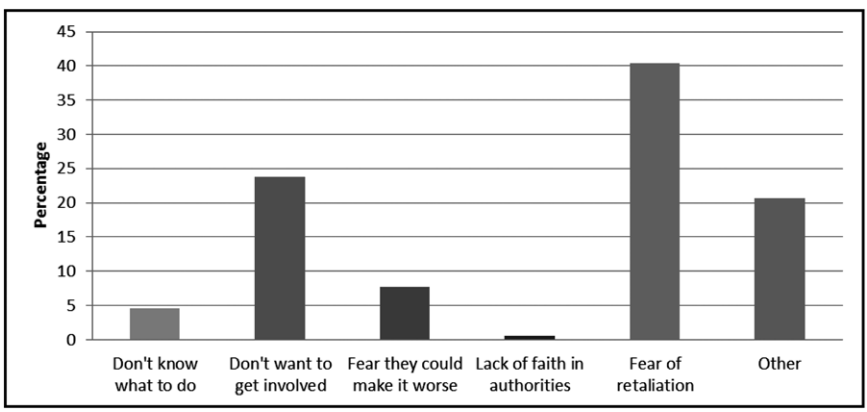

Figure 7.2: Some people choose not to do anything even if they suspect a child is in danger. Why do you think people decide not to do anything? (N = 4200)

Discussion

The problem with understanding child abuse and neglect reporting is defining what constitutes abuse or neglect and whether those definitions vary with time and place. Definitions vary among individuals as well as communities. Communities have their own set of structural characteristics that act as protective factors or risk factors for child abuse and neglect. However, these community characteristics also drive community norms and values that influence expectations around how children should be treated, who should be responsible for them and what should be done when a child is in danger (Sampson et al. 1999). Results show that community characteristics are important for understanding whether signs of child abuse and neglect are identified as problematic for a community. In particular, residents of communities with higher levels of collective efficacy, or a collective willingness to intervene when problems arise, are those that are least likely to identify child abuse as a problem for their neighbourhood. This could mean that abuse rates are lower in general in these communities; however, it could also indicate that child abuse is more hidden from the view of the community. What is clear is that these high collective efficacy communities have more capacity to intervene on behalf of children who are in danger.

Results also show that identifying the problem of child abuse is linked to community characteristics indicative of disadvantage. These communities were the lowest in collective efficacy and, although child abuse potential may be perceived as high, had the least capacity for intervening to protect children. When asked about the potential barriers to intervening, fear of retaliation was the primary reason respondents reported an unwillingness to report suspected cases of child abuse and neglect. Given what is already known about norms of behaviour and conflict resolution in disadvantaged and problem-ridden communities, it is also possible that additional community processes such as norms around the use of violence to resolve conflict and different types of social ties may hinder attempts at intervention and explain why fear of retaliation is the primary reason for not wanting to intervene. These mechanisms were not tested in the above results, but future research needs to disentangle whether behavioural norms are also linked to community process if we are to better understand child protection and reporting mechanisms. These results underscore the mismatch between where problems may be occurring and the capacity to intervene on behalf of a child; communities with potentially high rates of abuse do not have the

capacity to intervene and those that do, have not identified child abuse as an ongoing community problem.

The recent focus of the Royal Commission into Institutional Responses to Child Sexual Abuse highlights the importance of understanding reporting behaviour in geographic, religious, school and institutional communities. These communities are all likely to exhibit norms and values around abuse detection, problem identification and reporting. Given that the work from geographic communities around crime reporting has been some of the most rigorously and empirically tested, the work of criminologists, particularly through the collective efficacy framework, is useful as a starting point to understand the dynamics of why people report and the context of coming forward to report victimisation. In regard to child sexual abuse specifically, where additional shame and secrecy make reporting even more difficult (Fontes and Plammer 2010), it is important to understand the complexities of the community relationship to the child and whether what we see as largely beneficial for enhancing child protection, community cohesion and informal social control might also have the potential to hinder willingness to intervene and report child abuse.

Community collective efficacy is consistently related to positive outcomes for communities and children (Sampson et al. 1999, Coulton et al. 1999), but in some cases, cohesive communities might thwart efforts to come forward with information to authorities, especially when it means reporting on another member of that cohesive community. Broader criminological research suggest that there could be a dark side to community collective efficacy and cohesion in particular. Early work by sociologist Baumgartner (1988) described how loyalty and intense social interaction protected abuse and violence. Cooney (1998) also highlights the potential for cohesive communities to capitalise on loyalties to the community that might promote conflict but also internalise conflict resolution rather than bring in external authorities. In the context of institutional child sexual abuse, these dynamics could be important in understanding how, why and when cases of child abuse come to the attention of authorities and when they remain hidden for long periods. Further research is needed to understand how these empirically tested geographic community dynamics function in different types of community.

Further research is also necessary on how communities create norms and expectations around who and in what way the community can contribute to protection and promoting the wellbeing of children. Research shows that child abuse and neglect can happen in any household, even those from affluent

families (Coulton 1999), but child abuse and neglect are most often identified in communities with concentrated disadvantage. Hence, to understand how community expectations allow for some cases to go unreported whereas others feel the full extent of the statutory child protective system is critical for a better understanding of incidence. Neighbourhoods where violence or disadvantage is more commonplace may reduce the likelihood of community residents wanting to get involved in cases of child abuse and neglect. It would also be interesting to understand how different types of child abuse are identified and reported in the community context. Community processes as a theoretical framework for understanding how these cases are reported are therefore useful in understanding how to better protect children and prevent cycles of abuse from continuing.

Acknowledgements

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Chapter 8

THE PRIVATISATION OF INCEST

The neglect of familial sexual abuse in Australian public inquiries

Michael Salter

This chapter reflects on the recurrent focus of Australian public inquiries into child abuse on extra-familial and out-of-home settings and the relative lack of attention paid to familial abuse. Since the 1970s, public inquiries have become an increasingly common method through which governments respond to critical child protection incidents and public concern about child abuse. It is therefore striking that the last public inquiry into child sexual abuse that addressed incest concluded in the late 1980s. Since then, public inquiry has focused on abuse outside the family, although it is evident that there are ongoing and systemic failures to detect incest and provide adequate support to victims.

This chapter situates the avoidance of incest in public inquiries within the hegemonic norms of publicity and privacy in liberal democracies. It argues that incest's position in the 'private' sphere of intimate and familial relations has delegitimised it as the focus of public inquiry. The privacy of incest was briefly disrupted by feminist activism in the 1970s and 1980s, which was reflected in a series of public inquiries into incest at the time. However, familial privacy has since been reasserted in a neoliberal milieu in which the state is defunding social supports under the expectation that families are self-sufficient, and social problems are increasingly individualised and medicalised.

The reassertion of familial privacy is evident in the contemporary focus of public inquiries on extra-familial forms of abuse such as institutional abuse,

clergy abuse and abuse in out-of-home care. The exception to this has been a number of state and federal inquiries into abuse in Indigenous families and communities, which is indicative of the selective interpretation of familial privacy by the state. While public inquiries have produced important lessons, they have granted abuse in extra-familial settings a public salience that is in contrast to the relative invisibility of incest as a social problem. This chapter argues that incest remains an egregious form of child sexual abuse that has yet to receive adequate public attention and response.

The politics of incest

'Incest' refers to sexual activity between parties related by blood or some other familial relation. The term can apply to consensual, albeit criminalised, acts between adults (Heath 2005). This chapter focuses specifically on incestuous child abuse; that is, the sexual abuse of a child by a related adult, or by a related child with power over the other child by virtue of their age difference or coercion (Briere 2000). Throughout the twentieth century, incest was generally assumed to be very rare (and, some experts claimed, harmless or even beneficial), until the feminist movement of the 1960s and 1970s began to mobilise around women's widespread reports of sexual abuse in the family (Herman 1981). Measuring the prevalence of incest is challenging for a range of reasons, owing to variations in the definition of incest and sexual abuse, methodological challenges in sampling and recruitment, the ethical quandaries of asking participants about traumatic events and the potential for false negatives owing to the shame or memory disturbance associated with familial sexual abuse. However, clinical reports and survey research have substantiated the feminist contention that incest is a significant proportion of child sexual abuse as a whole, with potentially deleterious consequences for later health and function.

Adult retrospective surveys suggest that between 70 per cent and 90 per cent of perpetrators of sexual abuse are known to the child as acquaintances or family members (Finkelhor et al. 1990). These surveys find that between a third and half of perpetrators against girls are family members and a tenth to a fifth of perpetrators against boys are family members (Finkelhor 1994). The preponderance of research suggests that perpetrators are most commonly siblings, cousins or extended family members, followed by abuse by parents or stepparents (De Jong 1989, Finkelhor 1980, Finkelhor et al. 1990, Sariola and Uutela 1996). Clinical research with both female and male victims of incest has emphasised its harms (Finkelhor 1994). When situated within a

multifactorial framework of traumatisation, many of the characteristics of incest, including the power of the perpetrator over the child, the betrayal of the child's trust and a dysfunctional or disordered family environment, are highly predictive of subsequent mental illness and psychosocial dysfunction (Paolucci et al. 2001).

It is the case that most incidents of child sexual abuse go undetected and unreported at the time. This is because of a range of factors, including the secrecy of abuse and the control of the perpetrator over the child, while the child's capacity to disclose or seek help is inhibited by their early social and cognitive development, as well as feelings of shame and fear of negative consequences (Goodman-Brown et al. 2003). Incest victims face particular barriers, since they are abused by adults who have considerable control over them owing to familial authority (Salter 2013a). Research consistently finds that victims of incest by a biological parent are the least likely to disclose their abuse at the time, if at all (Goodman-Brown et al. 2003). If they do disclose, incest victims frequently encounter negative responses and a lack of social support (Ullman 2007). This is illustrative of the broader social dynamics that are at play around the incestuous family, which tend to affirm rather than challenge the familial social structures and power dynamics that make incest possible (Salter 2013a). Itzin (2001) has argued that the family can provide, in effect, a zone of impunity for perpetrators of sexual violence.

The notion that familial and intimate life should be free from government intrusion is understood in liberal democratic philosophy as integral to human flourishing (Pateman 1988). However, the privacy afforded to the family presents an ongoing and unresolved dilemma for the investigation of incest. On one hand, privacy is necessary for personal and intimate life to unfold without inappropriate state regulation. On the other hand, the privacy afforded to the family has obscured the prevalence of abuse, violence and exploitation in familial settings and excised discussion of these issues from the public political sphere. The paradox of familial privacy can be seen in the contradictory public response to reports of child sexual abuse in the family. The public expects authorities to 'do something' about sexual abuse, but can then excoriate those same authorities when they are seen to transgress 'too far' into the private sphere of the family and parent–child relations (Campbell 1988). Investigating incest necessarily requires that the private and intimate affairs of families are made public, an action that many in the community and in political life view as distasteful or even an abrogation of basic rights. Indeed, this was the cornerstone of a sustained backlash against child protection efforts throughout the 1980s and 1990s, which specifically

objected to state intervention into incest allegations (Hechler 1988, Myers 1994). As the following discussion shows, this backlash coincided with a 'reprivatisation' of incest as its uncertain status as an object of public inquiry came under attack.

Australian public inquiries into incest

The women's movement was the main catalyst and driver of public awareness of child sexual abuse in the 1970s and 1980s (Olafson et al. 1993). Before this, girls' and women's allegations of abuse and incest were routinely dismissed as confabulations. The criminalisation of incest in Australian jurisdictions in the late nineteenth century did not dispel the widespread belief that girls who complained of sexual abuse were morally dubious and potentially culpable, even where the accused was the father (Smaal 2013a). In a paper in the *Australian and New Zealand Journal of Psychiatry*, Medlicott (1967) concluded that one girl was lying about incest because her parents denied it and that another patient's disclosure of incest was false because the father 'was obviously extremely attached to his other child, a son' and therefore could not have abused his daughter (p. 181). He accused another young patient of 'gaining satisfaction' from recurrent nightmares of incest by her father (p. 181). In accordance with the psychiatric literature at the time, where Medlicott (1967) accepted that paternal incest occurred, responsibility was ascribed to the daughter and the mother. Medlicott (1967) argued that daughters actively 'accept or even provoke' incest with their fathers through their 'promiscuity or submissiveness' (p. 182) while their mothers precipitate incest by 'frustrating their husbands sexually' (p. 182).

Surveys of child sexual abuse challenged the view that incest was a rare or aberrant experience (Russell 1983) while researchers linked incest to other forms of abuse, including domestic violence (Gordon and O'Keefe 1984). Feminist clinicians such as Herman (1981) began documenting clinical reports of incest and the treatment of victims, contesting the long-standing psychiatric wisdom that allegations originated with mentally unstable or malicious girls and women. Instead, feminist explanations of incest were closely linked to their critique of gender inequality, including a rejection of the gendered ideology of the public/private divide. Feminist theorists contended that dominant formulations of the 'public sphere' and 'private' life marginalised women from public participation and constructed the 'private' sphere of the family as a place of masculine control over women and children (Pateman 1988). The predominance of highly patriarchal structures within

incestuous families, in which the control of incestuous fathers was typically 'absolute, often asserted by force' (Herman 1981: 71), was an important early insight of feminist research. The women's movement reframed the nuclear family as a contingent rather than 'natural' arrangement that should be subject to public scrutiny and debate, much like any other social institution.

In Australia, this reframing of familial life as a 'public' and political, rather than personal and private, concern was evident in a series of public inquiries in the 1970s and 1980s that directly addressed the prevalence of sexual abuse in the family. Public inquiries are distinguished from other forms of government inquiry, such as departmental reviews and internal reports, by the element of 'publicness'. According to the Australian Law Reform Commission (2011), the 'public' nature of an inquiry is affirmed where the inquiry's existence, scope and proceedings are publicised, where members of the public and interest groups are consulted and/or invited to make submissions and where the findings of the inquiry and its recommendations are publicly available (p. 54). In principle, if not always in practice, the publicity that attends the public inquiry signals an opening up of the state apparatus to scrutiny and criticism by civil society. In this process, wrongdoing or incompetence is exposed so that those responsible can be held accountable and measures can be taken to prevent recurrence. Publicity is thus one of the prime mechanisms through which public inquiries achieve their goals of generating new learnings, curtailing wrongdoing, giving voice to grief and injustice and re-establishing public trust in the authorities (Reder and Duncan 1996).

In 1974 the Whitlam Government established the Royal Commission on Human Relationships to investigate 'the family, social, educational, legal and sexual aspects of male and female relationships' (Evatt et al. 1977). A Royal Commission is the most powerful form of public inquiry in Australia, and has specific powers that other inquiries lack, such as the power to compel evidence, including admissions that are self-incriminatory (Prasser 2006). The establishment of the Royal Commission on Human Relationships was widely viewed as a concession to the women's movement in the aftermath of the Federal Government's failed attempt to reform abortion laws in the Australian Capital Territory (Arrow 2015). The Commission's terms of reference were extremely broad, and it was tasked with investigating how government policy should be adjusted to the realities of contemporary intimate and family life. The Royal Commission took extensive testimony from the general public as well as experts about family life, and 'functioned as a site where private unhappiness became public, and politicized' (Arrow

2015: 25). The Commission heard testimony on such controversial topics as abortion, homosexuality, family planning and single motherhood as well as domestic violence, rape, child abuse and incest. It was particularly focused on the role of taken-for-granted attitudes towards gender and the family and the instantiation of these attitudes in public policy and law, in producing unnecessary suffering for women, children and sexual minorities.

However, the public airing of private suffering, including extensive discussion of incest and child sexual abuse, prompted the conservative Fraser Government (which succeeded the Whitlam Government) to disavow the findings of the Royal Commission when it reported in 1977 (Arrow 2015). Public discussion of family and intimate affairs was denounced as offensive by a number of conservative commentators as well as politicians. Nonetheless, public awareness of child sexual abuse was a growing international phenomenon that, by the 1980s, had become a dominant theme in the media and academic research. Although the Commission's report was sidelined by the Whitlam Government's successor, the findings of the Royal Commission 'left a valuable body of research and a reform template for those who followed' (Arrow 2015: 38). Ongoing feminist agitation around child sexual abuse led to the formation of state task forces on the issue in the 1980s in New South Wales (1985), South Australia (1986) and Western Australia (1987). The influence of feminist thought clearly showed in the politicisation of child sexual abuse, which the task forces linked to unequal power structures operating within the family and more broadly in society.

For example, the New South Wales Task Force emphasised the problem of sexual abuse 'within the home and family' (p. 15) and rejected the view that child sexual abuse was primarily committed by deviant or pathological offenders. Instead, the task force argued that sexual abuse was a form of sexual objectification and exploitation that reflected a society characterised by 'an imbalance of power between women and men, children and adults' (p. 22). Child sexual abuse generally, and incest in particular, was framed in their report as a product of sexual and gender norms that promoted male aggression, possessiveness and entitlement, as well as social and economic structures that enforced women and children's dependency on men. The task force endorsed a primary prevention approach to child sexual abuse that sought to ameliorate the vulnerability of children and women and increase their capacity for autonomy and self-determination. Many of the state task force's findings and recommendations have a contemporary resonance and indeed have been repeated in subsequent inquiries.

The shift to extra-familial abuse

The state task forces were notable for their focus on the specific challenges that faced children experiencing incest, although their findings were broader than this and pertained to abuse in a range of settings. By the 1990s, however, the issue of incest had largely disappeared from the agenda of public inquiries. This coincided with an international backlash against feminist activism and the public prominence they attributed to incest and sexual abuse (Armstrong 1994). Lobby groups of accused parents alleged that social workers were violating the privacy of the family, and a range of psychologists and psychiatrists alleged that testimony of incest was being confabulated by suggestible children and adults (Myers 1994). As this backlash gathered momentum, incest was increasingly characterised as a psychological issue to be discussed privately with a therapist rather than a public issue related to broader social and political problems (Armstrong 1994).

In Australia, the depoliticisation and psychologisation of child sexual abuse was clearly evident in the public inquires of the 1990s. Whereas previous inquiries had framed sexual abuse as a socio-structural problem, the inquiries of the 1990s were narrowly targeted at the investigation of 'paedophilia', understood as a mental illness leading to the sexual abuse of children. Incest was deprioritised as a 'situational' or 'opportunistic' form of offending in comparison to extra-familial abuse, which was said to be conducted by more serious 'fixated' and pathological offenders (Cossins 1999). Throughout the 1990s, the Parliamentary Joint Committee on the National Crime Authority's report on 'organised criminal paedophile activity' (1996), the 'Paedophilia in Queensland' report of the then Queensland Children's Commissioner Norman Alford (1997) and the Paedophile Inquiry of the New South Wales Wood Royal Commission into the New South Wales Police Service (1998) were all focused on allegations of extra-familial abuse by 'paedophiles', some of whom were said to enjoy protection from corrupt police.

These inquiries took shifting positions on the veracity of these allegations, accepting some while rejecting others. However, their conflation of sexual abuse with 'paedophilia' re-centred the proposition that sex offenders were fundamentally different from 'normal' men and obscured the routine nature of violence and abuse in many families (Kelly 1996). In this process, paedophilia and homosexuality as linked forms of sexual deviance came to displace the feminist argument that child sexual abuse was a permutation of widespread masculine sexual coercion and aggression. Public attention

was drawn away from sexual abuse by known offenders to sexual abuse in extra-familial settings, with a particular emphasis on the abuse of boys by homosexually identified perpetrators. While the Wood Royal Commission accepted testimony of the organised and sadistic abuse of teenaged boys, it claimed that similar allegations against parents required a 'quantum leap in credibility' (Wood Report 1997). Instead 'over-zealous' therapists and social workers and 'mad' mothers were blamed for inciting incest allegations from vulnerable children and women (Rogers 1999). More generally, the Wood Royal Commission contended that incest had been the subject of sufficient public attention and that it was time to address the seriousness of extra-familial abuse (Rogers 1999).

The privatisation of incest

The psychologisation of incest in the 1990s occurred contemporaneously with its 'privatisation' as a personal and therapeutic phenomenon, rather than as a public and political issue. Once privatised in this fashion, incest could be pathologised and indeed restigmatised as a suspicious allegation made by girls and women of questionable credibility. Since then, Australian public inquiries into child abuse have reflected a diversifying set of concerns about institutional child abuse, clergy sexual abuse, the sexualisation of children through the media and the abuse of Aboriginal children. Prominent state and territory public inquiries include the Commission of Inquiry into Abuse of Children in Queensland Institutions (1999), the Gordon Inquiry in Western Australia to investigate responses to violence and abuse in Aboriginal communities (2002), the Northern Territory Board of Inquiry into the protection of Aboriginal children from sexual abuse (2007) and the South Australian Commission of Inquiry into Children in State Care (2008). The mission and findings of these inquiries have overlapped with various national inquiries, including the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), the Senate Community Affairs Committee inquiries into child immigrants (2001) and children in institutional or out-of-home care (2005), a federal Senate Inquiry into the Sexualisation of Children in the Contemporary Media Environment (2008) and now the ongoing Royal Commission into Institutional Responses to Child Sexual Abuse.

The visibility that public inquiries have granted to various forms and settings of abuse have been vitally important and long overdue. However, the focus of these inquiries can be seen as indicative of ongoing community

tension and ambivalence over child sexual abuse. On the one hand, public concern about child sexual abuse has generalised to the point where it appears that, as McKee says (2010), 'everything is child abuse'. The 2008 Senate Inquiry into the Sexualisation of Children in the Contemporary Media Environment heard a range of complaints that art, advertising, television and movies both sexually exploit children and promote their sexual exploitation (Faulkner 2011). However, such concern is highly selective and largely affirms the existing social divisions of public and private life. Arguably, the sexualisation inquiry was prompted by the perceived intrusion of a sexualised and sexualising consumer culture into the lives of children, potentially abrogating the right of parents to raise children as they choose. Other public inquires have focused on abuse in settings with a degree of 'publicness'; that is, abuse in institutions, the churches or out-of-home care, where the state often plays an authorising or funding role and relations between children and adults are determined categorically by professional or social roles, such as teacher, priest or care worker. Inquiries into abuse in these settings can raise uncomfortable questions and challenge the status quo, but they do not ultimately transgress the boundaries of familial privacy.

It could be argued that the rise of the welfare state and the expansion of child protection services has eroded familial privacy. However, Fineman (1999) suggests that the neoliberal valorisation of self-sufficiency and independence has produced a situation in which 'the state is perceived to have a role only in the case of family default' (p. 1209). State intervention in family affairs generally has a punitive aspect that reinforces the presumptive autonomy of the family by stigmatising those families in need of assistance or support as 'dependent' (Fineman 1999). Hence state intervention in family life is generally aimed at re-establishing the self-sufficiency of the family unit and punishing those families who fail at this project. The multiple public inquiries into abuse and violence in Aboriginal communities highlights how constructions of family 'failure' or 'dependency' justify stigmatising forms of state intervention and the highly symbolic position of incest in this process. In such a context, Fineman (1999) argues that the family can be conceived of as a coercive social institution insofar as membership is obligatory rather than voluntary, and the state exerts relatively little oversight as it seeks to devolve its welfare functions to the family as much as possible. In such a context, incest is potentially less rather than more visible, particularly as the regimented and closed family structures that characterise many incestuous families maintain a high degree of autonomy from the state, rarely coming to the attention of welfare services (Morris 2009).

Marginalising a 'wicked problem'

The privacy of the family may therefore be understood as having evolved from liberal to neoliberal variants as the opacity of family life has become central to contemporary modes of governmentality. It is public rather than private abuses that are salient in such a context, since they are indicative of failings within the highly restricted systems of state responsibility for child welfare outside the family. The current Royal Commission into Institutional Responses to Child Sexual Abuse was established in 2013 as evidence accumulated of multiple systemic failures within and beyond the churches to respond adequately to sexual abuse by perpetrators in institutional settings. A number of explosive revelations from state-based inquiries into clergy abuse in Victoria and New South Wales were critical in building political pressure for a more definitive and national inquiry to resolve the matter once and for all. The media and civil society played a vital role in emphasising the links between multiple cases of clergy abuse across Australia in a manner that crafted a compelling narrative that institutional authorities were failing in their responsibilities to children and the community at large.

It is therefore instructive to reflect on egregious examples of incest that have emerged. In Australia, high-profile cases include that of the Victorian teenager who shot and killed her stepfather in 2007 in a desperate attempt to end years of sexual abuse and exploitation, including the mass production of child abuse images (*Sydney Morning Herald*, 27 March 2009). Her friends had reported their suspicions about the girl's abuse to a teacher and counsellor at the girl's high school, but to their knowledge no action had been taken. In 2009 it was revealed that a Victorian woman had been raped, assaulted and controlled by her father for almost thirty years, giving birth to four children by him (*Australian*, 18 September 2009). The family had been known to child protection authorities during this time owing to multiple child deaths in the family and other child protection concerns, although there had been no intervention in the sexual abuse of the daughter. In 2012 New South Wales authorities raided the rural compound of an extended family where incest had been endemic for at least four generations (*Daily Telegraph*, 15 November 2014). The family had moved several times over a period of decades to evade suspicion before coming to the attention of child protection services in 2010. It took two years and seven 'risk of significant harm' reports before the twelve children on the property were taken into care suffering from malnourishment, easily treatable infections and congenital diseases (*Guardian*, 12 December 2013). More recently, a man in Perth was

charged with facilitating the sexual abuse of his daughter by at least seven other men (ABC News, 29 July 2015).

Away from the media spotlight, adult women with histories of serious and prolonged incest present regularly to Australian mental health services (Middleton and Butler 1998, Middleton 2013). Middleton (2015) has documented his clinical experiences with Australian women whose incestuous fathers subjected them to sadistic sexual violence, torture and organised exploitation over many years. My research with adult Australians reporting organised sexual abuse in childhood has also highlighted the central role of incestuous fathers in arranging the sexual exploitation and sadistic abuse of their children (Salter 2013b). This research suggests that multiple institutions and agencies are failing to detect the severe incestuous abuse of children, while the complex needs of adult survivors are typically unmet in health or justice responses. Nonetheless, the accumulation of media reports and research evidence has not sparked widespread reflection on how children can be subject to sustained and intensive abuse in the family over years or decades, nor the appropriate law, policy or service reforms necessary to detect incest more effectively and improve health and justice outcomes for victims.

Recent efforts to have incest addressed by public inquiry have been rebuffed. Advocacy group Bravehearts attempted to have incest included within the terms of reference of the current Royal Commission,[1] but these calls were rejected by the then Labor government, which chose to focus the Royal Commission on non-familial forms of child abuse and institutional responses to it. People contacting the Royal Commission to complain about institutional failures to respond to incest have been told that their complaint falls outside the Commission's terms of reference (*Background Briefing*, Radio National, 11 August 2013). The stated concern has been that the Royal Commission would be 'overwhelmed' by the number and complexity of incest cases. Tellingly, this rationale contradicts the position of the Wood Royal Commission almost twenty years before, which justified its focus on extra-familial abuse on the basis that the problem of incest had already received adequate public attention (Rogers 1999). However, it is apparent that incest is now, as then, a 'wicked problem' (Devaney and Spratt 2009) that is poorly addressed by existing systems and institutions, but as a 'private' form of abuse, it continues to be marginalised within the 'publicness' of public inquiries.

1 See 'Kids remain at risk if Royal Commission omits Family Law Court from inquiry.' <www.bravehearts.org.au> (retrieved 25 November 2015).

Conclusion

Incest is in many ways the spectral double of contemporary public inquiries into child abuse. It stands in the shadow of more visible and better recognised forms of child sexual abuse, consistently excluded from the terms of reference of public inquiry. While renewed attention is being paid to the responsivity of health, welfare, religious and educational institutions to their child protection obligations, systemic insensitivities to the prevalence and harms of incest have evaded publicity. As funding for social services shrinks and families take on an increased burden of unpaid care labour, public inquires have generally focused on apparent failures within those restricted systems and institutions that provide care to children outside the home. The principle of familial privacy is renewed where the state seeks to intervene in private life only where families are deemed to have failed at the neoliberal project of financial self-sufficiency. This provides the backdrop to the sustained depoliticisation of incest since the late 1980s and its continuing neglect in public inquiries. The efforts of the women's movement to articulate the political significance of incest in the 1970s and 1980s have been wound back by a persistently individualising and pathologising logic that construes incest cases as a series of private aberrations rather than a public problem.

This chapter is not suggesting that clergy abuse or other forms of extra-familial or institutional sexual abuse are not serious forms of abuse, nor does it aim to devalue the important work of the current Royal Commission or previous public inquiries. Instead it emphasises the role of public inquiries in reinforcing problematic norms of publicity and privacy. Recently, there has been cause for optimism. The current Royal Commission into Family Violence in Victoria, and the national prominence given to domestic violence and intimate partner homicide, may signal a renewed public willingness to interrogate the harms of familial relations. These shifts are attributable to a strengthening consensus in the mass media that violence in private spaces should be taken as seriously as violence in public places. However, a similar consensus that quasi-public forms of abuse, such as institutional and clergy abuse, deserves a public response has yet to be extended beyond the bounds of familial privacy. The mounting clinical and research evidence, as well as child protection and police investigations, have established that incest poses major challenges for law, public policy and service provision that have yet to be acknowledged and addressed. This clearly justifies the examination of incest by public inquiry; however, this would require the reclamation of incest as a legitimate target of public scrutiny.

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Part 3

Lessons learned?
Justice and redress

Chapter 9

INVESTIGATING HISTORICAL ALLEGATIONS OF SEXUAL ABUSE

The investigation of suspected offenders

Mark Kebbell and Nina Westera

Allegations of cases of historical child sexual abuse are a consistent concern for police. For instance, in the United Kingdom a Select Committee on UK Home Affairs reported in 2002 that 34 of the 43 police forces in England and Wales have been involved in investigations into allegations of various forms of child abuse in children's homes and other institutions (Home Affairs Committee 2002). All of the allegations relate to historical abuse believed to have occurred years, often decades, ago. This is a pattern repeated in other countries. For example, Connolly and Read (2006) identified 2,064 cases of historical cases going to court in Canada between 1986 and 2002. In Australia a Royal Commission is investigating allegations of historical child sexual abuse within such institutions as the Catholic Church (Brown and Asheville 2013).

The very nature of allegations of historic child sexual abuse—one person's word against another and the negative effects of delay on the quality of evidence that is available—creates inherent difficulties for investigators. The purpose of this chapter is to outline how police investigations can be conducted most effectively and fairly on the basis of what is known about these cases. First we examine how factors typical to investigations of this type could influence how police gather evidence from the two main sources: a complainant and a suspect. Then we explore other potential sources of evidence. Finally, we examine what police can do when the investigation is complete and there is insufficient evidence to proceed with a prosecution.

Before examining the police investigation in more detail, it is important to define what historical child sexual abuse actually is. It is possible to blur boundaries between contemporary and historical allegations of abuse. There is no clear boundary where one becomes the other. For example, there will more than likely always be a delay between abuse occurring and police being informed; indeed, in most child sexual abuse cases, police will never be informed (e.g. Daly and Bouhours 2010). Some definitions appear deliberately vague. For example, the National Centre for Policing Excellence has defined historical cases as allegations of child abuse reported to the police 'a long time after the abuse has occurred' (NCPE 2005: 18) whereas others are more specific. For instance, the UK's Greater Manchester Police (GMP) have defined historic child abuse as 'an allegation of abuse which is made by a person who at the time of making the allegation is an adult, i.e., 18 years or over, and, at the time of the abuse, the complainant was under 18 years of age; and, where the abuse was either intra-familial, committed by another carer, or by another professional' (GMP Public Protection Division, 2012). The prevalence of child sexual abuse is estimated by a recent meta-analysis (Pereda et al. 2009) to be generally less than 10 per cent for boys and between 10 and 20 per cent for girls. Given the low reporting rates for child sexual abuse, this means there are a potentially large number of victims of child sexual abuse who might come forward with allegations in future.

Investigation of historical child sexual abuse

Like most criminal investigations, historical child sexual abuse enquiries begin, typically, with an allegation from a complainant (i.e. the victim) or by a friend or relative of the complainant (although in large-scale investigations there can be pro-active approaches by police to identify potential victims). In all cases of alleged sex offences, it is vital to obtain an accurate, detailed and complete account from the source of the allegation as early as possible to avoid potential memory loss or interference (Read and Connelly 2007, Westera, Kebbell and Milne, in press). Of course, in historical cases there has already been a long delay between the alleged offence and reporting. In these cases it is essential that the investigator finds out not only about the alleged offence but also about the circumstances in which decisions to come forward were made. The circumstances of an allegation vary and could explain why reports to the police are delayed. For some complainants, the alleged offender might have been a family member, so allegations were not made at the time because of fear or concern about breaking up the family.

For others, the delay might have been because the complainant waited until they were out of an institution and felt safe to make an allegation—they may still remain vulnerable because of vulnerabilities that put them in the institution in the first place, for example, intellectual disabilities or having no family to support them. Investigators face profound difficulties in verifying how the complainant claims to have remembered or the extent to which other individuals might have shaped the account (Alison, Kebbell and Lewis 2006). Nevertheless, investigators should enquire during an interview about who the complainant has spoken to and what led them coming forward to make the complaint at this time.

Memory is not like a video-camera system. A video-camera captures all of the events that are viewed in the direction in which it is pointed, records them and can replay them. Our memories cannot do this. Moreover, we do not passively take information and replay it; rather memory is an active, creative process that can be inaccurate for a variety of reasons. For material to be remembered, it must go through three main stages. It must be encoded into memory, stored there and finally retrieved from memory. Problems can occur at each of these stages and, for storage and retrieval, are exacerbated by the time elapsed since an alleged event occurred (see Kebbell and Wagstaff 1999).

Investigators need also be aware that memory contamination can occur during this delay. Psychological research has found that media reports about the event, co-witness discussions, psychological therapy, and even a person's expectations about how an event should occur, can all influence what is remembered at the expense of accuracy (French, Garry and Kazuo 2008, Loftus and Banaji 1989, Tuckey and Brewer 2003). Some studies have also found that under some conditions entire events can be falsely remembered (e.g. Wade et al. 2002). Simple forgetting can occur, especially with regard to peripheral, contextual information, while central information concerning what physical activity took place may be better remembered (Kebbell and Wagstaff 1999).

The way in which witnesses are interviewed and their responses interpreted has an important influence on the quality of information retrieved. Witnesses tend to provide the most accurate answers to open questions (such as 'tell me what happened'). Even people with generally poorer memories can show high accuracy rates for open questions. However, as questions become more specific and closed, accuracy rates fall. Nevertheless, 'closed' questions (such as 'what colour was his shirt?') might have to be used as a last resort to elicit information about something a witness omitted to describe in open

questioning. The subtle use of language in questions can influence witnesses by suggesting a particular response. The phrasing of questions that suggest a particular response, for instance, leading questions such as 'was his shirt red?' can decrease accuracy levels even in normal adults, but particularly in vulnerable people, and cause long-term memory contamination.

Memory distortion in response to suggestive questioning may be exacerbated by witnesses wanting to 'please' the interviewer by telling the interviewer what he or she would like to hear (see Gudjonsson 2003). This is particularly problematic in historical child sexual abuse cases, because we would expect a complainant to remember less, tempting the interviewer to resort to closed questions to fill in the gaps. Inaccurate evidence may be elicited that falsely suggests an innocent suspect's guilt or, alternatively, is demonstrably false and discredits the witness's account. Because the interviewer has asked a suggestive question that suggests what they think has happened, the interviewer is likely to be motivated to uncritically accept the answer they get (Ask and Granhag 2007).

In addition to what happened during the event, exploring the relationship between the complainant and the suspect may help decision-makers understand the complainant's behavioural response. Tidmarsh, Powell and Darwinkel (2012) argue that a 'whole story' approach is required, a recommendation underpinned by the assumption that offenders commit sexual crime within the context of a relationship. Understanding the offending thereby requires an understanding of this relationship and how the offender manipulates the victim to comply through grooming and other means. They make the point that if an investigator asks only about the sexual component of an allegation, the behaviour of the complainant may be difficult to understand—for instance, why the complainant did not scream, why the complainant did not make an immediate complaint. However, if the whole story is elicited, understandable explanations may become apparent. For instance, the complainant might not have screamed because the offender had the capacity to send her to another children's home and she would become separated from her sister. Alternatively, the complainant might not have made a complaint because the offender appeared to be a good friend of the manager of the children's home so the complainant thought the manager would not believe them.

Another difficulty is that for an offender to be convicted most jurisdictions require that a particular offence be identified with regard to time and place (Guadagno and Powell 2009), and this can be a problem when there have

been repeated, similar events. The complainant may find it difficult to separate each instance of abuse as one may be confused with another.

The developmental issues that make it difficult for children to remember repeated events are well documented, but less understood is the difficulties adults have when trying to recall repeated childhood events. An area that shows potential but has received little attention in the research is the use of interview aids, such as sketch plans and timelines, which help to provide a contextual framework for the adult to remember and particularise these childhood events. Investigators gathering school records, class photographs, council records and similar material can all help to narrow dates and times. It is important, however, to note that if the complainant is incorrect about some of these background features, this might point to a memory error, but does not imply that they have also made an error about the sex offence actually occurring. Investigators might differ from lawyers in their understanding of the evidential requirements for particularising and obtaining specific details about each crime event (Burrows, Powell and Anglim 2013).

'Best practice' today is to video-record important witness interviews rather than use written statements (Shepherd and Milne 2006). It is important to record exactly what the witness says and to be able to determine changes in accounts, which could reflect distortion over time. Video-recording also provides the possibility of using the recording in some jurisdictions as the basis for an adult complainant's courtroom testimony (e.g. England and Wales, New Zealand, and the Northern Territory in Australia). There is evidence that such a process is likely to improve the experience of a complainant giving evidence and provide a tribunal with more detailed and accurate evidence (Burton, Evans and Sanders 2006, Westera, Kebbell and Milne 2013).

Given the delay between the alleged offence and the investigation, corroborating evidence is rarely available, but research suggests the following possibilities (Alison, Kebbell and Lewis 2006). Most frequent would appear to be admission or confession evidence. For this reason, effective and professional interviewing of suspects should be given the same consideration as the interviewing of complainants. Of course being suspected of a sexual crime is unpleasant regardless of whether one is guilty or innocent, and the sensitivity of the task must be considered.

An increasingly sophisticated literature indicates that much can be done to ensure that suspected offenders are treated fairly and that the likelihood of eliciting an accurate and reliable account is enhanced. The literature indicates that the evidence against a suspected offender is highly influential in their

decisions to confess or deny. For example, Moston et al. (1992) investigated confessions for 1,067 suspects who had been interviewed by detectives for a range of crimes. The results showed that when the evidence was rated weak by researchers, confessions occurred in less than 10 per cent of cases. However, when evidence was rated as strong by researchers, confessions occurred in 67 per cent of cases. Specifically relating to suspected sexual offenders, Kebbell et al. (2010) surveyed 43 convicted sex offenders concerning how the police interviewed them and how this related to their decisions to confess or deny. Sex offenders perceived that police investigators presenting evidence to them had influenced offenders' decisions to confess to their own crimes and was a strategy that should be used to increase the likelihood that a suspect would respond honestly.

The implication of this is that investigators should ensure they have the most evidence possible before the suspect interview—the previous section concerning the complainant gives some guidance as to how this can be achieved. Indeed, providing the enhanced account to the suspected offender and/or their legal adviser has the potential to demonstrate the strength of the evidence if it is strong and may facilitate suspects' truth-telling. In addition, it is important that the suspected offender perceives that their account and alleged behaviour will be heard, understood and not 'judged' by the police. Convicted sex offenders strongly endorse interviewing strategies that they believe to be fair and not aggressive (Holmberg and Christianson 2002, Kebbell et al. 2010). As Read et al. (2013) point out, in many cases where persons suspected of committing sexual offences are truly guilty, shame and fear of exposure are likely to be driving factors underlying non-disclosure. Therefore asking the suspect (without assuming any wrong-doing) to give their version of the events or to explain the nature of their relationship with the alleged victim is a worthwhile and recommended strategy.

There are additional sources of corroborating evidence. In historical cases previous complaints by the complainant might have been recorded. For instance, the complainant might have made previous complaints to the police and/or institution that were not progressed at the time but were recorded. Another form of evidence is deliberate lies by the defendant, for example, the defendant saying that he or she was not at a care home when records show that this is not true. Of course, when dealing with events that happened a very long time ago, one must be alert to the possibility that the defendant might be making a genuine mistake rather than deliberately lying—it is easy to misconstrue memory errors with deliberate falsehoods, particularly if

one is biased against the person giving the statement. Contradiction of the defendant's account by the complainant on its own is unlikely to be sufficient as the complainant will not be considered to be an independent witness.

Additional sources of evidence are the defendant's prior or subsequent misconduct and similar allegations by other witnesses. A great deal of research indicates that committing one sex offence makes one more likely to commit another—although it is far from inevitable (see for example Kemshall 2001, Sjöstedt and Långström 2001). Therefore, if repeated, independent, allegations have been made by different witnesses, this increases the likelihood of at least some of the allegations being true. A key issue here is the independence of the allegations. It is possible for complainants to collude to make allegations, for instance to obtain compensation, or for malicious reasons. It is not necessary for complainants even to meet to collude, with the internet today facilitating complainants' communication, including sharing information such as *modus operandi* and details of allegations made by other complainants. In these cases it is important to establish how multiple complainants are related or know one another and what they know about each other's alleged victimisation. Corroborating evidence can also include circumstantial evidence; for instance, other family members might have witnessed grooming behaviour and be able to give corroborating accounts.

Multiple complainants will usually make the prosecution case compelling, leaving the defence with little choice but to establish that the complainants have been influenced by each other through either inadvertent contamination or deliberate conspiracy. For the previously mentioned reasons, how investigators attempt to seek out other potential victims should be thoroughly planned, handled with care and well documented as it influences not only the reliability and credibility of these accounts but also the potential avenues of defence. In these cases investigators' specific details about how the offence was committed might corroborate accounts and in some circumstances lay the foundation for a court application for the use of 'similar fact' evidence (i.e. having multiple complainants giving evidence about the suspect's sexual offending in the same trial). Holding back specific details of this type from other potential victims and advising victims not to talk to each other can reduce the risk of allegations about contamination or conspiracy being made. The possibility that victims have already discussed the alleged abuse with each other is an important line of investigation, as we have already outlined.

Other potential sources of evidence include physical forensic or medical evidence, for example documentation of injuries to a child at the time of an alleged offence; photographs or recordings of the abuse; school records

and institution records; confirmation of other factual events recalled by the complainant; and independent eyewitness accounts. Advances in technology might mean that there is more of an evidential trail in more recent, but still historical, allegations. The alleged offender's computer or smart devices could contain important evidence in the form of social media, email communications and photographs that provide evidence of the actual offending, grooming behaviour or behavioural signifiers. Investigators skilled in the analysis of such electronic data might nevertheless lack the skills to address the documentary record of historical cases. When cases of this type leave a paper trail, such as institutional abuse, it could be helpful to enlist the archival skills of historians to help join the pieces, for example, to locate and examine records to establish whether there are connections between an employee and a victim, institution, date or other employees. This type of information might ascertain not only whether the alleged crime was possible but also who could have been involved and whether there is circumstantial evidence that they were conspiring together.

Technology also provides a means for investigators to use covert methods to elicit evidence from the suspect. It should be noted, however, that this type of evidence risks entering a legal minefield, which attempts to balance fairness to the accused and investigative effectiveness. An example of such risk might be 'pretexting', where investigators attempt to gain admissions by asking the complainant to make recorded phone calls or send text messages that will provoke an admission from the suspect, but which could be seen as deceptive and unfair. Clarity about the boundaries would help investigators, but part of the difficulty is that an adversarial legal system always leaves room for debate, depending on the circumstances of each case. Such nuance is not helpful to investigators who are seeking clear boundaries, but it is a reality of the context in which investigations take place.

Outcomes of investigations

In some investigations there will be enough evidence to charge a suspect and for the case to move to prosecution. Similar to sex offences generally, in many other cases there will not be enough evidence to charge or, if prosecuted, to convict. However, prosecution might not be the only object of complaint and investigation. Kebbell, O'Kelly and Gilchrist (2007) found that a satisfactory outcome for many rape complainants was the knowledge that they and others would not be victimised by the offender again. A successful outcome for some victims might be the knowledge that measures

to protect children from future abuse will be put in place, or that institutions will be required to reform systems to prevent abuse. Similarly, some might be motivated by wanting others to be aware of what happened to them, or to seek compensation claims that do not require a conviction.

Finally, as we have flagged throughout this chapter, investigators also need to consider the possibility of false allegations, which the complainant genuinely believes to be true. On both these latter points, however, investigators must be very careful about giving the impression that they do not believe the victim. In relation to false allegations, there is a huge disparity between the different estimates of the number of false allegations reported to the police (e.g. Kanin 1993, Lisak et al. 2010). With regards to historical allegations, we simply have no idea how many are true and how many are false.

Conclusion

In sum, since allegations of historic child sexual abuse are inherently difficult to investigate, the investigators of these alleged crimes have to be particularly skilled (Westera et al. 2014) to do a good job. Investigators have a duty to do the best they can in the circumstances, even though in many instances it will not be possible to determine, beyond reasonable doubt, what has happened. The passage of time and the inherent difficulties associated with these investigations mean in many cases it will be one person's word against another's, with no corroborating evidence. For such reasons investigators of these challenging cases could be left with little resolution to offer complainants, however determined they might be to achieve the greatest possible access to justice. The criminal justice system providing redress for complainants of child sexual abuse is hampered by the difficulties of investigating and prosecuting these cases. Nevertheless, police can go some way towards contributing to this goal by engaging with complainants in a fair, humane and open-minded way and by thoroughly investigating the allegations.

Chapter 10

CHILD SEXUAL ABUSE COMPLAINANTS UNDER CROSS-EXAMINATION

The ball is in our court

Sarah O'Neill and Rachel Zajac

Child sexual abuse is an issue of global concern (Stoltenborgh et al. 2011). A recent meta-analysis—integrating data from 55 studies across 24 countries—showed that the pooled prevalence estimate of forced intercourse was 9 per cent for girls and 3 per cent for boys. Many more children are victims of non-contact abuse, such as solicitation and indecent exposure (Barth et al. 2013). Children who are the victims of sexual violence are at increased risk for subsequent anxiety, mood and substance use disorders (Molnar, Buka and Kessler 2001). Given the magnitude of the problem and the long-term sequelae of child sexual abuse, it is critical that nations develop and implement prevention strategies to reduce risk and respond in such a way that children are provided with the support they need to heal.

Unfortunately, we are not yet at this place. Despite progress in some areas, there are others in which systemic factors place further strain on children. The cross-examination of child witnesses is one such area. Even after sexual abuse allegations have come to light and a decision has been made to prosecute the case, complainants of child sexual abuse often report feeling as if they are revictimised by the very system that is designed to deliver justice. In fact, child sexual abuse complainants' experiences of the criminal justice system can lead to long-term, negative effects on multiple areas of health and wellbeing (Eastwood, Patton and Stacy 2000, Eastwood and Patton

2002, Goodman et al. 1992, Prior, Glaser and Lynch 1997). Many children report being so upset by their experiences that they would not disclose sexual victimisation in the future (Eastwood and Patton 2002, Prior et al. 1997)—a sentiment echoed by their parents and legal professionals (Alaggia, Lambert and Regehr 2009, Cashmore and Bussey 1996, Eastwood and Patton 2002, Powell, Wright and Hughes-Scholes 2011).

Adding to concerns about the effects of the legal system on children's psychosocial functioning are concerns about its potential negative impact on the reliability of children's testimony. In acknowledgement that the adult-oriented adversarial system could prevent children from providing complete and accurate evidence, many jurisdictions have implemented reforms to make the process more accessible to children (e.g. the use of CCTV, the introduction of support people and the reduction of trial delays; Bala 1999, Pipe and Henaghan 1996, Whitcomb 2003). Although these changes have been welcomed, they have generally been restricted to the processes by which lawyers solicit children's direct evidence. In stark contrast, the process of cross-examination has remained largely untouched.

In this chapter, we review the legal framework for cross-examination of child witnesses and discuss how current laws and practices allow for revictimisation of child witnesses and distortion of their testimony. We then offer suggestions for reform to the cross-examination process, so that we can better protect child witnesses while also preserving the rights of defendants.

Children under cross-examination

Cross-examination is the legal process by which a witness's evidence is scrutinised by the opposing lawyer in an attempt to uncover inaccuracies or inconsistencies that may render that evidence unreliable (Yarmey 1979). Legal professionals consider cross-examination to be a necessary and central aspect of any adversarial trial; without it, all evidence would go unchallenged. In particular, however, cross-examination is deemed to be invaluable in cases that hinge on verbal testimony (Eichelbaum 1989)—a common characteristic of trials involving sexual offences.

It is highly unlikely that any witness—adult or child—would find the cross-examination process palatable (Brodsky 2004, Flin 1993). Children, however, are likely to find cross-examination particularly challenging, because the challenges that cross-examining lawyers pose to their accuracy, credibility and motivation amount to a verbal exchange that goes well beyond their conversational experience (Donaldson 1982, Lyon, 2002).

Accordingly, most child complainants describe cross-examination as very distressing (Eastwood and Patton 2002, Prior et al. 1997). In fact, many children nominate cross-examination and the behaviour of defence lawyers as the most frightening aspects of the trial (Eastwood et al. 2000, Eastwood and Patton 2002, Prior et al. 1997).

Indeed, cross-examination has aptly been described as a 'how not to' guide to interviewing children (Henderson 2002: 279). The kinds of questions children are asked during cross-examination differ strikingly from those asked during other legal interviews (Davies, Henderson and Seymour 1997, Zajac, Gross and Hayne 2003, Zajac and Cannan 2009) and from 'best practice' guidelines for questioning child witnesses (e.g. APSAC 1990, 1997, Home Office 1992, 2002).

Three main question types provide cause for concern (see table 10.1). First, lawyers conducting cross-examination are permitted—and often encouraged—to use leading questions, the purpose of which is to control the witness (Eichelbaum 1989, Henderson 2002, Salhany 1999, Westcott and Page 2002). Second, the cross-examination questions posed to children are frequently well beyond children's developmental reach (Brennan 1995, Brennan and Brennan 1988, Davies et al. 1997, Hanna et al. 2010, Walker 1993, Zajac et al. 2003). Questions often jump from topic to topic without warning, employ complex vocabulary and syntax, are ambiguous or even nonsensical, or solicit information that children do not have the cognitive maturity to provide. Finally, cross-examination questions are designed to challenge the witness's credibility—either by suggesting that children are unreliable witnesses or by suggesting that they are dishonest. Child complainants are often accused of having poor memories, of being influenced by others' suggestions, of having an ulterior motive for making an allegation, or of outright lying (Brennan and Brennan 1988, Davies et al. 1997, Eastwood and Patton 2002, Elliot and Briere 1994, Goodman et al. 1992, Hampton and Wild 2000, Hanna et al. 2010, Martone et al. 1996, Prior et al. 1997, Salhany 1999, Westcott and Page 2002).

Table 10.1: Examples of cross-examination questions posed to children in Zajac et al. (2003) and Zajac and Cannan (2009)

Question type	Examples
Leading/suggestive questions	You never got into the front seat at any stage, did you?
	Have Mum and Dad been telling you how bad [accused] is?
	And you kids yelled at him, do you remember that?
Complex questions	
Complex grammar/jargon	Is that the lady who you told about [accused] touching you?
	And if you say that you didn't say these things, would you be telling the truth?
	You've suggested in relation to the incident in May that you were bringing [accused] a cup of tea?
Ambiguity/sense	So neither of your brothers weren't there?
	That night after you told Mum about [accused] and before you made the videotape at the police station, do you remember whether you went to school the next day?
	So he could have just about seen you where you were across the road through the window when he backed in?
Specificity/measurement	How long after [accused] waking you up did the police arrive? Do you remember? Can you estimate the time?
	What kind of day was it? How cold?
	If I suggested to you that you were there for about an hour, would that be right, do you think?
Credibility challenges	
Poor eyewitness ability	It would have been pretty dark, was it? It would have been hard to see his face?
	And you're sure that this isn't just an accident; that maybe once when he's held your hand you've accidentally touched his penis?
	Have any of those people helped you remember what [accused] did?
Dishonesty	When you were at [mother's friend's] house and the dirty movie was on, why didn't you tell [mother's friend] that night what happened?
	He's going to say that he has never put your hand on his penis; that he wouldn't do that sort of thing to you. Now, wouldn't he be telling the truth?
	He didn't really touch your private parts at the camp, did he?

The effect of cross-examination on children's reports

Research has confirmed that children have great difficulty comprehending—and even repeating verbatim—questions of the type posed during cross-examination (Brennan and Brennan 1988; Perry et al. 1995). Moreover, when child sexual abuse complainants are cross-examined, they seldom request clarification, often answer questions that do not make sense and are highly likely to comply with leading questions (Zajac et al. 2003). In fact, in Zajac et al.'s (2003) study, three-quarters of child complainants of sexual abuse changed at least one aspect of their testimony during cross-examination, and some retracted their allegations altogether (see also Zajac and Cannan 2009).

What effect might those changes have on children's accuracy? In theory, cross-examination can be seen as an attempt to facilitate accuracy. In fact, it has famously been described as the 'greatest legal engine ever invented for the discovery of truth' (Wigmore 1974: 32). In line with this view, there is widespread belief among the legal community that cross-examination will not pose a problem for a witness who is telling the truth (Eichelbaum 1989, Libke v. The Queen 2007, Salhany 1999, Wellman 1986, Wigmore 1974). In practice, however, cross-examination is often used with the aim of discrediting the witness's evidence, regardless of its accuracy (Henderson 2002). It is important to ask, then, whether the changes that child witnesses make under cross-examination are directed towards or away from the truth. To answer this question, it is necessary to employ cross-examination-style questions in a situation where researchers can objectively evaluate children's accuracy.

Several laboratory studies have now cast doubt on the assumption that cross-examination leads to more accurate accounts from children. In a seminal study conducted by Zajac and Hayne (2003b), for example, 5- and 6-year-old children went on a surprise trip to the police station and were then interviewed about their experiences. Eight months later, the children were shown a videotape of their interview, then questioned with an analogue of cross-examination. The aim of the cross-examination interview was to talk children out of their earlier responses, irrespective of accuracy. To do so, the interviewers used several reasons for disbelief (e.g. 'I don't think that you did get to try on handcuffs. I think someone just told you to say that. That's what really happened, isn't it?'). Most of these reasons were taken directly from court transcripts, while some were based on statements that adults often make when challenging children.

During cross-examination, most children (85 per cent) changed at least one aspect of their earlier reports—a finding highly consistent with what happens in the courtroom (Zajac et al. 2003, Zajac and Cannan 2009). Furthermore, a third of children changed all of their previous responses during the cross-examination interview. The changes that children made to their initial accounts of the trip could not be discriminated on the basis of prior accuracy; children were equally likely to change an accurate response as they were to correct a previous error. The net effect of these changes was a marked decline in children's accuracy. In fact, the accuracy of children's cross-examination responses did not differ significantly from chance (50 per cent). Even children whose initial reports were 100 per cent accurate performed at a chance level during cross-examination.

Since Zajac and Hayne's (2003) concerning findings were published, researchers have explored the factors that might drive this effect. Some of this research has investigated factors over which the criminal justice system has little or no control but that could help to identify children who might be particularly vulnerable during cross-examination. Although older children make fewer changes to their earlier responses, for example, they are not immune to the negative effects of cross-examination-style questioning on their accuracy (Zajac and Hayne 2006). Perhaps not surprisingly, high levels of anxiety during cross-examination questioning are associated with poorer performance (Bettanay et al. 2015). Furthermore, certain dispositional differences confer risk—children with low levels of self-esteem, self-confidence and assertiveness perform particularly poorly (Zajac, Jury and O'Neill 2009). Given that children who have experienced abuse also tend to obtain low scores on these measures (Howing et al. 1990, Kaufman and Cicchetti 1989, Martin and Beezley 1977, Oates, Forrest and Peacock 1985), the latter findings raise a concerning possibility: that the same factors that could make children targets for abuse—or may be the consequences of it—could also make children particularly vulnerable in the courtroom.

Other factors identified in laboratory research are procedural factors that are under the control of the criminal justice system. We now know, for example, that we can place responsibility for the negative effect of cross-examination chiefly—but not exclusively—on the types of questions asked, rather than the fact that children are being interviewed a second time about the same event (Fogliati and Bussey 2013, O'Neill and Zajac 2013a). We have also shown that cross-examination-style questioning impairs accuracy even when it is conducted very soon after the memory event (Righarts et al. 2015) and that children do not appear to believe the majority of changes

that they make during this process (Righarts et al. 2015). A comprehensive understanding of factors like these is valuable when considering potential reform to the cross-examination process or the wider legal process for child witnesses.

Outcomes of child sexual abuse trials

In most countries that have inherited their legal system from the British, it is the jury that is faced with the task of synthesising the entire body of evidence to make a decision about the defendant's guilt. In criminal trials, the burden of proof rests with the prosecutor to establish beyond reasonable doubt that the defendant being tried is guilty of committing the offence. Conviction rates in cases of child sexual abuse are typically low. It is possible that the complex demands of the criminal justice system—and in particular cross-examination—combines with the high burden of proof to account for these low rates. It is therefore crucial to ask how jurors factor cross-examination into their decision-making, especially in cases that hinge largely on the word of a child. Does the fact that children make so many modifications to their original reports under cross-examination alter jurors' perceptions of the accuracy of their evidence? And does this predict the verdict?

Research has confirmed that jurors are not naïve to the difficulties that child witnesses experience during cross-examination (Cashmore and Trimboli 2006), but little is known about whether they take this into account when making a verdict. Some recent evidence suggests that they might. Evans, Lee and Lyon (2009) found that 83 per cent of child sexual abuse trial outcomes could be predicted by the complexity of the questions asked during cross-examination. The direction of the findings, however, ran counter to expectations—more complex cross-examinations were associated with guilty verdicts rather than acquittals. Two main explanations for this finding are possible. First, it is possible that a third factor is influencing both cross-examination complexity and verdict. For example, defence lawyers might be more likely to use highly complex questions when the prosecution case is strong, in an effort to confuse a witness who is otherwise difficult to discredit. Second, a complex cross-examination might influence the way in which jurors perceive the child or his or her evidence.

There is some experimental evidence that mock jurors are sensitive to inconsistencies in the evidence of a young child. Leippe and Romanczyk (1989, Experiment 3), for example, found that children who gave trial testimony that was inconsistent with their earlier evidence lost credibility

with jurors. Similarly, in Cashmore and Trimboli's (2006) study, juries who returned guilty verdicts rated children as more consistent in their responses and more credible than juries who returned not guilty verdicts. Zajac and Hayne (2015), however, saw some indication that mock jurors took the questioning style into account when evaluating the retraction of an abuse allegation under cross-examination. In that study, cross-examination only exerted an influence on jurors' verdicts when the child complainant retracted her allegation in the face of developmentally appropriate questioning. When she retracted her allegation in response to developmentally inappropriate cross-examination questioning, cross-examination did not exert a significant effect on the likelihood of a guilty verdict.

The next step in this research is to determine whether cross-examination assists or obstructs jurors' ability to determine children's accuracy. While there is preliminary evidence that cross-examination could be more helpful in this sense to mock jurors than direct examination (e.g. Turtle and Wells 1988, Zajac and Hayne 2003a), there is a considerable need for further research. Furthermore, jurors' ability to judge children's accuracy is likely to be determined by multiple interacting factors, including—but not limited to—the complexity of questioning (Zajac and Hayne 2015), the child's emotionality while testifying (Cooper, Quas and Cleveland 2014) and the age of the child (Cooper et al. 2014). It could also be that other corroborating evidence would help to mitigate any negative effect of children's inconsistencies for the jury. There are data to suggest that conviction rates are higher in child sexual abuse cases when there is corroborating evidence (e.g. another witness, medical reports, a confession) than when the case rests on the child's evidence alone (Walsh et al. 2010). Walsh et al. (2010) found that even one piece of corroborating evidence lifted the conviction rate in these cases from 61 per cent to 87 per cent.

It is also likely that defendants are aware of the low conviction rates in child sex abuse cases—particularly where a case rests solely on the child's report—and might opt to plead not guilty because of a reasonably high chance of acquittal. There is evidence to suggest that guilty pleas increase in frequency as strength of evidence increases. Walsh et al. (2010), for example, showed that for cases in which there was only the child's disclosure, 59 per cent of convictions were obtained by a guilty plea, compared to 91 per cent in cases where the child's report was supported by one additional piece of evidence.

Taken together, these studies raise important questions about how children's testimony during cross-examination might influence juror decision-

making. Furthermore, the presence of additional corroborating evidence might interact with children's testimony to affect conviction rates.

How do we address the child cross-examination issue?

In general, any push for reform to cross-examination has been met with greater resistance than that for other aspects of the legal process (Cashmore and Bussey 1996, Davies et al. 1997, Peters and Nunez 1999). Nonetheless, reforms have been implemented by several countries and proposed by several more. These reforms encompass both bottom-up approaches, which aim to help children negotiate the existing system, and top-down approaches, in which the system is modified to better accommodate children. Below, we outline several possibilities, many of which are not mutually exclusive.

Retain cross-examination in its current form

Before considering major changes to legal procedure, it is first necessary to consider whether the problems with cross-examination are already resolved by other aspects of the legal system. For example, most jurisdictions allow for re-examination, providing the opportunity for a lawyer to repair any 'damage' done under cross-examination. Indeed, Righarts and colleagues (2015) observed a high level of consistency between children's direct examination responses and their responses in a neutral post-cross-examination interview, suggesting that cross-examination does not impair children's memories for the event(s) in question. In the process of conducting our court transcript research (Zajac and Cannan 2009, Zajac et al. 2003), however, we have observed that re-examination does not appear to be standard practice, even when children have retracted their allegation during cross-examination.

It could also be argued that changes children make to their testimony under cross-examination do not pose a problem as long as jurors can distinguish between changes directed towards the truth and those directed away from it. Here again, the research findings are scant. We know that jurors are suspicious of inconsistency in a child's statement (Leippe and Romanczyk 1989, Experiment 3), but emerging research suggests that jurors take the context of children's inconsistencies into account and are sensitive to the complexity of cross-examination questioning (Zajac and Hayne 2015, 2003a). Therefore developmentally inappropriate cross-examinations might not necessarily reduce conviction rates (Evans et al. 2009).

Reduce delays to cross-examination

A common feature of almost all jurisdictions around the world is the considerable length of time it takes to bring a child sexual abuse case to trial (Eastwood and Patton 2002, Goodman et al. 1992, Hanna et al. 2010, Lash 1995, Plotnikoff and Woolfson 1995). In fact, despite efforts to expedite cases involving child witnesses, delays to trial in many countries are increasing (e.g. New Zealand; Hanna et al. 2010). In the general memory literature, it is well established that delay exerts a negative influence on remembering (Bauer 2013). Children's performance under cross-examination does not appear to be immune from this phenomenon, with longer delays being associated with a decrease in children's ability to maintain accuracy in the face of cross-examination-style questions (O'Neill and Zajac 2013b, but see Righarts et al. 2015).

It is possible that substantially reducing delay to cross-examination might mitigate some of the negative effects of this process on children's accuracy. Some have even proposed carrying out cross-examination at the same time that children's direct evidence is pre-recorded. In fact, several jurisdictions allow for this approach (e.g. USA, England, Wales, New Zealand, Australia), although it is rarely—if ever—carried out (Gupta 1994, Hanna et al. 2010). As well as potentially improving children's accuracy on the stand, completing legal proceedings more quickly might also allow children to seek mental health services earlier (Esam 2002).

In considering the impact of delay, however, it is important to note that children tend to perform poorly under cross-examination-style questioning even when they are interviewed soon after the event to be remembered (O'Neill and Zajac 2013b, Righarts et al. 2015, Turtle and Wells 1988, Zajac et al. 2009). Delay reduction might therefore be best considered a useful adjunct to other types of reform.

Employ third parties to pose cross-examination questions to children

The option of conducting cross-examination through a third party, or intermediary, has gained considerable traction in past years, with several countries either implementing or considering such a move. This approach, however, is not necessarily a straightforward one. Policy-makers must first agree on the aspect(s) of cross-examination from which children need to be safeguarded. If the answer is the aggressive and intimidating tone that is often employed during child cross-examinations, then an intermediary

could be effective merely by repeating lawyers' questions verbatim to the child (e.g. as in Norway).

Our laboratory research would suggest, however, that children perform poorly under cross-examination questioning even when the lawyer assumes a supportive—yet professional—tone (O'Neill and Zajac 2013b; Righarts et al. 2015; Righarts, O'Neill and Zajac 2013; Zajac and Hayne 2003b, 2006; Zajac et al. 2009). In light of this finding, combatting the negative effects of cross-examination on children's evidence is likely to require the intermediary to act as an interpreter—rephrasing questions to render them more developmentally appropriate (e.g. as in England).

The intermediary-as-interpreter approach raises several questions, not least of which is what qualifications would be necessary to assume such a role. In an ideal world, the ability to rephrase questions would require comprehensive knowledge in several disparate areas: child development, memory, linguistics and the evidential process. In reality, intermediaries seldom possess all of these qualities, and there is considerable variation in accreditation processes (Hanna et al. 2010).

Furthermore, a question-by-question approach to cross-examination rephrasing is rather simplistic. Individual questions are not asked in a vacuum—even a developmentally appropriate, open-ended question might be an inappropriate culmination to a particular line of questioning. Similarly, the appropriateness of a given question might be highly dependent on a child's response to a question asked much earlier. It is unclear how much control an intermediary could exert over these wider characteristics of cross-examination (but see Plotnikoff and Woolfson 2012 for information about ground rules discussions).

Finally—and crucially—we do not know how an intermediary approach would affect children's evidence. In laboratory research, cross-examination-style questions are far more likely to impair accuracy than questions that address the same issues but are phrased in a more developmentally appropriate manner (Fogliati and Bussey 2013, O'Neill and Zajac 2013b). In those studies, however, the vast majority of children provided accurate testimony to begin with. Whether the intermediary approach would have the desired effect on a child whose original evidence was flawed or even fabricated is as yet unknown. It may be very difficult to strike the balance between removing some of the more challenging elements from cross-examination and adequately testing children's evidence.

Educate judges and lawyers about developmentally appropriate questioning

Many lawyers and judges lack knowledge of child development and, consequently, what constitutes inappropriate questioning for children (Bala 1999, Eastwood et al. 2000, Eltringham and Aldridge 2000, Henderson 2002). Unfortunately, attempts to educate the legal fraternity about the types of questions that are appropriate for children have been largely unsuccessful (e.g. Cashmore and Trimboli 2005).

Efforts to upskill legal professionals might have failed for several reasons. First, lawyers might purposefully use children's limited language skills against them to reduce their standing in the eyes of the jury (Bala 1999, Henderson 2002, Eichelbaum 1989). Because the danger of suggestive questioning in eliciting false allegations (Henderson 2002) and false confessions (Kassin et al. 2010) is well known in the legal fraternity, it seems highly unlikely that lawyers would not understand the risk of children acquiescing under the demands of similar questioning (Henderson 2002).

Second, it may be that lawyers use grammatically complex questions not deliberately to confuse a child witness but because cross-examination questioning is by its nature largely unrehearsed (Zajac et al. 2003). Although general lines of cross-examination questioning can be decided in advance, the individual questions cannot (Eichelbaum 1989). It is possible that this results in questions that are more complex than intended. Educating lawyers about questioning style is unlikely to resolve this problem.

Finally, a nuanced understanding of cognitive development is not something that can be taught in one workshop—nor is it knowledge that can be easily applied to individual cases in the courtroom context. Two children of the same age, for example, might have vastly different language skills, resulting in very different capabilities on the stand. It is unreasonable to expect that lawyers or judges can fully assess—in the moment—what an individual child's skill level is. In line with this idea, at least one study suggests that lawyers overwhelmingly consider their cross-examination questions to be age-appropriate (Henderson 2002).

Are judges adequate arbiters of the questions posed to children in their courtrooms? After all, many jurisdictions allow or compel judges to intercede when questions are inappropriate. In reality, however, judicial intervention rarely occurs when a child is giving evidence (Davies and Seymour 1998, Zajac et al. 2003, Zajac and Cannan 2009, O'Kelly et al. 2003), even though judges often believe that they are adequately addressing inappropriate courtroom questions (Hafemeister 1996). This lack of intervention might occur

for a number of reasons, including a fear of appearing biased, a reluctance to disrupt a trial, or a belief that a child's distress is an unfortunate but acceptable consequence of adequately testing evidence (Davies and Seymour 1998, Cashmore and Bussey 1996, Kebbell et al. 2001; O'Kelly et al. 2003).

Prepare children for cross-examination

In recognition that testifying in court is difficult for child witnesses, many jurisdictions offer preparation programs in the lead-up to the trial. Unfortunately, children's difficulty with cross-examination questioning has largely been neglected in these programs, which generally focus on familiarising children with the courtroom and its procedures (Davies, Devere and Verbitsky 2004, Dible and Teske 1993, Doueck et al. 1997, Finnegan 2000, Gersch et al. 1999, Mellor and Dent 1994, Morgan Libeau, Woodham and Rickard 2003, Welder 2000). Some programs tell children that their integrity might be questioned (Bauer 1983) or give some basic instruction on addressing cross-examination questions (Morgan Libeau, Woodham and Rickard 2003), but these elements typically comprise only a small part of the intervention.

Recent research has demonstrated that merely drawing children's attention to the challenging nature of cross-examination questioning does not help them to answer such questions accurately (Righarts et al. 2013). Righarts and colleagues (2013) therefore went a step further, developing a brief intervention specifically designed to give 5- to 10-year-old children practice with—and feedback on—questions of the type that they might encounter during cross-examination. Importantly, children were not 'coached' on their testimony about the staged event; they merely received practice at answering questions about an unrelated topic. During the cross-examination interview, children who received this intervention made fewer changes to their earlier responses and changed a smaller proportion of their correct—but not their incorrect—responses, relative to control children. Overall, children in the intervention condition obtained higher accuracy levels during the cross-examination interview than children in the control group. In other words, the intervention was successful (Righarts et al. 2013). Subsequent research has shown that the intervention is successful if conducted up to one week before cross-examination (O'Neill and Zajac 2013a) and that its success does not rely on overlap between the practice questions and the cross-examination questions (Irvine, Jack and Zajac 2015).

Naturally, however, numerous aspects of this intervention require more comprehensive investigation. Most important is that while the intervention

has facilitated children's cross-examination performance in three studies, even children in the preparation conditions made changes to their earlier testimony that decreased their overall accuracy levels. Further work needs to be carried out, to determine which components of the intervention could be added to preparation programs, which aspects should be altered or which reforms the intervention should be implemented alongside to maximise effectiveness.

Conclusion

It is clear from the research described in this chapter that cross-examination is unlikely to be the truth-finding technique that it is often touted as. On the contrary, the style of questioning typically used during this process directly contravenes almost every principle scientifically established for obtaining accurate evidence from any witness, but particularly a child. Indeed, questions of the type that lawyers ask during cross-examination have repeatedly been shown to decrease the accuracy of children's reports about personally experienced events. Although the difficulty that children experience during cross-examination appears to be widely recognised, there is widespread resistance to reform of the cross-examination process, which is generally considered a mainstay of any adversarial trial procedure. Progress is being made in designing effective interventions to help children to maintain their accuracy in the courtroom, but significant work is still needed. It is also crucial that the legislature and judiciary are open to alternative means of gathering and testing children's evidence.

Chapter 11

CHILD SEXUAL ABUSE IN FAITH-BASED INSTITUTIONS

Gender, spiritual trauma and treatment frameworks

Deborah Sauvage and Patrick O'Leary

This chapter examines the literature relating to the characteristics, effects and treatment frameworks of child sexual abuse in faith-based institutions. Three major themes were identified: (1) the over-representation of male victims, (2) the multifaceted dimensions of spiritual trauma and (3) the need to adopt a complex trauma approach. Each theme will be discussed in turn, followed by evidence-informed recommendations for enhancing services, as well as institutional and justice responses to child sexual abuse. More research is required to guide the development of independent complaint management and support systems.

The over-representation of male victims

Gender plays a significant, unexpected role in institutional child sex abuse. At a population level, more victims of child sex abuse are female, because most sexual abuse occurs in intra-familial contexts. However, this situation is reversed when it comes to faith-based institutions. Official inquiries and research into faith-based institutions indicate that boys are much more likely to be victimised by this type of abuse. A study of child sexual abuse in the Catholic Church in the United States (Terry et al. 2011) reported that 81 per cent of victims were male, while another reported that 71 per cent of victims in the Catholic Church in Germany were male (Rassenhofer et al. 2015). An Australian study of child sex abuse perpetrated by Anglican clergy found

that three-quarters of victims were male (Parkinson, Oates and Jayakody 2012). Meanwhile, the Interim Report of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2014) noted that two-thirds of abuse reports were made by males. It is clear that males are over-represented in child sex abuse that occurs in faith-based institutions, relative to females.

A gender analysis acknowledges that 'there are both similarities and differences in men's and women's experiences of sexual violence and that there is a need to create responsive, evidence-based policy initiatives and service provision that recognises, but does not amplify these' (Foster, Boyd and O'Leary 2012: 3). Most sexual abuse is perpetrated by males, which constitutes 'same-sex' abuse when applied to most instances of child sex abuse in faith-based institutions. Male-to-male sexual assault has traditionally been regarded as a subset of homosexual behaviour and/or a way of exerting male power or dominance. These stereotypes 'paint men as active rather than passive participants in sexual activity and assume they are able to protect themselves' (Crome 2006: 1). Male child sex abuse victims are often labelled as being gay people who should not be trusted with children (Crome 2006, Kia-Keating et al. 2005). Some seem to have internalised these beliefs, including reports by men who experienced sexual abuse by clergy who now question their sexual identity, fearing that they were somehow attracting men (Isley et al. 2008). These erroneous stereotypes, beliefs and fears are exacerbated by societal norms that prompt men to be self-reliant, invulnerable and independent, creating difficulties when they need to seek support (Crome 2006). Myths about abuse, homosexuality and masculinity are not supported by evidence, yet they permeate the community, potentially resulting in a devastating impact on men who have experienced sexual abuse (Easton 2014). It is important to separate sexual identity from child sex abuse experiences, as it is not a determining factor for perpetrators or survivors.

In the context of these gender stereotypes, it is not surprising that one of the most significant issues for males is their difficulty with disclosure and seeking assistance following child sex abuse. Male victims generally disclose at a much lower rate than females and take significantly longer to discuss their experience in later life (O'Leary and Barber 2008). In a study of 145 women and 151 men, O'Leary and Barber (2008) found significant gender differences following childhood sexual abuse. Men were more likely to be silenced than females and took significantly longer to disclose (O'Leary and Barber 2008). Non-disclosure can lead to a greater propensity

for men to engage in coping behaviour, such as social withdrawal, substance abuse, denial and isolation, which can be detrimental to mental health (O'Leary and Gould 2009). Men subjected to sexual abuse also exhibit a greater propensity for externalising behaviour such as aggression and excessive risk-taking, whereas women who have been sexually abused tend to exhibit internalising behaviour such as guilt and depression (Romano and De Luca 2001). It is probably not surprising that men who adhere to stronger masculine norms tend to be worse off in terms of mental health (Easton 2014).

Myths and stereotypes about male victims must be acknowledged when developing responsive, evidence-informed efforts to reduce child sex abuse in faith-based institutions. The lack of research on the impact of child sex abuse committed by clergy on men requires an examination of the broader body of literature about the effects of child sex abuse on men in general. Foster, Boyd and O'Leary (2012) found that men who have experienced child sex abuse disproportionately report the following factors relative to men who had not experienced child sex abuse: depression/anxiety, intense emotions/anger, flashbacks/nightmares, overwhelming shame/guilt, decreased appetite and weight loss, suicidality/self-harm, sexual difficulties, relationship difficulties, sleep difficulties and mental health problems. In fact, suicidality is one of the most significant effects on male victims. In Australian research, O'Leary and Gould (2009) found that sexually abused men were up to ten times more likely to report suicidal ideation than men in the broader community sample. They also found that men who had been subjected to child sexual abuse are vulnerable to substance abuse and a range of mental health difficulties. The gender imbalance in child sex abuse victims of faith-based institutions points to a distinct need for more research and support services specific to males (Ponton and Goldstein 2004).

The multifaceted dimensions of spiritual trauma

Spiritual betrayal and isolation

Sexual abuse by spiritual leaders (clergy) occurs within the context of a powerful blend of institutional credibility, righteousness and self-regulation; which silences child sex abuse victims and confuses their beliefs. Clergy often use the concept of 'God' and religious conditioning (Farrell and Taylor 2000) to justify their abuse and stop victims from speaking out. Survivors tend to hold the institution's teachings as part of their spiritual identity.

Yet when sexual abuse occurs, it conflicts with their religious teachings and undermines their ability to trust institutional leaders. It occurs in a patriarchal structure where the clergy who are meant to uphold morals and ethical practice are charged with investigating sexual abuse complaints within their ranks. This reinforces the power dynamics for sexual abuse survivors and heightens their risk of retraumatisation.

Trust and power are inseparable in the environment of faith-based institutions, and the institution's failure to protect children and respond to child sex abuse incidents in an appropriate manner can have a dramatic, ongoing impact on the lived experience of survivors. It can affect people's ongoing relationship with the institution and the way that they reconstitute their sense of spirituality. Existing relationships with non-offending members of the faith-based institution can change dramatically, leading to exclusion and isolation, and impeding survivors' ability to access support networks.

International inquiries and insufficient reporting mechanisms

There has been a growing recognition of the occurrence of child sex abuse within faith-based institutions since the early 2000s. Public outrage has prompted numerous inquiries around the world, with high-profile government sponsored investigations in countries such as the United States, Ireland, the United Kingdom, Germany, Belgium, New Zealand and Australia. The Catholic Church has featured as one the most prominent institutions, but many other institutions have been implicated in sexual abuse scandals, including other Christian denominations and other faiths (e.g. Jewish and Islamic institutions). Investigation findings are complex, often drawing on retrospective survivor experiences and evasive institutional representatives. Survivors frequently report inconsistent and uncompassionate internal institutional mechanisms to respond to complaints or facilitate support and/or financial arrangements (Broken Rites Australia 2015). These post-abuse experiences can add to the trauma and dislocation of child sex abuse survivors.

It is important to differentiate between mechanisms that respond to current (or recent) reports of sexual abuse and child sex abuse complaints reported by adults retrospectively. Each instance requires different response systems, which need to be independent and linked to appropriate justice systems.

The consequences of child sex abuse in faith-based institutions

Child sex abuse survivors report many common consequences of their experiences. Anxiety, depression, social withdrawal and substance abuse are well documented in contemporary child sex abuse research (Dube et al.

2005, Finkelhor 1994a, Romano and De Luca 2001, Hillberg, Hamilton-Giachritsis and Dixon 2011, Wolfe, Francis and Straatman 2006). There are a variety of terms that describe spiritual reactions to trauma. For example, Fater and Mullaney (2000) used the term 'spiritual distress' in their study of seven male victims of clergy abuse. They referred to 'bifurcated rage and spiritual distress that pervades [victims'] entire life being' (Fater and Mullahey 2000: 281). Spiritual distress was associated with self-sabotage, loathing, suicidal ideation, depression and feeling overwhelmed. These effects extended to personal and social relationships.

A study of the long-term impact of physical, emotional and/or sexual child abuse on religious behaviour and spirituality in men (n = 1207) found that the impact of abuse on religious behaviour and spirituality was much more complex than first hypothesised (Lawson et al. 1998). The men were recruited through a substance abuse treatment program in the United States and interviewed by a member of the Chaplaincy service. It was not stated whether any of the men had experienced child sex abuse by faith-based institutional personnel. A history of child abuse was related to significantly greater spiritual injury and lower stability of spiritual behaviour and experiences, but not to the overall rate of current religious behaviour. There was also an unexpected finding that child abuse was related to increased frequency of prayer and of 'spiritual experiences', although the effect size was small (Lawson et al. 1998).

Crisp (2007) explored spirituality literature for male and female victims of child sex abuse in general, not just those who have been victimised in faith-based institutions. The issues experienced by survivors included an inability to retain previously held viewpoints or ways of being, including spirituality. Spirituality effects included confusion over religious traditions and socialisation, such as the beliefs that Christians should always forgive and never be angry. Crisp concluded that spirituality is complex for survivors, but can be possible within a 'Christian framework'. This highlights the complexity of spiritual dimensions and victims' needs after abuse.

Other writers have raised questions about how a 'transformative spirituality' might relate to transformative 'post-traumatic growth' (Easton 2014, Shakespeare-Finch and De Tassel 2009). In a study of spirituality and coping among adult survivors of child sex abuse (n = 101), a distinction was found between negative and positive forms of 'spiritual coping' (Gall 2006). Spiritual discontent predicted depressive mood, whereas 'active surrender' and spiritual support led to lower levels of depressive mood (Gall 2006). It is important to acknowledge the lack of research in this area, as spirituality

linked to the faith of the institution is unlikely to be helpful for many survivors.

Available knowledge on survivors of child sex abuse in faith-based institutions identifies distinct effects on spiritual or religious belief systems. Some suggest that the impact on spiritual and religious belief systems can be devastating (Doyle 2009, McLaughlin 1994). This can be linked to survivors reporting a sense of loss of their spiritual self. Farrell and Taylor (2000: 22) suggest that 'sexual abuse by clergy is different rather than worse' and that 'child sexual abuse by clergy appears to create in its victims unique trauma characteristics distinct from other types of abuse'. Farrel and Taylor point out that a post-traumatic stress disorder diagnosis is of limited use when responding to the needs of survivors of clergy child sex abuse. This is congruent with the findings of broader child sex abuse research, which suggests that complex trauma offers a more fitting diagnosis and understanding of the impact of child sex abuse (Briere and Scott 2006, Foster, Boyd and O'Leary 2012, Middleton et al. 2014). Post-traumatic stress disorder is a diagnosis more applicable to acute episodes of traumatic events, whereas complex trauma is more applicable to repeated ongoing abuse and violation by a person with whom there is a relationship of trust (Herman 2004, Kezelman and Stavropoulos 2012). This is more in line with the majority of reported child sex abuse cases, which involve physical and penetrative contact on repeated occasions (Rassenhofer et al. 2015, Parkinson et al. 2012).

Spiritual trauma is inherently complex and heterogeneous, requiring careful exploration of distinct survivor needs as well as the needs of other child sex abuse victims generally (Gross-Schaefer, Feldman and Perkowitz 2011, Rossetti 1995). If there is a continued relationship with faith-based institutions, this needs to be carefully considered. McLaughlin (1994) found that the majority of victims, but not all, left the church altogether as part of their way of addressing spiritual trauma. Some survivors reported that certain aspects of rituals or theology were implicated in the perpetration of abuse. For example, Farrel and Taylor (2000) found that 'God' had often been referred to by perpetrators as part of their silencing strategies. Similarly, Gavrielides and Coker (2005) found that victims had been pressured to remain silent for 'God' and the 'good of the Church'. These requests had also been made by perpetrators and church representatives after people had complained about child sex abuse within a particular faith-based institution. Responses of this type represented a unique and powerful betrayal by the church, leading to a profound distrust of institutions. The negative response

to victims' disclosures of child sex abuse, either at the time or later in life, was a recurring theme in the available literature (Flynn 2008, Isley et al. 2008). This type of betrayal damaged core values and expectations of trust, honesty, accountability and a sense of personal safety in everyday life, and especially in institutions (Fater and Mullaney 2000, Flynn 2008, Isley et al. 2008, Gross-Schaefer, Feldman and Perkowitz 2011). The abuse was a violation not only of physical, psychological and emotional wellbeing but also of one's faith (Guido 2008).

The unique difficulty facing survivors of child sex abuse in faith-based institutions was the confusion created by the conflict of what was held up as 'good' within the faith and its actions to deny or minimise the occurrence of sexual abuse. Flynn (2008) found that the abuser often embodied God who is 'good and right', but did something that was not 'good or right' resulting in a unique kind of 'crazy making'. The antithetical impact of double messages led to victims experiencing an 'inability to think straight' (Flynn 2008: 226). Isley and colleagues (2008) found that it was difficult for victims to know that the sexual contact was abusive and not their fault, owing to sexual naivety in the context of a Christian upbringing. Doyle (2009) discussed this as the 'enabling' aspect of religious conditioning that facilitated the blaming of victims. Flynn (2008: 230) concluded that a process of 'stigmatization and contamination' often occurred, whereby those who were victimised were subsequently branded as evil by members of the faith-based institution.

For some survivors, loss of spirituality was often more damaging than the trauma of sexual abuse. The injustice of what occurred resulted in loss of spirituality, mistrust of the church and a rage expressed as rejection of self and others (Fater and Mullaney 2000). As one of the men who participated in the research stated (Fater and Mullaney 2000: 290), 'This guy had my soul in his hand. It was devastating to know that someone would step out of the powers of spiritual liberty to take over someone else's soul … I still have anger about a lot of that and I think more of the anger is about the spiritual loss than anything to do with the sexual abuse.'

Part of the spiritual distress for survivors can be a questioning of why the abuse occurred in the first place. This can lead to questions about why they were not protected by God or the church. Fater and Mullaney (2000) explained that this type of spiritual trauma can lead to anger, nightmares and self-destructive actions. The quality of the response of professionals in understanding the complexity of and impact on spirituality is very important. Even more challenging is ensuring that the response of the institution does not replicate the survivor's experience of abuse.

The need to adopt a complex trauma approach

A complex trauma approach (Kezelman and Stavropoulos 2012) accounts for the fact that each effect can manifest in different ways. For example, gender can influence a person's experience of depression, while the circumstances of their abuse might affect their experiences of anxiety. In the case of child sex abuse in faith-based institutions, anxiety might stem from a survivor's relationship with the institution, triggering spiritual trauma.

Post-traumatic stress disorder has been a common way of understanding the effects of trauma, and its applicability to survivors of child sex abuse has been well documented (O'Leary 2009). However, much of the clinical work on post-traumatic stress disorder is based with trauma arising from accidents, armed conflict, kidnappings and similar incident specific events. Owing to the fact that child sexual abuse often occurs over a prolonged period involving multiple traumatic events with invasive, interpersonal and psychological characteristics, post-traumatic stress disorder was not seen to account adequately for child sex abuse.

Complex trauma, on the other hand, is a clinical framework that accounts for the complex array of long-term effects arising from abuse and violence, which occurs in the context of interpersonal and psychological trust over a prolonged period, often in secrecy (Briere and Spinazzola 2005). This type of trauma can have substantial developmental and cumulative consequences from childhood through to adulthood. These effects relate to anxiety, depression, interpersonal skills, substance use, coping strategies and relationships. Outcomes are heterogeneous and variable across time, and can be moderated by factors such as social support, access to clinical resources, socioeconomic status and destigmatisation (Briere and Spinazzola 2005).

Responding to spiritual trauma through a complex trauma perspective

A complex trauma approach has been particularly useful in comprehending the general impacts of child sex abuse (Kezelman and Stavropoulos 2012), so this approach will be used to understand the unique context of child sex abuse that is perpetrated by personnel in faith-based institutions. Research on victims of clergy child sex abuse show that the experience can be defined as both 'complex' and 'spiritual' trauma (Farrel and Taylor 2000, Foster, Boyd and O'Leary 2012, Middleton et al. 2014), suggesting that it is highly compatible with the framework of complex trauma. This perspective can inform therapeutic and institutional responses to the needs of survivors of

child sex abuse in faith-based institutions, as these two responses are not mutually exclusive. Often unresolved issues with institutional and justice responses can significantly hamper progress in the therapeutic and support-based context. This requires a holistic response to survivors of child sex abuse from faith-based institutions.

In a study of individuals who had sued the church, Balboni and Bishop (2010) found that alienation from and betrayal by the church was a major factor in people's decisions to take legal action (Balboni and Bishop 2010). This was often in the context of stonewalling and minimising by the church, which denied the victim's very existence outright, not only as victims but also as members of the church. A further theme related to the importance of adjudication in that 'beyond simply being believed, many survivors needed to re-assign blame, as several of them had been told (or told themselves) that they were responsible for the abuse' (Balboni and Bishop 2010: 143). Engaging in an adjudication process can, under certain circumstances, be important and powerful, but much more research is needed to develop specialist protocols that account for the legacy of spiritual trauma.

An understanding of complex and spiritual trauma is essential in identifying and managing the considerable risks to which victims are exposed when commencing complaint procedures. This is especially important when victims are required to negotiate their entitlements in the presence of the institution and perpetrator. This underlines what Farrel and Taylor found: that 'the actions of Church establishments have heightened potential to re-traumatise survivors' (Farrel and Taylor 2000: 22). Noll and Harvey (2008: 387) pointed out the significant and unique scope of power that faith-based institutions hold, 'when the crime is reported to the archdiocese and the claim is not turned into a criminal or civil lawsuit, the archdiocese has the power to believe the victim-survivor or not, to help or not, and to disclose what happened to the abusers or not'.

One of the unique dimensions for victims of child sex abuse in faith-based institutions is that individuals are exposed to the whole institutional system of the church and their reactions (Flynn 2008). This complex form of retraumatisation of victims occurs not only through 'cover-up' responses but also when victims are expected to 'put it behind [them]' (Doyle 2009). Closely associated with the damage to their religious beliefs and spirituality, victims have reported a loss of trust in their faith-based community (Gross-Schaefer, Feldman and Perkowitz 2001). Some have stated that it feels as if a 'wrecking ball' was continually smashing through their lives, damaging their trust in the faith-based institution and undermining core values such

as trust, responsibility, integrity, fairness, honesty, accountability and safety (Gross-Schaefer, Feldman and Perkowitz 2001: 224). This demonstrates that spiritual trauma can also be defined as a violation of trust in the values and actions of faith-based institutions, which is so pervasive that it is also experienced as a violation of core everyday values. In essence, when a victim is asked to use a procedure offered by a faith-based institution, they are being asked to trust a source of previous trauma. Indeed, any requirement to invest trust in anyone is a requirement to revisit a relational site of trauma.

Professionals working with survivors need to understand any experiences related to past and ongoing contact with the institution, perpetrator and legal actions (civil and criminal). These contacts are likely to be significant in determining whether the survivor feels that their experience is acknowledged and how this relates to their identity, their spiritual identity and their sense of justice. Offering counselling and other support requires a conscious balance between the therapeutic and advocacy needs of the survivor. Issues of independence are often important in coordinating an institutional response. Experience from research with survivors of child sex abuse that occurred within the Catholic Church in Germany showed that critical incident reporting systems that are independent of the institution in question are important to empower survivors to be able to make full disclosures (Rassenhofer et al. 2015). These considerations are particularly important in considering policy, legal and complaint management reform.

Key implications: improving knowledge and responses

The key implications discussed in this chapter relate to the immediate improvement of service, institutional and justice responses. This will require new research to build a more thorough understanding of the phenomenon and critically evaluate the responses of organisations. In the meantime, there are key responses that can be improved, on the basis of available knowledge on the experience of survivors of child sex abuse in faith-based institutions. These are explored below under three headings: service responses, institutional and justice responses, and research.

Service responses

A number of generalisations have been made about victims' post-abuse needs but have not been supported by the data. For example, Doyle (2009) assumes that part of the solution to spiritual trauma is to restore or encourage

survival of religious belief. Similarly, some child sex abuse complaint response protocols used by faith-based institutions have embedded the goals of pastoral care (e.g. the Australian Catholic Church response of 'Towards Healing'), assuming that healing will arise from reconnection with religious or pastoral values, and contact with representatives from the institution itself. Yet the evidence base for such claims is not clear, with a significant number of survivors making a conscious decision to cease direct contact with the religious institution and its beliefs (Balboni and Bishop 2010). It is also important to refrain from assuming that connections with spirituality and/or new or ongoing involvement in the religious community are always harmful. For some victims, the opportunity to experience increased wellbeing is associated with the spiritual dimensions of their lives.

Crisp (2007) suggests that the key transformative elements of spirituality for some survivors of child sex abuse may be: 'to provide coping strategies for living well after traumas such as sexual abuse … developing a sense of meaning in life … becoming connected in a positive way with oneself, others and God … spiritual beliefs and practices can provide a framework for hope … or to maintain a sense of self-worth, believing oneself to be loved by God despite enduring abuse' (Crisp 2007: 311). These core transformative elements—namely coping strategies, connection with self and others, hope, self-worth through unconditional love and positive regard—may be general elements of recovery for many victims, and some victims of child sex abuse may find these elements within a spiritual or religious context or community. Much more research and inquiry is required to gain an in-depth appreciation of the support that individual victims require to redress spiritual damage.

Institutional and justice responses

Development of gender transformative, complex trauma-informed approaches to policy, practice and interventions needs to extend beyond therapy to incorporate institutional responses and complaint management protocols. For example, in light of evidence of delayed disclosure among male child sex abuse victims, it is important that response protocols do not limit the time frames for complaint lodgement. Complaint management systems need to be designed in a way that consciously reduces the risks of retraumatisation by the faith-based institution. This highlights the need for independence in the management and adjudication of complaints. Assumptions of any need to reconnect with faith or religious institutions should be avoided, yet for those who wish to re-engage with a religious community, this should be an

option that can be facilitated. Complaint management systems need to have different protocols for reports of child sex abuse that relate to immediate or recent incidents. Moreover, links to child protection, criminal and civil justice systems are essential to any complaint management system.

An approach informed by complex trauma should be developed that specifically addresses the unique context of child sex abuse by faith-based personnel (Kezelman and Stavrolpoulos 2012). This is relevant to the development of policy initiatives, service development and therapeutic practice. Owing to the betrayal of trust and the fact that many victims experience victimisation by the institution as a whole, the independence of those who adjudicate and manage complaints, redress and compensation is crucial, in order to reduce risks of retraumatisation.

Research

The empirical evidence for understanding and ameliorating spiritual trauma is embryonic. This applies to both male and female victims. Research is needed to frame the issue so that knowledge can be applied to therapeutic, policy, institutional and justice responses. Public attention and subsequent inquiries (e.g. the Australian Royal Commission into Institutional Responses to Child Sexual Abuse) into the occurrence of child sex abuse in faith-based institutions needs to be translated to research initiatives.

Current international and Australian data indicates that the majority of victims of child sex abuse by faith-based institutional personnel are male, which necessitates the need for a deeper understanding of the effects of child sex abuse on men. There is a gap in current knowledge on the specific trauma-informed therapeutic work with men who have been sexually abused in childhood (Foster, Boyd and O'Leary 2012). Mental health practitioners should understand and include masculine norms, disclosure history and childhood adversity in assessments and intervention planning with male survivors (Easton 2014). Much more research is needed about the shared and differentiated impact and needs of male and female victims of clergy child sex abuse. The World Health Organisation (2007) has argued that 'gender transformative' research endeavours are more effective than 'gender neutral' or 'gender sensitive' approaches when promoting men's health and wellbeing. A gender transformative approach would encourage participant involvement in seeking change in awareness, policy and practice, at individual and societal levels. This could help to address power relations and cultural practices that influence the construction of gender (Foster, Boyd and O'Leary 2012).

Conclusion

A review of the available literature on child sex abuse in faith-based institutions shows a limited knowledge base in understanding the 'unique' experience of survivors, and even less evidence about effectiveness of service, institutional and justice responses. The literature suggests that children and adult survivors of child sex abuse in faith-based institutions are likely to have specific needs in relation to the fact that the abuse occurred in a context of religious ideals that were meant to promote trust and safety. This creates a clear area of conflict and confusion for spirituality and identity associated with being a member of a particular religious group. Responses by institutions to complaints of child sex abuse often show a high level of victim/survivor dissatisfaction and retraumatisation. This is symptomatic of both a lack of institutional knowledge of the needs of people affected by child sex abuse and a historical and cultural failure to acknowledge and take responsibility for the problem. Often the very structure and teachings of the institution were part of the justification and silencing strategies used by the perpetrators and officials.

There is substantial heterogeneity in the needs of victims/survivors. This requires a nuanced approached that accommodates these complexities. For example, it is important to have a good knowledge of masculinity and the preferred coping responses of men and boys, owing to the high number of male victims. The framework of complex trauma offers a useful approach to account for factors that include spiritual trauma. Complaint management systems remain a significant area of controversy, and available evidence advocates for independent bodies and adjudicators to facilitate institutional responses to allegations of child sex abuse and any resulting support services, or criminal or civil justice responses. These areas remain an important area for future research in the effort to improve the outcomes for survivors of child sex abuse in faith-based institutions.

The implications of spiritual trauma, complex trauma and the gender of victims of child sex abuse by faith-based personnel are complex and multifaceted. The following three issues warrant attention. First, attention needs to be paid to the gendered and cultural experiences of victims, including the impact of masculine norms, given that the majority of victims of sexual victimisation by clergy are male. Second, spiritual trauma needs to be researched and assessed much more rigorously. It is crucial that institutions and practitioners do not embed assumptions of homogeneity of spiritual or religious needs of victims into the theory and practice of their responses to

allegations of child sex abuse. This needs to reflect the spiritual needs of survivors, whereby they have control over their engagement with institutions or related religious activities. Finally, spiritual trauma and complex trauma mean that there are considerable risks of retraumatisation for victims when engaging in complaint processes or when seeking redress, especially those that involve a response to the complaint by a faith-based institution, or indeed any institution. This underlies the need for independent and transparent adjudication of sexual abuse complaints relating to faith-based institutions.

Chapter 12

MONEY FOR JUSTICE?

Money's meaning and purpose as redress for historical institutional abuse

Kathleen Daly

In September 2015, the Australian Government's Royal Commission into Institutional Responses to Child Sexual Abuse tabled its *Redress and Civil Litigation Report*. The report, which has 99 recommendations, was expedited[1] because the Commissioners believed a more rapid response was appropriate 'to give more certainty on these issues … and to improve civil justice for survivors as soon as possible' (Royal Commission, 14 September 2015: 8). The report is a significant achievement and a world first. Although many inquiries have been conducted before and others are underway today, none has intended to produce recommendations for redress that include such a broad range of institutional contexts (both closed and community-based), multiple government jurisdictions, churches and charitable organisations. In this chapter, I place the Royal Commission's work on redress in historical perspective, and I consider the meaning and purpose of monetary payments in achieving justice for survivors.

Monetary payments are termed the 'most contentious' element of redress schemes (Australian Senate 2010: 225). Drawing on an analysis of 19 Australian and Canadian cases of institutional abuse of children (Daly

1 The Royal Commission is to conclude its work on 15 December 2017; hence its September 2015 report and recommendations on redress and civil litigation were fast-tracked by more than two years. In releasing the *Consultation Paper* on 30 January 2015, Justice McClellan (2015: 19) said a 'rigorous timetable' was pursued 'because we know that there are many survivors who are frail or ageing who are entitled to an effective response through redress for their abuse'.

2014a, 2014b), an analysis of the estimated costs of a redress scheme by Finity Consulting Pty Limited (hereafter Finity; July 2015), the Commission's *Consultation Paper* on redress and civil litigation (Royal Commission, 30 January 2015), its public hearings on the *Consultation Paper* held over three days in March 2015 (Royal Commission, 25 March 2015 [Day 130]; 26 March 2015 [Day 131]; 27 March 2015 (Day 132]) and relevant research,[2] I explore these questions concerning monetary payments: how have these been determined, and what is the purpose of a monetary payment? I compare different money logics used in calculating payments and the average payments in redress schemes. I then compare the average payments with what survivors and their community supporters and legal representatives are seeking. My focus is mainly on survivors' perspectives, but I recognise the value of considering other views, such as those of individuals and organisations accused of or responsible for abuse, their legal representatives and insurers, and family members and others associated with the cases. In the final section, I consider how members of the general public may view survivors' claims for redress. First, however, I sketch a socio-historical context of the term 'institutional abuse' and why it has become the subject of redress.

Defining institutional abuse of children

The meaning of institutional abuse is not self-evident. 'Abuse' may include physical, sexual, emotional and cultural abuse, or it may be limited to sexual abuse alone. 'Institutional' contexts can be historical, contemporary or both, and in 'closed', other out-of-home care or community-based settings. Closed institutions are residential facilities for children. They include orphanages, homes, farm schools, training schools, hostels, youth detention and facilities for those with disabilities. Other out-of-home care includes foster, kinship and relative care. Community-based settings are organisations in the public, private, voluntary and faith-based sectors that provide educational, sporting, recreational, cultural and other activities for children.

My analysis here focuses on historical abuse of children in residential facilities from the last quarter of the nineteenth century to the 1990s. These institutions held children who were voluntarily placed by parents or other family members, or were court-ordered wards of the state, including

2 Research for this paper was undertaken before the Commission's report was released in mid-September; hence, with some exceptions, I rely on the *Consultation Paper* in analysing the Commission's approach and thinking on redress schemes.

those adjudicated delinquent. They came from socially and economically disadvantaged families, whose parents were deemed 'unfit' or whose mothers were not married. Some had been taken from parents as part of forced assimilation policies of Indigenous peoples in Canada and Australia, or migration policies established by the British and Australian governments, with support from religious orders and charitable organisations. Others were taken from parents who were unable to care for them, or who had neglected or abused them; still others had mental or physical disabilities at a time when institutions were believed to be the most appropriate place to care for them.

Discovering and responding to institutional abuse

Inquiries and investigations of child maltreatment or the negative effects of institutions on children began in the mid-nineteenth century in Canada and Australia, and they proliferated throughout the next century. Also, from the 1850s to the 1970s, numerous reports of maltreatment were made by children or family members to the police or other authorities, and there were clear signs of children's distress by frequent reports of 'runaways' from residential care. In some cases, sexual offending was prosecuted or an offending individual was dismissed or moved to another institution. However, institutional practices did not change.

Change began to occur in the early 1980s, when four elements coalesced to define institutional abuse as a social problem that demanded a response: changing concepts of childhood, new concepts that facilitated 'seeing' abuse, significant cases of clergy sexual abuse, and what I call the 'sexual turn' in the institutional abuse story.

For concepts of childhood, a societal shift occurred in the early 1960s in affluent nations of the developed world toward a more child-centred world, a 'prizing of childhood' that came with higher standards of living, lower birth rates and better treatment of child illnesses (Corby, Doig and Roberts 2001: 43). For new concepts, institutional abuse of children was 'discovered' in the 1980s. It built upon the 'discovery' of child physical abuse in the 1960s. Concept diffusion—that is, seeing child physical abuse as widespread—occurred in the late 1960s and early 1970s (Parton 1979). The 'discovery' of child sexual abuse began in the 1970s. The term 'child sexual abuse' was used for the first time in published research by de Francis (1969) and Gil (1970). The next step—of seeing child sexual abuse as widespread—began in the 1970s and continued into the 1980s. Like child physical abuse, attention centred on intra-familial sexual abuse. In 1975 David Gil coined the term

'institutional abuse' of children, which he defined broadly to include not only acts of abuse but also 'abusive conditions' and policies, which occurred in a wide array of settings, including residential care (Gil 1975: 347).

Major media reporting of sexual abuse of boys by Catholic priests in the United States first arose in the mid-1980s. Although the priests' offending took place in community settings, their admissions made more credible children's reports of offending in closed institutions. Finally, and related to clergy abuse, the 'sexual turn' in the abuse story transformed what had previously been viewed by authorities as 'too harsh' corporal punishment of children into the recognition of 'a more disturbing form of abuse' (Corby et al. 2001: 83): sexual abuse by adults of children in their care. This galvanised a belief that 'something must be done' to address institutional abuse.

Some observers have termed the 1980s a decade when a 'moral panic' concerning child sexual abuse took hold (Jenkins 1998). A moral panic occurs when fear over a social problem is 'wildly exaggerated and wrongly directed' (Jenkins 1998: 7). At the time, such fears included organised paedophilia and satanic ritual abuse. My analysis of institutional abuse cases in Canada, Australia and elsewhere (Daly 2014b) suggests that although most were subject to media attention, it was not sexual abuse of children alone that motivated government, church or charitable organisations to respond. Other factors triggered responses: media stories of failed investigations and cover-ups by government and church authorities in the past, victim/survivor advocacy group campaigns, previous inquiries and the pressure of civil litigation.

The temporal ordering of discovering and responding to institutional abuse is, first, the emergence and recognition of a social problem; then heightened media, political and public concern to 'do something' about it; then a variety of triggering factors that precipitated responses by authorities. By responses, I mean a sustained set of initial and subsequent activities that were taken to address a perceived social problem.

The major responses were criminal prosecution, civil litigation, public inquiries and redress schemes, and typically, each case had more than one response. Of the 19 cases in my study, 14 were associated with criminal prosecutions that resulted in convictions; for the remaining five cases, no charges were laid in three, and two were redress-scheme only cases. Sixteen cases were associated with civil litigation, and seven had public inquiries. Fourteen cases had redress schemes with monetary payments, and in two others, survivors received monetary payments from civil settlements only. However, for the remaining three—all Australian nation-wide cases (*Stolen*

Generations, *Child Migrants* and *Forgotten Australians*)—there remains unfinished business. Survivors view the monetary payments from state redress schemes in Queensland, South Australia, Tasmania and Western Australia, and from non-government schemes, as inadequate. And there are many others who have not sought or received any monetary payment.

Victim redress and redress schemes

Victim redress can be defined broadly[3] as all the activities, processes and outcomes that recognise and provide a compensatory mechanism for harms or wrongs against an individual or group.[4] Redress is a type of corrective or civil justice that aims to rectify what is termed private wrongs, as compared to criminal justice, which aims to address what is termed public wrongs by criminal prosecution, trial and punishment.[5] Civil litigation and redress schemes are two modes of redress, and my focus here is on redress schemes.

Applied to institutional abuse, a redress scheme is more than a monetary payment. Broadly conceived, it includes all the processes that occur when claimants seek monetary payments, benefits and services: how well informed they are and whether they understand the redress process, how they are treated and whether they have a role in shaping the process and desired outcomes. In addition to monetary payments, benefits and services, redress outcomes may also include public apologies, memorialisation, commemoration and other memory projects. The latter activities have a wider audience and purpose. They seek to remember and reinterpret past wrongs, and they attempt to imagine new futures and identities of wronged individuals or groups.[6]

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3 I explicitly include all activities and processes—not just the outcomes—of redress schemes or civil litigation. The 'how' is as important as the 'what' of redress.

4 For historical institutional abuse of children, the term 'redress' is commonly used; however, for international crime and violations of human rights, reparation is more common (Torpey 2006), although redress may also feature (McCarthy 2012). I have not seen the two compared, nor do I see a bright line between them. I suspect that the choice of term arises from historical usage, coupled with a writer's academic discipline or field of research.

5 I do not consider here the relationship between corrective justice and distributive justice in the design and implementation of redress schemes, nor in how these justice aims relate to the purpose of a scheme, but will save that analysis for another time. I note that neither corrective nor distributive justice has been explicitly discussed by redress scheme planners or in the research literature more generally (but see Winter 2014).

6 Arguably, a broader response to institutional abuse might be envisaged, which goes beyond a redress scheme by instituting more systemic reforms to the provision of

Of the 19 cases, 14 had redress schemes or packages and one had two schemes, for a total of 15. Redress schemes are structured by content and constraints. Content has three dimensions: (1) the logics used in deciding monetary payments; (2) the processes used to validate and assess applications; and (3) the inclusion (or not) of benefits, services or other outcomes. The content of a scheme may change over time, and it may include a combination of money logics in deciding payments. The schemes are constrained by the amount of money that government and non-government entities are willing to spend and the number of claimants who apply. Circumscribing content and constraints are questions about what, precisely, is the subject of redress. Is it any type of abuse or neglect, or sexual abuse only? Does it include peer abuse as well as that by adults? Is it exposure to and experiences of abuse and neglect as reflected by the number of years spent in care? If so, what types of care and in which institutions? Further, what should be redress for government policies and practices, in consort with those of church and charitable organisations, which targeted particular groups of children for removal from families, migration schemes, income generation and medical experimentation?

Monetary payments are just one element of a redress scheme, and from a survivor's perspective, what is considered an adequate payment can be contingent on the provision of benefits, services or other elements. Although victims and survivors say 'it's not the money that matters' in pursuing redress, in time a payment can matter because it is linked to a sense of validation (being believed) and vindication (recognition by an authority that a wrong has occurred).

Monetary payments

'Compensation' is used loosely by many to refer to a monetary payment that may be part of a redress scheme when, more precisely, 'compensation' refers to an amount of money decided by a court for damages in a civil suit, where fault or liability for an injury has been or is likely to be established on the balance of probabilities. When monetary payments are part of redress schemes, the accurate term is an *ex gratia* payment. This is understood to be an 'act of grace' or 'kindness' by authorities without an admission of

health and welfare services. However, I know of no redress scheme to date where such systemic change has been considered. Such a response could conceivably affect not only institutional abuse survivors but also other adults affected by childhood adversity and disadvantage.

liability, and the standard of proof (or evidentiary criteria) may be at a lower threshold ('plausibility' or 'reasonable likelihood').[7] Because such payments are discretionary, eligibility criteria and payment levels may change. Some schemes have used grids, matrices and scoring systems, coupled with high maximum caps, which more closely align with a tort logic of injury and damages. Examples of these are Canada's *Indian Residential Schools* (specifically, the Independent Assessment Process) and Ireland's *Residential Institutions Redress Board*.

Money logics

The logic of monetary payments has two dimensions: how to decide, and how much to pay.

How to decide can either be individualised or equal (same) treatment of eligible claimants. Individualised assessments use grids, matrices or scoring systems to assess abuse and severity, or to assess abuse, severity and impact. For equal treatment, claimants receive the same amount as a flat payment, or another equality-based formula is used, such as the number of years spent in an institution. How much to pay can be open-ended, with a high maximum cap, or it can have a much lower cap or be a flat payment. Of the 15 redress schemes in my study (Daly 2014a), some used a combination of money logics; thus, there were 20 monetary payment outcomes. Of the 20, 12 used individualised assessments, with lower maximum caps,[8] and one used an individualised assessment, with a high maximum cap. For the remaining seven, four paid the same amount to each eligible survivor ('flat payment') and three used other types of equality-based formula such as years spent in an institution or dividing a fixed sum by the number of eligible survivors.[9]

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7 The Victorian Government's *Public Consultation Paper* (2015: 8) notes that 'it is misleading to label redress as wholly *ex gratia*, given that institutional participation in redress carries some implication of responsibility'. In addition, executive redress for state wrongs may be justified as compensation. For example, described in Winter (2014: 164–8), the Civil Liberties Act Redress Provision provided a payment to Japanese Americans who were 'evacuated, relocated, and interned' during World War II. The payment (US$20,000, when applications were open from 1990 to 1993) was explicitly not *ex gratia*, but rather it was stipulated by the legislature to compensate for the US Government's liability.

8 One of these, *Jericho Hill Class Action*, level 2 and 3 payments, did not report outcomes; hence outcomes for eleven individualised assessment cases are shown in table 12.1.

9 Complicating the matter, in some redress schemes, individualised decisions are made within a fixed budgetary sum. This was the case in *Queensland Institutions* and *Redress WA* (Royal Commission 30 January 2015, appendix A: 235–40).

Money logics affect the processes used to validate and assess applications. Flat payments and other equality-based approaches do not require probing a claimant's experiences of abuse and, depending on the scheme, can be based on records of placement histories or time spent in institutions. However, relevant records may be lost, destroyed or difficult to locate. Individualised assessments require that claimants detail incidents of abuse and severity (and, when relevant, subsequent impact in adult years) on an application form. Depending on the scheme, additional supporting evidence may be required. On the basis of the available evidence, we have learned that the process of completing applications can create emotional difficulties when claimants are asked to relive memories of what happened to them (see Daly 2014a: 167–74).

As for how much to pay, there is no clear justification in any of the Canadian or Australian government schemes for why certain amounts were chosen as maximum caps and how these might relate to the type, frequency or impact of abuse (but see *Jericho Hill* below). The first government redress scheme for institutional abuse was negotiated in Ontario in 1993 between the Ontario Government, Catholic Church dioceses in Toronto and Ottawa, and a survivor group named Helpline. The logic of how much money to pay in that case (*St John's and St Joseph's*) was tied to the Province of Ontario's criminal injuries scheme, which in 1993 had a maximum of C$25,000 (and in 2014 the maximum was still C$25,000).[10] Other Canadian Government redress schemes emerged in the 1990s, modelled on *St John's and St Joseph's* and *Grandview*, the latter having a higher maximum (C$60,000) than the province's criminal injuries scheme.[11]

In a Canadian case, *Jericho Hill*, which centred on sexual abuse in a residential institution for deaf students, special counsel Thomas Berger was asked to provide advice on the parameters of a money payment. Berger (1995, section VII) reviewed amounts that had been awarded in Canadian courts for individual cases of contemporary sexual abuse. His report considered different categories of damages, but concluded that 'pain and suffering'

10 An Australian non-government redress scheme, *Melbourne Response*, set an initial cap of A$50,000 to align with the maximum that could be awarded in Victoria's Victims of Crime Compensation Scheme (Royal Commission 14 September 2015: 578). Unless otherwise noted, I report money amounts in a country's local currency and not adjusted for inflation.

11 Since 1993, and in addition to Australia's and Canada's government schemes, redress schemes have been established in Belgium, Germany, Ireland, the Netherlands, New Zealand, Norway, Scotland, States of Jersey, Sweden, Switzerland and the USA. In Australia, non-government schemes have been established by church and charitable organisations (e.g. *Towards Healing*, *Melbourne Response* and *Salvation Army*).

(non-pecuniary) was most appropriate for the claimant group. He decided to use precedent, proposing that *Jericho Hill* use a tiered approach like another Canadian case of institutional abuse, *Grandview*, with amounts ranging from C$3,000 to C$60,000.

Purpose of a money payment

The money logics of how to decide and how much to pay are linked to the purpose of a money payment. Royal Commission Chair Justice Peter McClellan probed witnesses in the redress and civil litigation hearings in March 2015 on the question of purpose. For example, on the first day of the hearings, he asked Nicky Davis, a leader of Survivors Network of those Abused by Priests (SNAP): 'In the context of justice for the survivor, what do you see the amount of money doing? What is it achieving? How is it contributing to justice?' (Royal Commission, 25 March 2015: 13610).

McClellan is asking two related questions: what is an amount of money achieving for survivors, and how does it contribute to 'justice'? The Commission's *Consultation Paper* focused on the purpose of a money payment as important to help claimants 'understand the purpose of the scheme' and what a monetary payment 'is meant to represent'.[12] It suggested that 'the purpose … should have some connection with the amount … For example, a smaller payment might more readily be accepted as an "acknowledgement", while a larger amount might be expected as a "tangible recognition of the seriousness of the hurt and injury"' (Royal Commission, 30 January 2015: 133–4).

Drawing from my analysis of previous redress schemes and what was said in the Commission's public hearings in March 2015, I identify three purposes of monetary payments, from a victim's perspective:

1. recognition of past abuse and actions of an institution as being wrong
2. support and assistance to bring 'closure' and 'healing' to survivors and their families (i.e. providing a limited form of rehabilitation), and
3. tangible recognition of the seriousness of the hurt and injury that can make a substantial difference in a person's life, or, as Justice

12 Justice McClellan's language implies a one-way determination of the meaning and purpose of a monetary payment, more specifically, of the state's (or church's) ability to communicate its meaning and purpose. However, survivors and their legal representatives can also be active participants in the negotiation process when they have bargaining power (Daly 2015).

> McClellan (2015: 3) says, 'to help those who have suffered heal and live a productive and fulfilled life' (i.e. providing a more expansive form of rehabilitation and social welfare).[13]

As we shall see, when they relayed their views to the Royal Commission, members of advocacy, community and legal groups talk about payment amounts and their rationale in ways that reflect purpose 3 (above), but they desire an assessment process with the lowest standard of proof, 'plausibility'.

Monetary payments in redress schemes

Table 12.1 displays the average monetary payments in Australian, Canadian and Irish redress schemes, both government and non-government. The figures provide evidence against which to assess witnesses' comments in the Commission's public hearings on redress. The bolded figures are averages, as reported in Daly (2014a: 151).[14] The non-bolded figures are sourced from the Royal Commission's report (14 September 2015, appendix N and chapter 7),[15] except for the *Defence Abuse Response Taskforce*, which was sourced from an Australian Senate (2014) report. Adjustments for inflation are important to take into account (but it appears that the Commission did not do so for Australian church and charitable organisations), along with the year used for calculating the exchange rate calculation. We may assume that recent estimates (2012 to 2014) are comparable to the bolded figures adjusted for inflation in 2012. Another matter is whether or not estimates are net of legal fees. They are for the bolded figures and the estimate for Ireland's *Residential Institutions Redress Board* (hereafter *RIRB*), but neither the Commission's *Consultation Paper* (30 January 2015) nor *Report* (14 September 2015) provides this detail.

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13 By assisting survivors who were *disadvantaged* by abuse (not simply *injured* by abuse) to 'live a productive and fulfilled life', McClellan is using the language of distributive justice. My appreciation to Stephen Winter (10 August 2015, personal communication) for calling my attention to the ways in which corrective and distributive justice are interrelated in redress schemes.

14 For ease of reading, I have rounded the figures to the nearest 100, rather than reporting precise amounts ranging from $1 to 99.

15 I compared figures given in the *Consultation Paper* and *Report*. Except for two schemes (South Australia and Salvation Army Eastern and Southern Districts), there were no differences. With more applications finalised, South Australia's average decreased from $14,400 to $14,100 and the Salvation Army's increased from $49,100 to $51,100 (which includes $5,000 for counselling). My average for the Australian state schemes, which was calculated in August 2014, used the (then) current figure for South Australia of $14,400.

Table 12.1: Monetary payment averages for redress schemes that use an individualised approach for assessing abuse severity or abuse severity and impact

	A$, adjusted for inflation in 2012 dollars (bolded)
AUSTRALIA	
Government institutions, 2003 to 2013	
Average (mean) for five individualised schemes in Queensland, South Australia, Tasmania (phases 1–3 and 4) and Western Australia	**23,100**
Other government institutions (individualised only)	
WA Country High School Hostels, 2012 to 2013	36,300
Defence Abuse Response Taskforce (DART), 2011 to 2014	40,860
Non-government institutions: faith-based or charitable organisations (individualised only)	
Melbourne Response (Catholic Church), 1995 to 2014	38,800
Salvation Army (after deducting $5,000 for counselling), Eastern and Southern Territories, 1995 to 2014 (updated from $44,100 given in the *Consultation Paper*)	46,100
Towards Healing (Catholic Church), 1997 to 2014	48,300
CANADA	
Canadian state institutions, excluding Independent Assessment Process for Indian Residential Schools, 1993 to 2001	
average (mean) for six individualised schemes: three in Ontario, one each in New Brunswick, Nova Scotia and British Columbia	**45,800**
Independent Assessment Process for Indian Residential Schools, 2007 to present	
average (mean)	**97,500**
IRELAND	
Residential Institutions Redress Board, 2003 to present (average [mean] as of December 2014, €62,237, using the exchange rate conversion in the Royal Commission *Report* [14 September 2015: 228]).	88,000

Note: The Royal Commission sought monetary data from governments and non-government organisations under notice. It reported the data in two documents (Royal Commission *Consultation Paper*, 30 January 2015, chapter 6 and appendix A; updated in Royal Commission *Report*, 14 September 2015, chapter 7 and appendix N). Table 12.1 combines three sources: (1) the Commission's data from Australian non-government organisations and *WA Country High School Hostels*; (2) data from my analysis of state schemes (Queensland, South Australia, Tasmania and Western Australia), as reported in Daly (2014a: 151); and a Senate Report (2014), section 3.53, p. 43, as of 22 September 2014, for the *Defence Academy Response Taskforce* (DART). The Commission's *Report* (14 September 2015) updated figures for the Salvation Army Eastern and Southern Districts and for South Australia's government scheme; otherwise, there were no differences in the figures in the *Consultation Paper* and *Report*. The Commission's figures and mine are the same for the Australia state schemes; however, my figures here are adjusted for inflation.

Four points can be drawn from table 12.1. First, comparing average payments for government institutions, the average (mean) for eligible claimants in the five Australian schemes was A$23,100 while the mean for those in the six Canadian schemes was nearly twice as high: A$45,800.[16] Second, more recent Australian schemes for government institutions, *WA Country High School Hostels* and the *Defence Abuse Response Taskforce*, report higher means than previous Australian schemes, ranging from about A$36,000 to $41,000. Third, for the Australian non-government **s**chemes, all but one of which (*Salvation Army*) addressed both physical and sexual abuse, the range is A$38,800 to $48,300 (Royal Commission, 14 September 2015: 578–9). For all the individualised schemes with lower maximum caps, purpose 2 appears to be the typical rationale for monetary payments (Daly 2014a; Royal Commission's *Consultation Paper*, 30 January 2015, appendix A, which shows information on more cases than the Commission's *Report*, 14 September 2015, appendix H).

Finally, the two individualised government schemes with the highest averages are Canada's *Indian Residential Schools*, Independent Assessment Process (A$97,500) and Ireland's *RIRB* (A$88,000). Each is closely aligned with a tort logic of injury, impact and a potential loss of opportunity. Supporting medical or psychological documents are required to demonstrate proof of abuse and impact, and legal representation of survivors is required (for which each scheme pays the costs up to a stipulated maximum), although survivors can self-represent. The rationale for the monetary payment in the *RIRB* is purpose 3:

> [To] provide some tangible recognition of the seriousness of the hurt and injury caused to the survivors of child abuse, and that it may enable some survivors to pass the remainder of their years with a degree of comfort which would not otherwise be readily attainable (Compensation Advisory Committee 2002: vi).

In general, higher average monetary payments, reflecting purpose 3, are associated with a higher standard of proof, supporting documentation and a more legalistic process.

16 In two cases, one in Canada (*Jericho Hill*) and another in Australia (*South Australian Institutions*), the schemes are based on sexual abuse only; all other individualised government schemes are based on physical and sexual abuse.

What do Australian survivor advocacy, community services and legal groups say?

During the hearings on redress and civil litigation in March 2015, the Royal Commission invited witnesses representing government and non-government entities (church, charitable, youth groups); insurance; survivor advocacy and legal groups; and peak bodies in child sexual abuse, psychology, social work, and community and victim services. The final witness list had 38 organisations or individuals, who were selected from a larger number of written submissions (more than 250 received). In addition, comments were received from about a hundred organisations and individuals via an online form (Royal Commission, 25 March 2015: 13556). I listened to the testimony live, as it was streamed on the internet on 25 and 27 March 2015, and I read the transcripts for the three days of hearings. My analysis here focuses on what was asked and said about the purpose and quantum of a monetary payment. It is provisional and would need to be augmented by a systematic analysis of the written submissions.

For context, the Commission's *Consultation Paper* (30 January 2015) put forward an approach to assessment that included a matrix for assessing severity of abuse, severity of impact and distinctive institutional factors. It did not explicitly discuss flat payments or equality-based formulas. Finity (revised report, July 2015)[17] modelled the costs of a redress scheme, based on assumptions of 60,000 eligible survivors, a maximum cap of A$200,000 and an average of $65,000. The Commission was correct in saying that average payments, not maximum caps, should guide estimates of cost. My analysis of the relevant Australian and Canadian cases shows that average payments were 24 to 65 per cent of the maxima (Daly 2014a: 143). Assuming that 60,000 eligible sexual abuse survivors received a mean of $65,000, the total cost of the monetary payment portion of the redress scheme is estimated at $3.5 billion (which includes a reduction of $400 million for previous payments received). Additional costs for counselling and administration are estimated at $330 million and $180 million, respectively (Finity 2015: 6).

What emerges from the testimony of survivor groups and their community and legal representatives is a significant gap between what they would like to see and what is feasible from a legal and fiscal perspective. Many wished to see a wider definition of abuse to include sexual, physical, emotional and,

17 Figures differ somewhat in Finity's first (January 2015) and second (July 2015) report, which were associated with the Commission's *Consultation Paper* (30 January 2015) and *Report* (14 September 2015), respectively.

at times, cultural abuse. They preferred plausibility as the evidence standard, and they desired high monetary payments to provide survivors a better life.

Nicky Davis of SNAP replied to the Chair's question about the purpose of a payment this way: 'The answer to that is completely individual. It really doesn't come down to the amount. For some people, it has been that they have needed to pay off a debt or they have wanted to give some money to their children … There are all sorts of things. But it's something that the survivor has to spend some time … thinking about: *what is going to make a difference to my life?*' (Royal Commission, 25 March 2015: 13611; emphasis added.) Here we see that Davis has in mind how justice is achieved for survivors in *spending a payment* that can 'make a difference', as compared to a scheme planner, who is likely to have in mind a particular purpose (or purposes) in *deciding to make* or *offering a payment*.

Noelle Hudson, of CREATE Foundation (a national body representing children and young people in out-of-home care), responded to the Chair's question, 'What would be seen to be the purpose of a redress money payment?' in a similar fashion, saying: 'We have found through our research that young people exiting care have had very poor educational outcomes … have been in homelessness and have experienced a reliance upon welfare. An investment in their life—to help them assist to transition to a better life, to access good educational outcomes or employment outcomes—would be a wonderful use for this money.' (Royal Commission, 27 March 2015: 13794.) Like Nicky Davis, Hudson imagines the ways in which a payment could be used (optimally) as an investment in making a better life.

Karyn Walsh, CEO for Micah Projects, called for a wider definition of abuse to include physical and emotional abuse. She drew attention to information collected from survivors by Lotus Place: 'We had listening posts of 162 people who came through the centre [Lotus Place] and gave their views on a range of issues … It is really complex, and people are coming from very many perspectives and experiences in their life.' (Royal Commission, 25 March 2015: 13577–8.)

Of the 162 posts, four directly mentioned money amounts; and here is what they said (Lotus Place 2015: 8–10): '$65,000 is reasonable for [an] average payment'; 'Should start at $100,000'; 'Everyone should get a decent and fair amount, and [it] should be the same, e.g. $400,000'; and 'Redress payment should be $200,000 to $2 million'. Compared to the average amounts received by survivors in previous redress schemes and with one exception, the proposed amounts are very high.

Similarly, Leonie Sheedy, CEO of Care Leavers Australia Network (CLAN), reported that her organisation 'asked care leavers what they think is a fair amount of redress'. She said that 'from almost 370 responses received so far, the most nominated amount was between $100,000 and $250,000. Notably, 11 per cent said no amount would ever be enough, and 36 per cent couldn't nominate any amount of compensation' (Royal Commission, 25 March 2015: 13786). I note that an average of A$100,000 to $250,000 as a monetary payment has no precedent in any redress scheme for institutional abuse to date.

Caroline Carroll, of the Alliance for Forgotten Australians (AFA), said that 'people have said that it is not about the money, but it is the only thing that churches and charities and governments … can do to say sorry'. She went on to say that 'they have said sorry, but nothing has changed in the lives of most Forgotten Australians. They are still living below the poverty line; they have still got drug and alcohol issues' (Royal Commission 26 March 2015: 13759). Thus, in Carroll's mind, a money payment is a mechanism that can give a real effect to an institution's apology, and it may go some way to changing a survivor's financial status and mental health. Written submissions by the AFA and Open Place, a Melbourne-based community service for 'Forgotten Australians', said that a financial payment is appropriate to 'enable survivors to build a fulfilling life' (AFA 2015: 12) and 'to allow a survivor to have life experiences that otherwise would not be possible' (Open Place 2015: 6). Unusually, this submission also said that a payment should 'hurt the institution and … make the point that failure to learn the lessons of the past will continue to hurt the institution financially' (Open Place 2015: 6). This assertion was not queried during the Commission's public hearings.

The Coalition of Aboriginal Services, based in Victoria, gave plausibility as the standard of proof, noting that 'the preference was for the highest average payment [of A$80,000], with a maximum of $200,000', and that 'being part of the Stolen Generations and suffering from cultural abuse' should be considered under 'distinctive institutional factors' in the Commission's matrix (Royal Commission, 25 March 2015: 13599). Tom Allen, speaking for Kimberley Community Legal Services in Western Australian, said that '… we've called for a high-end monetary payment or an upper cap above what's been published … We say [a $200,000 cap] would be insufficient.' The reasons he gave are as follows: 'Number one, we say one of the purposes of the monetary payment is to provide a substantial difference in people's lives, and number two is to recognise the high cost of living in the Kimberley. If a substantial difference in somebody's life is that they're able to be housed, then

that, we submit, reflects upon what the cap should be.' (Royal Commission 25 March 2015: 13616.)

A potential problem with Allen's argument is that he views the upper cap of a payment to be unrelated to the severity and impact of the abuse. Instead, the purpose of a payment—to make a substantial difference to a survivor's life—must consider the high costs of living in some areas. This reverses the way in which individualised redress schemes normally calculate how much to pay; that is, it is based on an assessment of abuse severity or abuse severity and impact. Many survivors would also challenge Allen's ideas because, they would argue, payments should not reflect where a survivor lives.

Contrary to others, Julian Pocock, of Berry Street, a community organisation in Melbourne, did not use a forward-looking purpose, and said: 'The [proposed] payments in the redress scheme … are payments that should be there to acknowledge the harm that has been caused and provide some measurable expression from institutions that they do truly regret what has happened.' (Royal Commission, 27 March 2015: 13826.) Thus, in part, like Carroll's comment above, Pocock views a payment as giving effect to an institution's regret for the harm that occurred.

Discussion and implications

Monetary payments are one element in redress schemes, which typically include the provision of counselling, other benefits or services, and apologies. The problem with money is that, unlike other redress elements, it has a market meaning. Sunga (2002: 40) argues that unless a symbolic meaning is given to a payment, 'the money will tend to indicate some form of exchange for abuse injuries'. One consequence is that, if survivors do not receive a money payment that reflects what they feel they (and their abuse) are 'worth', they will be angry and disappointed. To address this problem, Sunga (2002: 60) suggests that scheme planners should articulate a clear relationship of meaning to accompany a payment and moreover, that the payment should be seen as symbolic: 'a form of recognition for injury and a solace for pain'. Such a 'clear relationship of meaning' has not been made in previous Australian and Canadian schemes, and indeed all the individualised, tiered schemes have carefully 'calibrated' money payments to injury and impact (Winter 2009: 55).

Although the Commission's *Consultation Paper* (30 January 2015: 134) suggests that the purpose of a money payment should be linked to the amount paid ('a smaller payment might … be accepted as an "acknowledgement",

while a larger amount might be expected as a "tangible recognition of the seriousness of the hurt and injury""), little consideration was given in the *Consultation Paper*, public hearings or calculations by Finity of how this idea would translate in practice. In addition, sole attention was given to an individualised scheme, with a matrix similar to Ireland's *RIRB* and with average payments of A$50,000 to $80,000. More consideration might have been given to equality-based formulas and what would be viewed as an adequate level of a base or recognition payment, and to a scheme that combined equality-based and individualised assessments.[18]

The discussion of monetary payments in the submissions and hearings before the Royal Commission gives me cause for concern for several reasons. First, survivors' aspirations for high money payments, using plausibility as the standard of proof, have no precedent in any previous redress scheme. Relatedly, the average amounts they and their legal representatives have proposed are very high, higher than any previous redress scheme. Expectations will need to be realistic and have some relationship to precedent. Second, in the final design of a redress scheme, it will be crucial to establish agreement on the purpose (or purposes) of a monetary payment. This will require charting a path through the competing interests and expectations of institutions and their insurers, as well as survivor, community and legal groups in designing a scheme that is 'just, practical and affordable' (McClellan 2015: 19).

The final design and implementation of a redress scheme will be highly complex because of the breadth and variation of 'institutional contexts' and the Commission's recommendation to create a national redress scheme, to be led by the Australian Government. In March 2015 the Abbott administration did not support a national scheme. However, because the report was released on the same day as a change in party leadership (14 September 2015), there is hope that its recommendation to establish a national scheme will be met more favourably by the Turnbull administration. A letter by state and territory attorney-generals (25 September 2015) has urged the federal attorney-general to give the 'earliest possible indication from the Commonwealth as to whether it intends to establish and fund a national redress scheme' (N. Berkovic, 'Speedy response to abuse redress scheme demanded', *Australian*, 25 September 2015).

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18 The Royal Commission's *Report* (14 September 2015) proposes a matrix, but not a scheme that combines equality-based and individualised assessments. It anticipates a minimum payment of A$10,000, a maximum of $200,000, and an average of $65,000. Of the 100 points in the matrix, 20 are allocated for elements other than abuse or its impact.

Consideration must be given to whether members of the general public will support redress for institutional abuse as being the fair and right thing to do. The total estimated cost of a national redress scheme is $4.01 billion over ten years (Finity 2015: 7), and if federal and state/territory governments are the funders of last resort, they could pay 47 per cent of the total redress budget (Finity 2015: 64). Governments may not have the appetite for the cost of redress, and members of the public might question why a particular group of individuals deserves redress.

Survivor groups will need to find effective ways to communicate to the public what their aspirations are for justice and redress. Monetary payments can have varied purposes: recognition of past abuse and wrongs of institutions; an institution's giving meaningful effect to an apology; assistance to survivors in 'healing' and 'recovering' from abuse; and making a substantial and tangible difference in survivors' lives, including the ability 'to live a productive and fulfilled life' (McClellan 2015: 3). Of these, the last is often given by survivors, but its implied social welfare purpose will need to be carefully crafted and explained to persuade the public.

Chapter 13

NEW REGULATORY PARADIGMS FOR PREVENTING INSTITUTIONAL CHILD SEXUAL ABUSE

Lessons from corporate crime and white-collar criminals

Simon Bronitt

> I also expected to receive counselling and compensation. Compensation was not a big part for me, but I just knew that I might get words that were empty if I didn't go that step and ask for compensation.
>
> Joan Katherine Isaacs, Royal Commission, 9 December 2013, 2521

> I would go to my grave happy if I could see justice be done. To me, this means the Christian Brothers admitting the wrong they have done and doing something about it.
>
> Clifford Raymond Walsh, Royal Commission, 29 April 2014, WA1593-WA1594

The Royal Commission into Institutional Responses to Child Sexual Abuse (hereafter the 'Commission') is destined to be a landmark in Australia's long journey to acknowledge and remedy the historical and ongoing sexual abuse of children across a wide variety of institutional settings. As the Chair of the Commission, the Hon. Justice Peter McClellan AM, observed in a public

lecture (McClellan 2014), the Commission under its terms of reference (Royal Commission 2014) is required to focus its inquiry upon 'systemic issues' related to institutional child sexual abuse (hereafter ICSA): 'Drawing upon the experience of individuals and institutions and our research work, we are required to make recommendations that will provide a just response for people who have been sexually abused and ensure institutions achieve best practice in protecting children in the future. We do not have any power to provide compensation or initiate prosecutions.'

This systemic focus has already generated a significant agenda for research, policy development and law reform.[1] Importantly, the Commission's work is being informed by the testimony of individual witnesses recounting their experiences of abuse and the myriad institutional failures to prevent, report or remedy their abuse. The purpose of this chapter is not to offer a commentary or assessment of the Commission's work to date, but to think more deeply about what form the 'just response' proposed by Commissioner McClellan should take. As the opening quotes of two survivors of ICSA testify, seeking justice is a complex task involving distinct, competing and sometimes even contradictory interests (see Daly 2014a and Daly 2016 in this volume).

The Commission has usefully opened new spaces for thinking about what 'doing justice' involves and, more specifically, identifying appropriate and effective models of legal responsibility for, and responses to, ICSA. Commissioner McClellan in the above speech (McClellan 2014) noted that the eminent criminologist and legal scholar Professor Arie Freiberg (who had been retained to assist and advise the Commission on its research agenda) had posed the following key question for consideration: '… if there are significant failures in an institution's response to child sexual abuse, or if there is an institutional culture that encourages or tolerates abuse, should the institution be criminally liable, in addition to the individual abuser?'

Commissioner McClellan observed that creating new forms of institutional criminal responsibility required not only careful legislative drafting but also thoughtful consideration of the types of 'sanctions … [that] might best bring about changes within the institution to better protect children' (McClellan 2014). This chapter is, in part, a response to these questions posed by Professor Freiberg and Commissioner McClellan.

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1 The Commission, advised by a Criminal Justice Working Group, has commissioned research on the impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases, an extensive sentencing research study, and research on the use of alternative mechanisms for taking a complainant's evidence (Royal Commission, 30 January 2015: 73–6).

As the chapters of this book reveal, scholarly and policy debates about ICSA traverse many legal binaries: civil versus criminal law; retributive versus restorative justice; punishment versus prevention; individual versus institutional responsibility; and even legal versus non-legal responses. As I shall explore below, many of these debates have become siloed, restricted to assessing the advantages and disadvantages of new measures or strategies within a particular legal domain. Reflecting this tendency, the Commission has examined civil liability issues relating to redress and civil litigation separately from criminal justice issues (Royal Commission, 30 January 2015).[2] This chapter, by contrast, seeks to traverse these binaries, sketching a new regulatory framework that responds to ICSA in a more systemic fashion, one that places legal accountability for such harm on the shoulders of institutions as well as individual perpetrators, while also assigning new duties upon institutions (which are legally enforceable) to compensate for past harm and to take steps to prevent ongoing and future harm.

Drawing lessons from corporate criminal responsibility, regulation and governance, the model of legal accountability proposed here recognises the central importance of organisational responsibility for ICSA. The model outlined here is not novel; it was developed in Australia in the 1990s to remedy the limitations and restrictive scope of corporate criminal liability under traditional common law models.

This new model of institutional justice traverses both the civil and criminal law, melding restorative justice and compensation with selective and strategic uses of prosecution. In relation to the latter, lessons are drawn from the United States and United Kingdom where regulatory agencies are disposing of a wide range of corporate criminality through entering into agreements with corporations to terminate or defer prosecution under specified conditions. Under the terms of a deferred prosecution agreement (hereafter 'DPA'), the failure of the corporation to abide by the conditions (which may extend to an apology, compensation and adopting prevention strategies) may have legal consequences including revival of the prosecution, which may lead to conviction and ultimately punishment. The question explored in this chapter is whether this hybrid model of regulation offers better prospects for holding organisations accountable under the law for the harms caused by ICSA and, most importantly, establishing effective systems for the prevention, monitoring and detection of future offending.

2 The *Redress and Civil Litigation Report* is technically an interim report, although the Commission noted that it contained its final recommendations on the topic (Royal Commission, 14 September 2015: 2).

The chapter is organised into two discrete sections. The first section, 'Institutional responsibility in the criminal law', provides an overview of how the criminal law imposes liability upon organisations (such as corporations, unincorporated associations and other legal entities) as distinct from 'natural persons'. The second section, 'Negotiating justice with institutions responsible for child sexual abuse', examines the regulatory dilemmas that arise in pursuing criminal responsibility against organisations that perform important functions within the community. As the regulatory failures that led to the Global Financial Crisis (GFC) demonstrate, the policing of global financial and banking corporations presented serious challenges for regulators. Corporations considered by some to be 'too big to fail' have led corporate and securities regulators in the United States and United Kingdom to experiment with a range of diversionary justice measures including the use of civil settlements and, more recently, DPAs. Some of these measures have been authorised by legislation, while others have simply evolved through administrative changes to existing practices and policies guiding enforcement action. The chapter concludes with an assessment of the prospects, payoffs and pitfalls of applying some of these innovative 'hybrid' forms of justice to tackling the problem of ICSA.

The rise of institutional responsibility in the criminal law

As a legal person, corporations famously were said to possess 'no soul to be damned and no body to be kicked' (Coffee 1981). Yet even Baron Thurlow, the eighteenth-century English judge said to have coined this oft-cited phrase, concluded that this was not a desirable state of affairs for the laws of England, concluding that 'by God, it ought to have both' (Clarkson 1996: 557). Modern consensus confirms that there are many good reasons, as a matter of principle and policy, to subject corporations to criminal liability (Findlay, Odgers and Yeo 2014; Wells 2001; Fisse and Braithwaite 1993). The alternative position, conferring blanket impunity for corporations, not only seriously challenges the rule of law but also fails to address the myriad social, political and economic harms caused by corporations (Passas 2005).

The history of the criminal law has been one focused largely, although not exclusively on individual human beings or 'natural persons'. While a corporation may be treated as a 'legal person', holding property rights and amenable to civil action, the application of the criminal law to corporate entities presented challenges for the common law, specifically that

corporations could not be tried for any offence whose punishment was 'corporal' in nature (e.g. flogging, death or imprisonment) as opposed to imposing a pecuniary penalty such as a fine (Bronitt and McSherry 2010: 176; Lanham et al. 2006: 411–12). This rule, which significantly restricted the scope of corporate liability to minor regulatory offences, has been reversed by statute in most jurisdictions.[3]

The idea that a body corporate could be held directly liable for offences took root slowly. The first wave of corporate criminalisation was directed to addressing the multiple harms caused by unbridled corporate capitalism during the industrial revolution (Pieth and Ivory 2011: 3, 7–8). The idea that corporations could become legitimate objects of regulation by general criminal statutes was undoubtedly facilitated by key developments in company law, including the landmark House of Lords ruling, *Salomon v. Salomon* [1896] UKHL 1, which held that the act of incorporation created a distinct legal person and had the effect of limiting the liability of shareholders and directors for debts incurred by an insolvent company. By the mid-twentieth century, the common law recognised two distinct approaches for attributing criminal liability to corporations: the first, based on vicarious liability, held the corporation strictly liable for crimes committed by its employees provided that they were acting within the scope of employment or authority (the agency model), and the second, based on direct liability, rendered the corporation liable for offences committed by its employees provided that the relevant *mens rea* (guilty mind) could be located within the 'directing mind or will' of the corporation, typically the board of directors, managing directors or other senior executives to whom the functions of the board had been delegated (the identification model).

There are significant limitations with these common law models of corporate criminal responsibility, not least of all the danger that senior executives are often insulated from the day-to-day operations and therefore lack the relevant *mens rea* from which corporate guilt can be inferred. Neither is fault within the corporate context typically located in the mind of just one person or group of senior executives. These limitations were addressed in the 1990s by Fisse and Braithwaite, who used insights from criminology and criminal law to conceive a new model of corporate criminal responsibility that sought to reflect the disaggregated nature of fault and responsibility

3 See *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241, where Ipp J noted that this limitation of the common law had been 'eradicated in Australia following the passage of legislation converting physical sentences and punishments into fines' (p. 266).

within complex corporate hierarchies (Fisse and Braithwaite 1993). Unlike earlier common law models, the core idea of corporate criminal responsibility was located not within a single corporate organ, senior officer or employee, but more broadly within the 'culture' of the body corporate.

This model has been highly influential in Australian law reform and policy circles.[4] The Model Criminal Code Officers Committee, tasked with drafting the principles of responsibility for a Model Criminal Code in Australia, drew on these ideas in redrawing the principles of corporate criminal responsibility. Although not enacted in all jurisdictions, this approach proposed for the Model Criminal Code has been adopted in the federal criminal law, as well as the law of the Australian Capital Territory and the Northern Territory (*Criminal Code* 2002 (ACT) Part 2.5; *Criminal Code Act* 1983 (NT) Sch 1, Part IIAA, Div 5). Section 12.2 of the *Criminal Code* (Cth) provided where the physical element (*actus reus*) of an offence is committed by an employee, agent or officer of a body corporate, acting within the scope of employment or authority, that element must be attributed to the body corporate. Section 12.3(1) provides that the fault element (*mens rea*) may be attributed to a body corporate where it has authorised or permitted—expressly, tacitly or impliedly—the commission of the offence. Section 12.3(2) then provides that authorisation or permission may be established in one of four ways:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence, or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence, or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

4 Although widely discussed in international academic and policy circles, the model has not been adopted in the United States or United Kingdom (Allens Arthur Robinson 2008). That said, corporate culture may be a relevant factor for juries to consider when determining breaches of duty under the *Corporate Manslaughter and Corporate Homicide Act* 2007 (UK) c 19.

The first two models of corporate fault attribution, paras (a) and (b) above, reflect existing common law models based on agency and identification. But as noted in a recent report prepared for the Commission, *Sentencing for Child Sexual Abuse in Institutional Contexts* (hereafter 'Sentencing Report') these two grounds are unlikely to arise in the context of ICSA, since rarely will the conduct of the board members or high managerial agents be accompanied with the requisite mental state of intention, knowledge or recklessness (Freiberg et al. 2015: 243).

Clearly then, the two 'culture-based' models of corporate fault attribution, paras (c) and (d) above, are more likely to arise in the ICSA context. The *Criminal Code* (Cth) defines corporate culture 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 take place' (s 12.3(6)). Since many of the regulatory offences that potentially apply to corporations may be satisfied by negligence, the Code further clarifies that corporate forms of negligence may be evidenced by inadequate corporate management, control or supervision of the conduct of one or more of the corporation's employees, agents or officers or by the failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate (s 12.4(3)).

The corporate culture provisions in the *Criminal Code* (Cth), although not tested in the courts, have been criticised as 'unworkable'. As the Sentencing Report above noted (Freiberg et al. 2015: 244): 'There are problems in proving the existence of a culture, difficulties in applying it to organisations that may be widely dispersed and which have fragmented management structures and varying sub-cultures, and the danger that "official" cultures may not reflect day-to-day "views, attitudes, habits and proclivities" within an organization.' The Report speculated that these difficulties with the provision lie behind the decision not to apply the default principles of corporate criminal responsibility in the *Criminal Code* (Cth) to offences in the *Corporations Act* 2001 (Cth) and the *Competition and Consumer Act* 2010 (Cth) (Freiberg et al. 2015: 244).

To address these perceived weaknesses, the Sentencing Report proposed the enactment of a new organisational offence called 'Institutional Child Sexual Abuse' (Freiberg et al. 2015: 244–5). This proposed offence would only apply to organisations (not individuals) in the following situation: (1) where a person associated with an organisation has been convicted of an offence of child sexual assault (CSA); and (2) that organisation (or high managerial agent) recklessly authorised or permitted its commission.

Significantly, the fault element for this offence mirrors closely the principles of corporate criminal responsibility in the *Criminal Code* (Cth), including reinstating into the offence the culture provisions in almost identical terms to s 12.2(2)(c), (d) above (Freiberg et al. 2015: 245). The organisational offence would be supplemented by a number of personal liability offences, applying to those found negligently responsible for the commission of child sexual abuse offences (Freiberg et al. 2015: 235–7) or who negligently failed to remove a risk of child sexual abuse (Freiberg et al. 2015: 239–40). Under the proposed ICSA offence, an organisation may raise as a complete defence that it had put in place 'adequate corporate management, control or supervision' for associated persons (Freiberg et al. 2015: 244–5).

Another potential obstacle to applying corporate criminal responsibility to ICSA relates to legal personality. In some cases, there may be doubts whether a defendant organisation (alleged to have engaged in crimes of the type exposed by the Commission) falls within the definition of 'legal person' or 'body corporate' applied by the legislation. In the field of civil liability, the Australian courts have struggled with the precise legal status of religious and charitable organisations, with one leading case determining that the Catholic Church, as an unincorporated entity, is not amenable to civil suit in its own name (see *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v. Ellis* (2007) 70 NSWLR 565). The precise scope of the so-called *Ellis* defence is hard to determine owing to the significant diversity in how religious and charitable organisations are legally constituted. Although disputing legal personality may result in the denial of institutional civil liability, there is no evidence that organisations in Australia have been deliberately structured to avoid liability for ICSA (Law Council of Australia 2015: 11–12).

The position is not much better in the criminal law sphere. For the purpose of federal criminal law, the Dictionary in the *Criminal Code* (Cth) defines 'person' as not limited to a natural person, but extends to include 'a Commonwealth authority that is not a body corporate'. This expanded definition, the Dictionary notes, is further supplemented by section 2C(1) of the *Acts Interpretation Act* 1901 (Cth), which provides that 'person' includes a 'body politic or corporate as well as an individual'. While 'body politic' and 'body corporate' are not further defined in the *Criminal Code* (Cth), the latter concept is presumably narrower than 'organisation'.

Indeed, there is a precedent for adopting an expanded definition of 'person' to include a much wider range of organisations. In Australia, the term 'organisation' has been applied in federal criminal law specifically to

offences relating to membership of a terrorist organisation.[5] In the United Kingdom, legislation provides that parties to a DPA include a 'body corporate, partnership or unincorporated association, but may not be an individual' (*Crime and Courts Act 2013* (UK) sch 17, para 4(1)). Indeed, for the purpose of the organisational offence of ICSA, the Sentencing Report proposed a broader definition that extended to 'any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described' (Freiberg et al. 2015: 244).

Notwithstanding this ongoing controversy over legal personality for the purpose of civil liability, the concept of a 'personhood' in the criminal law can be statutorily refined to bring a wider range of institutions expressly within the scope of ICSA offences. To resolve potential uncertainty, Australian legislatures should review, clarify and amend as necessary the definition of 'person' for the purpose of criminal liability for ICSA offences—it would be manifestly unjust for institutional liability to be contingent upon the legal status of the particular defendant organisation.

The Sentencing Report has provided a wide-ranging review of sentencing options, drawing on ideas from reactive organisational fault, restorative justice and responsive regulation (Freiberg et al. 2015: 245). However, the Report paid scant reference to potential application of DPAs in relation to ICSA (Freiberg et al. 2015: 250 at fn 822). By contrast, the next section of this chapter focuses on the regulatory potential of strategic non-prosecution of institutions to deliver to victims of ICSA the 'just response' envisaged by Commissioner McClelland above and to bring about the type of organisational change that will ensure best practice in protecting children in the future.

Negotiating justice in institutional child sexual abuse cases: prospects, payoffs and pitfalls of deferred prosecution agreements

As noted above, the GFC presented a range of challenges for the regulators of the financial and banking systems. Rather than prosecute multinational

5 For the purposes of Division 100 of the *Criminal Code* (Cth), which deals with terrorism offences, organisation means (a) a body corporate; or (b) an unincorporated body (s. 100.1). The definition applies 'whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation'.

corporations for breaches of corporate and securities law, regulators began to experiment with a range of alternative strategies. Some jurisdictions, such as Australia, already had in place an established system of civil penalties and enforceable undertakings policed by its corporate watchdog, the Australian Securities and Investment Commission (Comino 2015, 2014). Other jurisdictions, including the United States and United Kingdom, have sought to resolve the regulatory dilemmas over the policing of corporate wrongdoing through negotiating agreements to settle outstanding civil action and/or suspend criminal prosecution. The latter type of agreement, which is my focus here, is commonly known as a DPA.

DPA is an umbrella term that belies the significant diversity in how these agreements are legally conceived across jurisdictions (*qua* administrative immunity, legal indemnity or civil settlement) and the range of conditions, duties and consequences that may flow from organisations entering into, and potentially breaching, such agreements. The DPA typically defers prosecution on the condition that the corporate wrongdoer accepts responsibility and agrees to make amends for the harms caused and implement reforms to corporate governance that would prevent and deter future offending. The question posed here is whether the DPA could be applied to good effect in ICSA cases.

A key policy question is whether ICSA survivors and the broader public are prepared to forego (or, more precisely, to forestall) prosecution and trial of organisations as the 'first line' response for ICSA. In relation to corporate crime, the DPA presents as an attractive option, avoiding the potential high costs and delays associated with prosecuting white-collar crime.[6] Post-GFC, the DPA has become the regulatory 'tool of choice', routinely used by the US Department of Justice and Securities Exchange Commission. There are many good reasons to negotiate a DPA with putative corporate defendants: it avoids the risk that prosecution may precipitate corporate failure, which would affect innocent parties (including shareholders and employees) unfairly and damage confidence in national markets and, in some cases, the global economy.[7] From the standpoint of the victims of corporate crime, the DPA may encourage institutional self-reporting and offer swifter access

6 It has been estimated that costs of investigation and prosecution in a case involving a late guilty plea on average takes eight years and costs the Serious Fraud Office in the UK £1.6 million (Bisgrove and Weekes 2014: 418, Mazzacuva 2014: 251).

7 This risk, known as the 'Arthur Andersen effect', was exemplified by the high-profile collapse in 2002 of the US-based global accountancy firm following its conviction for obstruction of justice arising from its involvement in the destruction of evidence in the *Enron* case (Mazzacuva 2014: 250).

to compensation. From a crime prevention perspective, the DPA provides an enforceable organisational mandate for governance reform and enhanced compliance programs with the corporation. It also offers the regulatory authority a pathway to recoup (at least part of) the investigation and enforcement costs incurred (Bisgrove and Weekes 2014: 418).

There are pitfalls, however. While there are payoffs for the parties to the DPA, there is a danger that their routine use may be viewed as the state engaging in the 'sale of justice', applying leniency to otherwise culpable organisations in exchange for monetary payments and other 'in-kind' forms of redress. From the legality standpoint, this differential approach to dealing with 'crimes of the powerful' is difficult to reconcile with the rule of law and the principle of 'equality before the law' (Bottomley and Bronitt 2011: chapter 2). There is also some evidence in relation to corporate crime (specifically occupational health and safety offences) that public opinion favours harsher punishments for corporations than individuals, rebutting the myth that the community may be more lenient in its attitude to the punishment of institutions (Freiberg 2015: 253–5). From the ethical standpoint, commentators have also pointed to the corrosive effect of such 'legal bribes' and how expediency forces compromises upon state officials responsible for public prosecutions (Bisgrove and Weekes 2014: 418). There is a real danger that law enforcement agencies will themselves be compromised, especially during eras of growing public sector austerity, by an overdependence on DPA-generated revenue streams.

Although undoubtedly expedient, the use of a DPA reinforces a view that corporations 'too big to fail' have now become 'too big to jail' (Garrett 2014).[8] The use of a DPA also sends a mixed policy message about corporate crime and impunity. On the one hand, the public may view payments made under the terms of a settlement or DPA as yet another corporate 'payoff', tantamount to a 'legal bribe' offered by corporate offenders to state authorities to defer or discontinue prosecution. On the other hand, the corporation may view such payments in transactional terms as simply another 'cost of doing business' (Janis 2008: 4; Stevenson and Wagoner 2011: 778). Both perceptions weaken the moral authority of the law and its potential deterrent

8 In his recent book, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Austin: Harvard University Press, 2014), Garrett called for tougher law enforcement and penalties: in his opinion, it is only the criminal justice system, not the civil law, that possesses the moral power to condemn, shame and ultimately change the harmful behaviour of powerful global corporations.

effect, both general and specific. Finally, restitution required under the DPA might not benefit those who have suffered most harm by the corporation.

The DPA is a product of the culture and practices of US prosecutors routinely 'striking a bargain' with defendants and hitherto has not been a routine feature of the criminal justice system in Australia or the UK. That said, the legal framework for entering into such negotiations in common law systems (relating to cautions, conferencing, charges, pleas and penalties) rests upon the inherent discretion that inheres within the offices of both the police constable and prosecutor (Bronitt and Stenning 2011). Determining whether a particular prosecution serves the 'public interest' involves weighing a number of considerations. High-profile corporate scandals place intense political and media pressure upon the prosecution decision-making process; undoubtedly similar pressures would be placed on prosecutors in relation to cases of ICSA. To bolster the independence and legitimacy of prosecution decision-making in these 'hard' cases, guidelines play an important role.[9] Public perceptions of corporate impunity can be addressed through adopting a clear legislative mandate for the use of the DPA, combined with better transparency and administrative guidelines governing prosecution decision-making (Bisgrove and Weekes 2014).

The introduction of the DPA into ICSA cases would require sensitive explanation and public education. Although the philosophy of justice underlying DPAs is not well articulated, it is directed primarily to preventive aims; the punitive aim is triggered only where the defendant institution has breached the terms of its DPA (Mazzacuva 2014; Husak 2014; Greenblum 2005: 1867). While the DPA may involve an acknowledgement of institutional responsibility for the ICSA, it is important that the public understand that the agreement is not a court-sanctioned verdict of guilt or sentence involving punishment. The DPA is a voluntary agreement between an institutional party (putative defendant) and public officials exercising prosecution powers; as such, an agreement to make a payment to the state (or to a third party, whether it be a victim, family member or charity) is neither a penalty nor forfeiture order.[10]

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9 Supplementary guidelines have been issued in the UK to guide foreign bribery prosecutions: Serious Fraud Office UK, 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions' (London: Attorney General's Office, 2010), <www.sfo.gov.uk> (retrieved 25 November 2015).

10 Strictly speaking, these consequences should not be viewed as a form of 'civil penalty', which in Australia has a specific meaning under corporations law (Comino 2015).

That said, the benefit of the DPA is its flexibility, pursuing multiple objectives through one process in a cost-effective manner: the DPA allows pursuit of restorative aims, obligating corporations to engage in acts of restitution, as well as provide a formal platform for public apologies to victims (something that might not happen in either civil or criminal trials). Most significantly, in terms of prevention of future offending, the DPA can put into place systems of external oversight and monitoring directed to ensuring that the organisation prevents the commission of similar or related offences in the future. Unsurprisingly, the DPA is garnering interest and support from regulatory, legal and private sectors on both sides of the Atlantic.

The advent of DPA schemes has raised concern in some quarters, particularly that the process involves state officials 'bargaining for justice' in high-profile cases. This concern can be allayed, at least in part, by providing an unambiguous legislative mandate and clear guidelines to regulate how state officials negotiate a DPA. Issues of breach must also be addressed by an independent person exercising an oversight function. Importantly, to maintain public confidence, the whole process must be subject to greater transparency than usually applies to negotiations between the prosecution and putative defendants.

In the United Kingdom, independent oversight of the DPA is provided by legislation requiring that the negotiations and terms of the final agreement be approved by a judicial officer of the Crown Court. Judicial involvement in the DPA process, however, would be viewed by some as an illegitimate intrusion into the area of executive power. In Australia, judicial involvement in approving the DPA may precipitate a separation of powers argument, trenching upon the constitutional limitation implied from Chapter III of the Australian Constitution that judges must not be compelled to exercise powers that properly should be vested in the executive (Stellios 2010). To ensure compatibility with judicial independence, the most straightforward solution of course is to vest the oversight function in former judicial officers, or some other independent statutory office-holder.

Conclusion

As this chapter demonstrates, there is an urgent need to move beyond individual punitive paradigms of criminal responsibility for ICSA. The first section, 'Institutional responsibility in the criminal law', examines trends in the modern criminal law towards wider organisational models of criminal responsibility. It goes on to assess what further reforms are required to ensure

that organisational cultures that have for many decades condoned, concealed and denied ICSA are properly held accountable to the criminal law.

The second section, 'Negotiating justice in institutional child sexual abuse cases', turns to responses, specifically the potential application of deferred prosecution agreements, drawing useful lessons from new directions in the policing of corporate crime and white-collar criminals. In particular this chapter offers a critical assessment of the prospects, payoffs and pitfalls of using agreements to defer prosecution under certain conditions to deal with ICSA. The Commission recently released two major reports examining the civil and criminal justice issues related to ICSA (Royal Commission 30 January 2015; Freiberg et al. 2015). Combined, these reports provide a 'smorgasbord' of options for reform across the civil and criminal law divide. What is now needed is that the Commission, in its final report adopts a 'systemic response' to ICSA, one that traverses conventional binaries of civil versus criminal law; retributive versus restorative justice; punishment versus prevention; individual versus institutional responsibility; and even legal versus non-legal responses. In preparing its final report, the Commission should give further consideration to application of the DPAs to ICSA, a new hybrid response that integrates (private) civil justice with (public) criminal justice.

In terms of payoffs, the DPA provides a broad basis for redress and compensation for a much wider category of persons harmed by ICSA. Moreover, by suspending criminal charges, the state has not unconditionally abandoned prosecution in favour of settlement. Rather, the DPA, operating in the 'shadow of the civil and criminal law', maintains the vision of achieving justice within the law. In this way, the DPA avoids the legitimacy deficit of extra-legal 'truth and reconciliation' commissions and 'alternative' systems of redress and compensation that have been applied in post-conflict societies.

In terms of pitfalls, the DPA poses risks to legitimacy as the discretion to defer enforcement action, although supporting the public interest, may cultivate public perceptions of leniency towards institutional forms of criminality. Advocacy of a discretionary justice model is challenging in the context of ICSA, since there is always a strong gravitational pull towards 'zero tolerance' strategies demanding mandatory reporting, investigation, prosecution and sentencing for sexual predators and organisations that have shielded or protected them.

Public concern about the state negotiating a DPA with a 'culpable' organisation is not insurmountable, although it would require state officials administering the DPA system to establish its legitimacy by publicly

explaining its aims, safeguards and beneficial outcomes. Most importantly, in relation to the latter, the public must understand that a DPA offers improved mechanisms for ongoing monitoring of the behaviour and culture of institutions tasked with caring for some of the most vulnerable in our society. Such an approach provides a form of preventive justice which, as Blackstone, writing in the eighteenth century, noted, 'is upon every principle, of reason, of humanity, and of sound policy, preferable in all respects to punishing justice' (Blackstone 1765: 251).

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THE SEXUAL ABUSE OF CHILDREN

RECOGNITION AND REDRESS

EDITED BY YORICK SMAAL, ANDY KALADELFOS AND MARK FINNANE

HOW CAN WE seek justice and redress for the sexual abuse of children and better prevent its occurrence? This work brings together the thoughts on this question advanced by leading scholars from a range of disciplinary backgrounds. These thinkers—some also professional practitioners—provide new perspectives on sanctioned and informal responses to abuse in religious, educational and total institutions, as well as to abuse carried out in non-institutional settings. *The Sexual Abuse of Children* will be a valuable resource for researchers, students and those who deal with related issues in professional contexts.

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