Response to ALRC Discussion Paper 87: Corporate Criminal Responsibility

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Proposal Two: The essence of criminal law

I greatly enjoyed the arguments about which contraventions by corporations can and should be designated as criminal offences. The ALRC has done an excellent summary of some of the academic literature in this area. I support the idea that criminal law has an expressive function and communicates right from wrong. The law routinely classifies conduct, defines action, interprets events and evaluates worth; it then sanctions these judgments with the force and authority of law.[1] Criminal liability carries 'a formal and solemn pronouncement of the moral condemnation of the community'.[2] Conviction carries with it serious consequences and social stigma. It expresses condemnation: it is not about just wearing a penalty for breaking the law but opprobrium. This expressive aspect of the law has value.[3] Moreover, it has been suggested by theorists that criminalising corporate conduct/failures has specific expressive value: '[d]eterring inefficient conduct is one socially desired objective, but repudiating the false valuations embodied in corporate wrongdoing is another'.[4] Accordingly, the fact of condemnation (or lack thereof) is itself significant.

The law asserts models of right and wrong, good and bad, and this assertion is enforced with the imposition of sanctions. Theorists have recognised and argued that the form of the law will affect, reflect and reinforce perceptions of the morality of a particular practice or behaviour. For example, both Duster (1970) and Manderson (1993) have undertaken analysis of drug laws in different jurisdictions and have argued that a change in the legal status of drug laws leads people to think of an activity as immoral even though they had not thought so previously. Immoral connotations in relation to illicit drugs developed through a process of social stigmatisation of drug users, by shifting from regulation by the free market to doctors and then to police and criminal justice agencies. The intersection of law and morality has also been argued in relation to the production of sexual identities.[5] This means that the failure to prosecute or conceptualise harms caused by corporations as culpable has its own symbolism. It suggests that 'corporations may violate criminal laws if they are willing to pay for it. Corporate crime would thus be little more than a menu of harms and prices'.[6] There is currently a disjunction between community responses to organisational failure and the response of the law. It is not simply a matter of a legal demand for culpability for a criminal conviction that does not adequately meet moral condemnation. But the structure of the criminal law has prevented any inquiry whatsoever into the ways in which the corporate organisation is at fault for facilitating, tolerating, or failing to prevent harms such

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[1] Penny Crofts, *Wickedness and Crime: Laws of Homicide and Malice* (Routledge, 2013); Penny Crofts, 'The Need to Criminalise Institutional Child Sexual Abuse' *International Journal for Crime, Justice and Social Democracy*.

[2] HM Hart Jr, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401.

[3] David Garland, *Punishment and Modern Society* (Clarendon Press, 1990).

[4] Dan Kahan, 'The Anatomy of Disgust in Criminal Law' (1998) 96(6) *Michigan Law Review* 1621.

[5] See, for example, Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge, 1995); Penny Crofts and Jason Prior, 'Intersections of Planning and Morality in the Regulation and Regard of Brothels in New South Wales' (2012) 14(2) *Flinders Law Journal* 329.

[6] Gregory Gilchrist, 'The Expressive Cost of Corporate Immunity' (2012) 64 *Hastings Law Journal* 1.

as institutional child sexual abuse and elder abuse. We need imagination and creativity to develop and structure notions of collective liability that adequately reflect and reinforce the fault and responsibility of organisations for crime.

Reforming Corporate Criminal Responsibility

Key issues to consider when reforming corporate criminal responsibility are whether the proposal establish blameworthiness (a normative account of liability) and are enforceable (a practical account of liability).

The Discussion Paper makes the argument that the corporate culture provisions have not been successful. Despite being celebrated as 'arguably the most sophisticated model of corporate criminal liability in the world',[7] the concept of corporate culture has not enjoyed practical success. For reasons unknown, the provisions have suffered statutory marginalization, specifically excluded from operating in other corporate legislation including the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth). Accordingly, there have been very few prosecutions testing the provisions for organisational responsibility in the courts. Problems associated with corporate culture provisions include uncertainty and vagueness, difficulties of proof, whether corporate culture has changed since offending behavior occurred etc.[8] I have referred elsewhere to findings of recent Royal Commissions to make arguments as to why corporate culture is relevant to offending.[9] Despite establishing blameworthiness, corporate culture provisions have failed in practical terms of enforceability.

The case for replacing corporate culture provisions with the TPA Model is not made out in the Discussion Paper. There needs to have been more information provided about how the TPA Model has applied in practice – and whether it will successfully apply to large organisations.

The proposed structure of the offence at 6.7 is also technically problematic. The defence of due diligence is a defence proper and consequently will be argued only after the physical and fault elements are made out. The defence of due diligence does have the advantage of achieving corporate blameworthiness. Rather than holding a corporation responsible for a rogue employee, the corporation will have an opportunity to point to practices and procedures in place to protect against the malfeasance. The presumption of innocence is appropriate for individuals given the disparity of power between the state and individuals. However, the reversal of the onus of proof for the defence of due diligence is a practical recognition of the power and resources of corporations. It also accepts that the corporation is most able to establish the defence, whilst a prosecution would struggle to establish the absence of due diligence.

The ALRC is correct to have concerns about the proliferation and complexity of offences. Unfortunately despite noting broad types of misconduct that could form the basis of criminalisation – including financial crimes and harms to individuals and the environment – the primary focus of the ALRC suggested reforms is upon financial crimes. This is indicated in

[7] Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002). 138.
[8] Jonathon Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 *Criminal Law Forum* 267.
[9] Crofts, 'The Need to Criminalise Institutional Child Sexual Abuse' (n 1).

part by the 'relevant inquiries' to which the ALRC refers at 1.8 – which have been focused primarily on financial malfeasance.

The ALRC Proposals fail to adequately deal with the most likely types of harms caused by large organisations - omissions. It is not clear if negligence offences under Criminal Code section 12.4(2) will remain – but it is recognised that there are shortcomings associated with the existing construction of negligence under the Criminal Code.[10] Despite this, the ALRC proposal does not consider negligence in detail.

The recent Royal Commission into Institutional Responses to Child Sexual Abuse and the ongoing Royal Commission into Aged Care highlight that many substantive harms are caused due to systemic failures by large organisations. As highlighted in both Royal Commissions, the criminal justice system has failed to engage with these forms of organisational failure. The proposed single method of attribution refers to the body corporate has 'authorised or permitted the conduct' – but the issue highlighted in in these Royal Commissions was a failure to prevent, rather than authorisation or permission.

One response in the UK has been to develop a realist approach to corporate liability, that of failure to prevent (or report) offences. The *Bribery Act 2010* (UK) specifies that an organisation will be guilty of corporate failure to prevent offences of bribery unless it can prove that it had adequate procedures to prevent the conduct (Wells 2014).[11] As required by section 9, the Secretary of State published guidance about these principles (based on the Organisation for Economic Co-operation and Development (OECD) guidelines on compliance (OECD 2010)) that would be considered for adequacy to prevent bribery: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (and training), and monitoring and review.[12] The offence occurs if the organisation fails to prevent a bribery offence by an employee or agent and cannot show it had in place adequate procedures to prevent the bribery. The corporate offence of failure to prevent bribery has since been emulated in the UK with regard to prevent facilitation of tax evasion in the Criminal Finances Act 2017, with a defence of 'reasonable' procedures to prevent the conduct. The Joint Select Committee on Human Rights has recommended the introduction of an offence of failure to prevent human rights abuses. In 2016 the UK Ministry of Justice issued a consultation paper on the wider issue of reform of the law on corporate liability for economic crime, raising a strong case for a new corporate offence of failure to prevent economic crime.[13]

[10] Clough and Mulhern (n 7).

[11] The Criminal Code also recognises a defence of due diligence where liability is based on the conduct of a high managerial agent. S 12.3(3). This defence is not available in respect of corporate culture provisions or where the fault element is negligence.

[12] See also the United States Sentencing Commission (2004: Ch. 8B2.1) which details the criteria that should be used to judge a corporate compliance program.

[13] Joint Select Committee on Human Rights, Human Rights and Business 2017: Promoting responsibility and ensuring accountability https://publications.parliament.uk/pa/jt201617/jtselect/ jtrights/443/44309.htm [191]-[193] (last visited 18 December 2017). Select Committee 67. C Wells, "Corporate Failure to Prevent Economic Crime – A Proposal" [2017] Crim LR 426, 427. Argues in favour of extending to other economic crimes.

In March 2019, the Select Committee on the Bribery Act 2010 tabled a report to the House of Lords.[14] The Committee found that the "Act is an excellent piece of legislation which creates offences which are clear and all-embracing" (3) and that 'the new offence of corporate failure to prevent bribery is regarded as particularly effective, enabling those in a position to influence a company's manner of conducting business to ensure that it is ethical and to take steps to remedy matters where it is not'.[15] The Committee commented that:

> The creation of an offence of failure by a commercial organisation to prevent bribery was an unprecedented way of enlisting the support of those most susceptible to being involved in the offence and most able to aid in its prevention. It is generally agreed to have been remarkably successful, and was described by Transparency International UK as "invaluable as a tool to incentivise improvements in corporate behaviour and for prosecutors to hold companies to account within a criminal law framework."
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> Under the Bribery Act there is no substantive requirement for commercial organisations to have anti-bribery procedures. It is not an offence to have no such procedures in place, but it is very much in a company's interest to do so; if it does not have adequate procedures in place, it will have no defence when an associated person bribes another person on behalf of the company. Companies which might previously have been unconcerned at being involved with bribery (even if at one remove) which assisted their business, now have every incentive to put in place procedures to prevent this happening.[16]

At the time of writing, five corporations had been prosecuted by the Serious Fraud Office under section 7 of the *Bribery Act* 2017. Of these, one pleaded guilty,[17] three involved Deferred Prosecution Agreements and one was contested.[18]

One of the restrictions on the failure to prevent offence is that it requires the individual commission of a specific substantive/predicate/foundational offence. In the UK, this requires that an employee or agent associated with the corporation committed bribery or facilitated the evasion of taxes. An advantage of the existing corporate culture provisions is that there is no need to create a new offence – the corporate culture provisions work with existing offences. Alternatively, a general failure to prevent offence could be created. As detailed below, the Royal Commissions (including the recent Banking Royal Commission) demonstrate that the organisations have already been recognised as sites of specific risks

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[14] Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House Of Lords, 2019) <https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf>.
[15] Ibid. 3.
[16] Ibid. 52-53.
[17] *R v Sweett Group Pty PLC* pleaded guilty in December 2015 and on 19 February 2016 was ordered by HH Judge Beddoe at Southward Crown Court to pay a fine of 1.4 million pounds together with confiscation and costs, a total of 2.25 million pounds. SFO, News Releases, 'Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction' (19 February 2016): https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced- and-ordered-to-pay-2-3-million-after-bribery-act-conviction/ [accessed 19 February 2019].
[18] *Serious Fraud Office v Standard Bank plc,* 30 November 2015, paras 6–8: Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House Of Lords, 2019) <https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf>. [accessed 21 January 2019]

and have existing legal duties. In cases of institutional child sexual abuse, elder abuse and fraud – the organisations have existing legal duties of care with regard to specific risks and mandatory reporting for breaches of these legal duties. It could be sufficient to require that the organisation failed to prevent breaches of duties of care. Alternatively, there are advantages to have specific offences which focus on the prevention of particular harms.

In relation to the Royal Commission into Institutional Reponses to Child Sexual Abuse the foundational offence committed by an employee or agent associated with the institution would clearly draw upon the cohort of child sex offences – including underage sex, grooming and failure to report. In the ongoing Aged Care Royal Commission, aged care providers that receive government funding are required to comply with responsibilities under the Aged Care Act concerning accountability, user rights and quality of care principles. The failure to prevent offence could include a broad failure to meet the existing legal duty of care that should be provided to consumers. Alternatively a specific offence of failure to prevent elder abuse could be created. The World Health Organisation defines elder abuse as 'a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.' This abuse may be 'financial, physical, psychological and sexual… [and] can also be the result of intentional or unintentional neglect.'[19]

The Banking Royal Commission highlighted a plethora of malfeasance and criminality which included but was by no means exhausted by fees for no service, charging fees to people who have died, allowing gambling addicts to increase their credit limits despite maxing out their cards, approving home loans that people could not afford, sale of worthless insurance, the failure to update medical definitions in some life insurance policies, misuse of members', applying default interest rate hikes to farms, excessive commissions, and bribes. Legal duties already exist in relation to much of this behaviour. For example, fees for no service could be prosecuted under section 1041G of the Corporations Act which makes it a criminal and civil offence for a company, or individual within it, to engage in 'dishonest conduct' relating to a financial product or service. There are already guidelines in place and mandatory reporting requirement. Financial institutions are recognised as a site of risk.

The focus of the UK offence and corporate culture provisions on *failure* is consistent with the findings of all the RC. For example, the lexicon of the reports is consistent with failure – for example, there are three 'fails' on page nine of the report 'failings of Oakden'[20] 'other

[19] World Health Organization, *Elder abuse*, http://www.who.int/ageing/projects/elder_abuse/en/. The Townsville Community Legal Centre recommended that abuse occurring within a residential aged care facility should be referred to as 'institutional elder abuse' which 'is often described as mistreatment or maltreatment or abuse of a person by or from a system of power'. The TCLS stated that institutional abuse may occur in three ways:

- Overt abuse, which might include financial, physical, sexual or emotional abuse;
- Program abuse, which may occur when the institution itself operates below acceptable conditions or through improper use of its power; and
- Systems abuse, in which an entire care system might cause mistreatment through inadequate resourcing

House of Representatives Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia* (Commonwealth Government of Australia, October 2018). 57.

[20] Ibid. 9. 30 uses of the word 'fail' in the House of Representatives Report.

failings' and 'systemic and longstanding failures of care'. All three recent Royal Commissions highlighted widespread wrongdoing due to systemic failures to prevent.

It is not enough to just establish that the foundational offence or breach of legal duty has occurred. The defence of due diligence or adequate procedures provides the organisation an opportunity to make an argument that the offences were due to a rogue employee, rather than due to failings of the organisation. Under the Bribery Act UK it is a defence for the body to prove that it had in place adequate prevention procedures. Under the Criminal Finances Act 2017, neither the relevant body nor its senior management need to have participated in, known about, or even suspected the facilitation of the evasion for the relevant body to be criminally liable. It is a defence for the body to prove that, when the UK tax evasion facilitation offence was committed, it had in place such prevention procedures as it was reasonable in all the circumstances to expect it to do so, or it as not reasonable in all circumstances to expect it to have any prevention procedures in place.[21] Unlike the Bribery Act there is no need for benefit to be intended or to accrue. Requiring proof of benefit or intention of this would ensure a nexus between the associated person's actions and the corporation, and would exclude those acting against the wishes or aims of it. This 'increases corporate accountability by incentivising the introduction of robust compliance and prevention policies.'[22] I would argue in favour of removing the causal factor in relation to failure to prevent offences in light of the findings by the Royal Commissions. For example, child sexual abuse is clearly not in the interests of a corporation. Elder abuse may indirectly be of benefit to the organisation, such as saving money through malnutrition or understaffing resulting in over-use of restraints, but a failure to prevent more adequately captures the malfeasance of the organisation. The Banking Royal Commission highlighted malfeasance that was for the benefit of the organisation (such as fees for no service; financial advisers acting against interests of client in favour of selling in-house products) but also malfeasance that was contrary to the interests of the bank (bribery, minimal deposits in childrens' bank accounts, and some fees for no service which benefitted the agent and not the bank). Accordingly it would be appropriate to exclude the requirement that the harm or breach of duty of care due was of benefit to the organisation.

In the UK, guidance has been published for both offences, using the same six principles. [23] Each is explained in some detail and they are followed by case studies explaining how the principles might apply in different hypothetical situations. The Select Committee on the Bribery Act 2010 recommended clarification of the Guidance – particularly taking into account different size of companies; and also issue of reasonable v adequate procedures.

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[21] Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12 *Law and Financial Markets Review* 57. 61.

[22] Ibid. 61.

[23] HM Government, Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion, 1 September 2017: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642714/Tackling-tax-evasion- corporate-offences.pdf (last visited 18 December 2017); also see The Facilitation of Tax Evasion Offences (Guidance About Prevention) Regulations 2017. Namely: risk assessment; proportionality of risk-based prevention procedures; top level commitment; due diligence; communication (including training); and monitoring and review. Regarding the meanings of due diligence see J Bonnitcha and R McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights" (2017) 28 European Journal of International Law 899.

- Proportionate procedures: A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

- Emphasis on proportionality – what is necessary for a large company will not necessarily be essential for a smaller company. What is needed by a company exporting to countries with poor corruption records will not necessarily be needed by companies doing little or no exporting. – need bespoke police in place.

- Top-level commitment: The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

- Risk Assessment: The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

- Due diligence: The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

- Communication (including training): The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

- Monitoring and review: The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

These guidelines reflect principles of situational crime prevention and could be developed to apply to specific or general harms. The Royal Commission into Institutional Responses to Child Sexual Abuse noted that the following situations allow criminal behaviour:

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

- Situational perpetrators are most likely to be influenced by these triggers to commit abuse.[24]

These kinds of arguments make it clear that organisations can be criminogenic. That their policies and procedures can tolerate or fail to prevent crimes.

The literature on the over use of restraints and institutional child sexual abuse emphasise that situational crime prevention is essential. For example, in relation to failure to prevent over reliance upon restraint – all available literature emphasises that this is a structural issue. It is recognised that 'the reduction of physical restraint requires an operational policy. Elements of such a policy would include: adaptation to environmental factors – for example, architecture, choice of materials; appointment of resource persons; an interdisciplinary approach (including the older persons and their relatives); registration of the use of physical restraint; communication about the policy pursued, and so on.'[25] These are all structural aspects which must be addressed at the organisational level.

Similarly, the Final Report of the Banking Royal Commission noted that the NULIS board were advised that the control environment for ASFs was poor:

- The controls for ensuring that all fees were paid to advisers were 'ineffective overall'. One reason for this was that no reconciliation was performed by the Finance division to ensure that all ASFs were paid onto advisers and not retained by NULIS.
- The controls for monitoring the charging of fees against the delivery of services were 'non-existent'. For example, no attestations were obtained from advisers to confirm that a service had been provided for the fee paid and there was too much reliance on member communications.
- The controls for ensuring that customers provided consent to ASFs were 'ineffective'.
- The controls for monitoring that fees are reasonably commensurate with the expected service were 'ineffective'.
- The obligation and control documentation controls were 'ineffective'.
- The adviser on-boarding enhancement controls were 'ineffective'.
- The controls for member communication and disclosure pre/post an ASF being initiated were 'ineffective'.

The paper said, in respect of next steps, that actions to remediate and uplift the control environment would be worked through with executive management.[26] NAB had been slow to stop fees for no service and had moved slowly in relation to compensation. While it is arguable that the directing mind had the necessary *mens rea* for dishonesty offences, it is

[24] Royal Commission into Institutional Responses to Child Sexual Abuse Royal Commission, *Interim Report: Volume 1* (Royal Commission, 2014). 250.
[25] C Gastmans and K Milisen, 'Use of Physical Restraint in Nursing Homes: Clinical-Ethical Considerations' (2006) 32(3) *Journal of Medical Ethics* 148. 151.
[26] *Final Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (No 2, Royal Commission, 2019). 34.

clear NAB as an institution failed to prevent and then adequately respond to fees for no service.

If corporate criminal liability is to be rethought, then there needs to be engagement with the types of harms most likely to be caused by large organisations, and the reasons why these harms come about. Whilst there are occasions where large organisations may actively choose to breach the law, it is more likely that breaches of the law are due to systemic failings on the part of the organisation. These systemic failings are culpable. A central contention of Midgley's book *Wickedness*, with which I agree, is the need to resuscitate the traditional model of wickedness. This does not mean that the subjective model of culpability is not still relevant, but it needs to be supplemented with a negative model of wickedness that could be applicable to systemic failures like those identified in the Royal Commissions. The negative account expresses the notion of evil as lack, dearth or failure. Thus wickedness can be conceived as an absence of goodness or grace,[27] a lack of balance.[28] Augustine expressed evil as 'knots of cunning calumnies' – highlighting the idea that wickedness is not a positive presence, but a warping and twisting of that which is good.[29] Midgley utilises the Aristotelian notion of the golden mean – a balance between too much and too little – to develop the negative account of wickedness. For Midgley, according to this Aristotelian account wickedness occurs where there is a lack of balance.[30] This account provides an alternative to the modern tendency to think of some emotions as inherently bad (such as jealousy, aggression); and others as inherently good (such as love). On this account, it is not the emotion, but the lack of balance that matters. This analysis applies effectively to bureaucrats like Eichmann, who claimed that he just wanted to be good at his job. His behaviour was culpable because there was a lack of balance between his desire to be good at his job and to be promoted, and his failure to care for the people who he was efficiently sending to their deaths.

The negative model of wickedness holds out the possibility of conceiving of corporate failure as culpable and will often be more appropriate to apply to corporations than the positive model of wickedness. It provides an example of a redefinition of responsibility practices that bypasses the criminal law focus upon individuals in attributions of blameworthiness and reinstates a link between (failure to) act and harmful consequences.

[27] Thomas Aquinas, *On Evil* (Oxford University Press, 1274, 2003 ed). For Aquinas, evil is the absence of a good that ought to be present.

[28] Aristotle, *The Nicomachean Ethics* (J. Thomson and Hugh Tredennick trans, Penguin, 2004).

[29] Augustine, *The Confessions of St Augustine* (Edward Pusey trans, Collier, 1961) VI, iii, 4.

[30] The flexibility of the golden mean highlights the need for malleability in fault terms. This was expressed by Aristotle's arguments about the different food needs of different people with different body sizes. For Aristotle, the golden mean is relative. Aristotle, above n 70, II, 1106b5-8: 'In this way, then, every knowledgeable person avoids excess and deficiency, but looks for the mean and chooses it – not the mean of the thing, but the mean relative to us.'