

# Introducing Complicity into the Australian Imaginary: the Bethcar Case Study in the Royal Commission into Institutional Responses to Child Abuse

Honni van Rijswijk

**L**EGAL AND QUASI-LEGAL PROCESSES HAVE BEEN CENTRAL TO THE FRAMING AND understanding of the Stolen Generations within the Australian imaginary. These forms adjudicate the claims of past injustice, foregrounding whose suffering matters, and how that suffering comes to matter. These processes also organise the national memory of the Stolen Generations. It is not the fact of suffering *per se*, but rather its articulation, refraction and even instrumentalisation through these cultural and legal forms that have shaped the collective memory of the Stolen Generations. These processes include *Bringing Them Home* in 1997, the ‘Sorry’ books, a handful of cases at common law, and Prime Minister Kevin Rudd’s ‘Apology to Australia’s Indigenous People’ in 2008 (hereafter ‘the Apology’).

This essay considers a new and very different framework for these harms: the response provided by The Royal Commission into Institutional Responses to Child Sexual Abuse (‘the Commission’). I consider the processes of the Commission in responding to harms, arguing that the Commission generates an alternative imaginary of the violence committed against the Stolen Generations—one that marks the wider violence and complicity of Australian publics and institutions, including legal institutions. The Commission’s ambit includes public dissemination of new forms of responsibility, and offers the possibility that its case studies can become allegories of new forms of memory and responsibility in Australia.

Royal commissions, as non-court based tribunals, are unique: commissions are not bound by the usual rules of evidence of courts, and may adopt an inquisitorial approach. In Australia, Commonwealth royal commissions are established by the *Royal Commissions Act 1902*, which provides *sui generis* powers of investigation that are in many ways more extensive than the powers of a court.<sup>1</sup> A royal commission is not subject to the Commonwealth's legislation relating to evidence but operates in parallel, with its own regime of evidence rules.<sup>2</sup> Institutionalised child sexual abuse has been the subject of investigations, reports and commissions in a number of jurisdictions (Daly 1-4). The terms of reference for these commissions and inquiries go beyond the common law's focus on victim and perpetrator, to consider the responsibility of established and powerful institutions, including governments and their agencies, the police, the legal profession, and the church.<sup>3</sup> Letters patent establishing the current Commission and its terms of reference were released on 11 January 2013,<sup>4</sup> authorising and requiring the Commission to inquire into 'institutional responses to allegations and incidents of child sexual abuse and related matters' (RCIRCSA, 'Terms of Reference'). The terms of reference ask the commissioners to consider matters of historical abuse, as well as to make recommendations regarding policies and practices for the future conduct of institutions in relation to the protection of children. Public hearings began in September 2013 and are ongoing, with a number of case studies being conducted across the nation.

The nineteenth public hearing of the Royal Commission was held between 22 October and 31 October 2014 and on 14 November 2014. The hearing focused on allegations of child sexual abuse by a number of former residents of the Bethcar Children's Home in New South Wales. Bethcar was a home for Aboriginal children

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<sup>1</sup> Royal Commissions are at liberty to admit hearsay evidence and are not bound by the best evidence rule (*Firman v Lasry* (VIC(SC)), 9 June 2000, unreported, [233] quoted in Donaghue 196); the privilege against self-incrimination is not available to a witness before a Royal Commission (*RC Act* s 6A), although the evidence obtained by the Commission cannot subsequently be used in court (*RC Act* s 6DD); and legal professional privilege is more circumscribed than in common law or under statutes including the Commonwealth Evidence Act 1995 (*RC Act* s 6AA). Commissions also have coercive powers, including the power to summon witnesses and compel evidence, and to impose sanctions if witnesses fail to cooperate (*RC Act* s 6H).

<sup>2</sup> The *Royal Commissions Act 1902* was the subject of a 2010 report by the Australian Law Reform Commission, 'Making Inquiries: A New Statutory Framework'. The report concluded that a new legislative framework was needed and also provided a useful analysis of the current legislation. The Australian Government has not implemented the recommendations of the report (Australian Law Reform Commission).

<sup>3</sup> Kathleen Daly argues that institutional abuse was 'discovered' in the 1980s and developed into the 1990s, but says that these responses can be distinguished from moral panics or 'scandals' (Greer and McLaughlin), in part because the establishment of these inquiries and commissions is motivated by concerns about the failures of institutions and authorities (Daly 8-11).

<sup>4</sup> A copy of the Letters Patent and details of the Royal Commissioners, along with other information about the Royal Commission, is available online at <[www.childabuseroyalcommission.gov.au](http://www.childabuseroyalcommission.gov.au)>.

that was run first in Brewarrina and later in Orange by Mr Burt and Mrs Edith Gordon. In February 1969, Mr and Mrs Gordon moved to the 'Old Mission' in Brewarrina and obtained a five-year lease of the old Brewarrina Mission from the Minister for Aboriginal Affairs. The home operated until 1989. Some of the children were admitted to the control of the State and placed at Bethcar, some were committed by the Court to the care of Mr and Mrs Gordon, and some were placed voluntarily by their families (RCIRCSA, *Public Hearings: Case Study 19*, Opening Address 1-3). The Commission examined a number of aspects of institutions' poor responses to the abuse, including the State's failure to monitor the residents, and the inadequate response of the NSW Police Force to complaints made by the residents. A particular focus of the Bethcar Case Study was the civil proceedings brought by fifteen former residents of Bethcar in 2008, and the poor handling of these proceedings by the Department of Youth and Community Services, which is now known as the Department of Family and Community Services (hereafter 'the Department'), and its legal practitioners, including the NSW Crown Solicitors Office ('CSO') and barristers retained by those solicitors (RCIRCSA, *Public Hearings: Case Study 19*, Submissions of Counsel Assisting 3). It is this aspect of the Bethcar Case Study that I will take as my focus, and in particular the archive of complicity that it reveals, the ways in which a legal institution caused suffering to vulnerable claimants who were the survivors of child sexual abuse and members of the Stolen Generations. These violent processes of the law, and of other institutions, are usually hidden, and it takes an extraordinary venue—such as the Commission—to delineate them.

### **Affect in Testimonial Culture**

Quasi-legal and transitional justice processes have been devised to respond to events ranging from apartheid to the systematic removal of indigenous children from their families. Despite these innovations, the law has still relied on a limited number of frameworks, and a limited lexicon of figures, to both represent and adjudicate violence. Transitional justice processes have also acted conservatively to increase the law's jurisdictions through these new forms, binding the law to state power and to state violence.<sup>5</sup> In Australia, Aboriginal people have been subjected to both state violence and the legal/quasi-legal responses to this violence. Here, the lexicon of responsibility has been limited to concepts of reconciliation (Johnson) and regret/apology (Frow; Reilly; Mookherjee et al.). Almost twenty years have passed since *Bringing Them Home* initiated a reparative process in response to the harms suffered by the Stolen Generations. The report

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<sup>5</sup> For readings of law's relation to violence, see for example Sarat and Kahn.

made strong political and legal claims,<sup>6</sup> and did important work in documenting ‘the everydayness and bureaucratization of genocide and of massive human rights violations in the liberal democratic state’ (Orford 863), making a significant intervention into the silence of both the legal domain and the public sphere of that time. Responsibility in the report was broadly textured, outlining the national and international legal frameworks that applied to the removals, but not focusing in detail on the actions or responsibilities of specific institutions and individuals. No criminal proceedings arose out of the findings. The wide range of people who were responsible for the policies of child removal, and who were involved in child removals—still-living public servants, legislators, politicians, police officers, heads of institutions and government ministers—were not included in the process of acquiring the testimonies that formed a large part of the inquiry, or of the subsequent report. Raimond Gaita argues that those authorities and their agents would be guilty of genocide and should have faced trials: ‘How can one say that genocide had been committed, yet only ask for an apology and compensation? How can you think genocide always to be a serious crime, yet find it unthinkable to call for criminal proceedings?’ (44). Gaita also states that in Australia, such trials ‘are literally unthinkable, and that they are so... is the most persuasive evidence that the significance of the crimes against the Aborigines has not been fully appreciated’ (45).

Despite the recommendations of *Bringing Them Home*, to date, no federal reparations scheme has been implemented. The Apology was the ideal moment when a federal reparations scheme should have been implemented. Instead, the Apology emphasised the discursive justice aspect of responses to the Stolen Generations, and implied that the state’s apology signified closure of past injustices, and a shift to a focus on the future. The effect of this failure is particularly stark, as there has been only one successful action in law (set out in the *Trevorrow* cases: (2010) 106 SASR 331; (2007) 98 SASR 136), so there is little availability for survivors to obtain not only compensation, but also statements of responsibility and culpability on the part of institutions and individual actors. The legal archive of Stolen Generations cases documents significant suffering, but does not lead to responsibility. The failures of political and legal domains are supported by the testimonial culture which has dominated the public’s encounter with the Stolen Generations, where the public response to harms has been largely affect-

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<sup>6</sup> The report went beyond national legal frameworks, concluding that the forcible removal of Aboriginal children constituted cultural genocide under the United Nations Genocide Convention 1948 (ratified by Australia in 1949) and customary international law (308-9). It recommended the use of the United Nations’ van Boven Principles for Victims of Gross Violations of Human Rights, including a full range of reparation measures, such as restitution, compensation, rehabilitation, satisfaction and guarantees of not-repetition (308-9). The report also recommended that a reparations scheme be adopted to deal with compensation arising from harms suffered by the Stolen Generations, and that there be a national apology (308-9).

based, and driven by state projects designed to elicit affective responses. This affective response has been shaped through encounters dominated by the testimonial form, with a focus on Indigenous suffering rather than on settler responsibility. These testimonial projects are experienced as 'scenes of suffering' rather than as 'scenes of injustice' (Kennedy 270), the focus on pain and empathy thereby foreclosing the development of a proper and subtle concept of responsibility in legal and political domains. This affective relation arising through these quasi-judicial processes requires nothing like revolutionary change, and ends up reinforcing the unjust distribution of wealth and resources that is the result of genocide. The role of this 'melodrama's' audience is not to struggle but to feel (Meister 70): '... [I]ts real aim is to reassure the compassionate witness of his own redemption' (Meister 78). The reconciliation narrative has the effect of aligning beneficiaries with the role of bystander, rather than the role of perpetrator, and of disguising beneficiaries' complicity in the acts that have caused suffering, thereby distancing them from responsibility for the past. These aesthetic relations produce the Australian nation as a community of beneficiaries, with non-Aboriginal Australians interpellated into a relationship with Aboriginal Australians through their demonstrations of bystander compassion regarding the harms of the past, rather than through responsible and responsive actions. These projects foreground affective responses and de-emphasise the legal and political consequences of harms. Reparation, then, is largely affective, a project of remembering and bearing witness, rather than material or political, such as redistributing the gains of colonisation.

In both *Bringing Them Home* and the Apology, the testimonial form acts to foreground suffering rather than responsibility in the Australian imaginary. *Bringing Them Home* contains a great number of excerpts from survivor testimonies, so it isn't feasible (or fair) to select a single testimony that is typical or representative of all. However, as a way to examine the effect of this form on the reader, consider that the report opens with the statement 'Grief and loss are the predominant themes of this report' (Commonwealth of Australia, *Bringing Them Home* 3), and with the following excerpt from a survivor testimony:

So the next thing I remember was that they took us from there and we went to the hospital and I kept asking—because the children were screaming and the little brothers and sisters were just babies of course, and I couldn't move, they were all around me, around my neck and legs, yelling and screaming. I was all upset and I didn't know what to do and I didn't know where we were going. I just thought: well, they're police, they must know what they're doing. I suppose I've got to go with them, they're taking me to see Mum. You know this is what I honestly thought. They kept us in hospital for three days and I kept asking, 'When are we going to see Mum?' And no-one told us at this time. And

I think on the third or fourth day they piled us in the car and I said, 'Where are we going?' And they said, 'We are going to see your mother'. But then we turned left to go to the airport and I got a bit panicky about where we were going ... They got hold of me, you know what I mean, and I got a little baby in my arms and they put us on the plane. And they still told us we were going to see Mum. So I thought she must be wherever they're taking us.

*Confidential submission 318, Tasmania: removal from Cape Barren Island, Tasmania, of 8 siblings in the 1960s. The children were fostered separately. (3)*

From the reader's point of view, the Stolen Generations are encountered as spectacles of suffering. Each encounter is with a vulnerable being in pain, who is in need of understanding and help, these scenes also relying on the trope of colonial rescue. The problem with this focus on suffering is that it doesn't go anywhere. This emphasis on affect stalls the political process. In her critique of humanitarianism, Hannah Arendt argues that this kind of empathic connection is close to cruelty because it is invested in the persistence of suffering:

... pity, in contrast to solidarity, does not look upon both fortune and misfortune, the strong and the weak, with an equal eye; without the presence of misfortune, pity could not exist, and it therefore has just as much vested interest in the existence of the unhappy as thirst for power has a vested interest in the existence of the weak. Moreover, by virtue of being a sentiment, pity can be enjoyed for its own sake, and this will almost automatically lead to a glorification of its cause, which is the suffering of others. (*On Revolution* 85)

Pity is about the self—it produces self-identification and even self-justification regarding the suffering of others. Prime Minister Rudd's Apology, the defining moment in the nation's memorialisation of the Stolen Generations, is a striking example of this self-identification and self-justification. The foregrounding of suffering in the speech supports this effect, and so does the affective relation of the listener to the testimonial aspects of the speech. Here, Rudd instrumentalises testimony to publicly model an interpretation of the Stolen Generations' experiences and the forms of justice that should follow. Rudd emphasises reconciliation rather than responsibility and draws on select elements of one survivor's testimony, that of Nanna Nungala Fejo's, so that it corresponds to the framework of reconciliation, and fits within a sentimental, resolvable narrative. Here, the listener is invited to inhabit the point of view of a suffering child, rather than that of a member of a complicit national public.

Stating that Nanna Nungala Fejo's story is one of many thousands of stories of forced separation, Rudd emphasises the role of suffering in grounding the need for a response:

There is something terribly primal about these firsthand accounts. The pain is searing; it screams from the pages. The hurt, the humiliation, the degradation and the sheer brutality of the act of physically separating a mother from her children is a deep assault on our senses and on our most elemental humanity. ... These stories cry out to be heard; they cry out for an apology. Instead, from the nation's parliament there has been a stony and stubborn and deafening silence for more than a decade. (Rudd)

Rudd then proceeds to tell her story, recalling Nanna Fejo's earliest childhood days in the late 1920s, living with her family and her community in a bush camp just outside Tennant Creek in the Northern Territory. Rudd deploys the subjective third person point of view in his retelling of Nanna Nungala Fejo's story. Focalising his speech through a childlike point of view, and using short sentences and simple vocabulary to inhabit the child's experience, Rudd recounts Nanna Fejo's early life, before her removal, taking on a position of innocence and naivety:

She remembers her earliest childhood days living with her family and her community in a bush camp just outside Tennant Creek. She remembers the love and the warmth and the kinship of those days long ago, including traditional dancing around the campfire at night. She loved the dancing. She remembers once getting into strife when, as a four-year-old girl, she insisted on dancing with the male tribal elders rather than just sitting and watching the men, as the girls were supposed to do.

The state, represented by Rudd, inhabits this naïve, innocent position, and by extension so does the national public. Rudd then relates the scene of removal, again using short sentences and simple words to inhabit the point of view of a child:

But then, sometime around 1932, when she was about four, she remembers the coming of the welfare men. Her family had feared that day and had dug holes in the creek bank where the children could run and hide. What they had not expected was that the white welfare men did not come alone. They brought a truck, two white men and an Aboriginal stockman on horseback cracking his stockwhip. The kids were found; they ran for their mothers, screaming, but they could not get away. They were herded and piled onto the back of the truck. Tears

flowing, her mum tried clinging to the sides of the truck as her children were taken away to the Bungalow in Alice, all in the name of protection.

She was taken to a mission, and Prime Minister Rudd takes up her story there:

She stayed at the mission until after the war, when she was allowed to leave for a prearranged job as a domestic in Darwin. She was 16. Nanna Fejo never saw her mum again. After she left the mission, her brother let her know that her mum had died years before, a broken woman fretting for the children that had literally been ripped away from her.

Rudd says:

As I left, later on, Nanna Fejo took one of my staff aside, wanting to make sure that I was not too hard on the Aboriginal stockman who had hunted those kids down all those years ago. The stockman had found her again decades later, this time himself to say, 'Sorry'. And remarkably, extraordinarily, she had forgiven him.

In this recounting, Nanna Fejo's particular experience becomes an allegory for the Reconciliation of the nation—all losses are remedied by the return to family, all losses are now in the past, and most important, there is forgiveness and resolution. The stockman's apology is graciously accepted, anticipating and modelling the response that Rudd hopes for his own, national Apology. This is a familiar pattern in the shaping of testimonies: writing of *Bringing Them Home*, Orford argues that the report's narrative begins with the transgressions of violence and removal, and ends with the resolution of obligations, and with stable families, 'where all are sorted back into their proper places and all debts are paid' (870-1). She notes that many people found that there was no home to return to, and that they could not recover their old identity or community, so that 'the text is haunted by the stories of children who cannot go home' (Orford 871). These losses that cannot be recovered are present in the testimonies, but are not prominent in the report's final recommendations (Orford 872)—and indeed, the genocidal practices, and colonisation in general, have set in motion losses that can never be recovered.

### **Structures of Complicity**

I now turn to the Commission's framework, which also solicits testimony, but to very different ends. Instead of the focus on empathy, the Commission emphasises the question of responsibility. In *Bringing Them Home* and the Apology, the focus of reader and listener is directed to individual suffering, and the pity that produces. In the Bethcar Case Study described below, the individual suffering is



taken for granted, and it is the detail of the survivors' experiences with the legal system, and the failures of this system, that becomes the focus.

The unique form of the Commission brings out, in specific, material ways, the networks and structures operating within and between institutions, which facilitated child abuse. The Commission has strong powers to call people to give evidence, and also has significantly more flexibility in how that evidence is given, compared to common law processes. While the Commission is a creature of the state, it is significant that its focus here is neither on perpetrators' nor victims' experiences (although these both form part of the terms of reference) but rather on the responsibility of *institutions*, including state institutions. This has meant that responsibility is formed through a lexicon of figures wider than that employed in *Bringing Them Home*. Some of the case studies concern institutions also described in *Bringing Them Home*: these include *Case Study 7* (Parramatta Training School for Girls and the Institution for Girls in Hay), *Case Study 17* (Retta Dixon Home) and *Case Study 19* (Bethcar). This overlap, and the different ways in which these inquiries have responded to the harms suffered by the Stolen Generations, are worthy of significant attention. The focus of this essay is on one part of the Bethcar Case Study, which elucidates the violence within legal processes experienced by survivors of child sexual abuse who tried to redress their claims. This legal violence was recent—taking place between 2008 and 2013.

The Commission uses the inquisitorial form and focuses on the responsibility of actors, as well as the suffering of victims. The Commission process provides a thick description of the operation of extra-legal power—the ways in which legal responsibilities to report crimes, for example, were ignored in favour of local cultures and alliances, intended to preserve the reputation of the church or a school. As in the testimonial archives of *Bringing Them Home*, the case studies focus on the thoughts, feelings and judgment of those who present evidence—but instead of seeking to elicit empathy, the Commission explores the texture of moral and legal culpability, eliciting acknowledgements of wrongdoing, guilt and shame of complicit actors in its proceedings. There is emphasis on the Commission's wanting the responsible party to show that they understand and acknowledge their culpability, as well as seeking acknowledgments that they would do things differently now, and will change their approach and policies for the future. The institutional responses to child abuse examined by the Commission range from incompetence and mismanagement of complaints to a range of behaviours that would lead to liability under criminal and civil law, including non-disclosure and deliberate cover-up. Witnesses to the Commission provide testimonial statements, and then are subject to interrogation by Counsel assisting the Commission, as well as by counsel of other interested parties, including survivors. These interrogations cover the range of the Commission's terms of reference, investigating past events, the consequences for current and future policy, and also

the moral aspect of failures. Responsibility goes beyond the roles of perpetrator and victim to involve a more complex and subtle lexicon of figures including: bystander, accomplice, culpable witness, irresponsible caretaker, negligent or ill-intentioned institutional head, corrupt priest or school principal (who holds the interests of the church or school ahead of the interests of a child/survivor) and—the focus of this article—the legal practitioner who is ‘doing their job’ but who fails to take into account the impact of their actions on survivors and fails to evaluate their own actions according to a moral framework or a framework of fairness.

### **Case Study 19: Bethcar Children’s Home**

Legal practitioners in NSW, as in other Australian jurisdictions, are required to conduct themselves with reference to obligations to their clients, and obligations to the court (*Civil Procedure Act 2005* (NSW) s 56(3)). As a state agency, the CSO also has obligations arising out of the Model Litigant Policy. This policy requires state agencies engaged in civil litigation to behave ‘ethically, fairly and honestly to model best practice’ (NSW Department of Justice). More specific obligations of agencies under the policy include dealing with claims promptly, not taking advantage of clients who lack resources, avoiding litigation where appropriate, keeping legal costs to a minimum, and apologising when the State has acted inappropriately (NSW Department of Justice). Senior Counsel assisting the Commission argued that the Department and the CSO breached the Model Litigant Policy on a number of grounds, including by using an approach to the litigation that drew the process out as much as possible and that included tactics designed to humiliate the plaintiffs, such as requesting their criminal histories (histories that were irrelevant to the claims), and by planning surveillance of the victims that was not necessary, and would only embarrass them (RCIRCSA, *Report of Case Study No. 7* 89-90).

There are a number of notable aspects to the Commission’s focus on the legal proceedings. What is extraordinary is that in the Bethcar Case Study there is a clear and detailed rendering of the legal violence arising through the legal processes behind a civil matter that dealt with vulnerable Aboriginal claimants who had suffered sexual abuse. In any litigation, the open secret of legal practitioners is that most parties employ legal tactics aggressively—that is, they use the legal process in ways that adhere to the letter of the law, but perhaps not so much to its spirit of fairness. The tactics that Counsel assisting the Commission outlines as being problematic—including requesting particulars that were already known to the Department, requiring plaintiffs to separately plead their statements of claim, requiring the plaintiffs to prove the allegations of sexual abuse despite liability being established previously in criminal proceedings, prolonging the point at which they agreed to mediation, and even the use of surveillance and demand for the claimants’ criminal histories (RCIRCSA, *Report of Case Study No. 7*

89-90)—are not uncommon practices in the context of litigation, and would be viewed by many legal practitioners as legitimate ways to further their client's interests. What is usually not apparent is the impact of these tactics on claimants, particularly vulnerable claimants. These legal processes are usually not subject to such scrutiny: solicitors who breach their obligations may be subject to disciplinary and judicial proceedings, but the range of such an investigation would not be as wide as that under the Commission, and nor would the process be as public. The inquisitorial and public forum of the Commission allows questions that go beyond legal technicality, to include questions of judgment using wider concepts of morality and fairness. The Commission Case Studies are open to the public and are also relayed live over the internet (daily transcripts of proceedings are made available freely online). Where other judicial processes are public, non-interested parties are generally not entitled to access transcripts and, even if they are allowed, the cost of obtaining these transcripts is prohibitive. The Commission provides a public forum of evaluation not only to judge the individual actions of the solicitors and of the CSO but also to consider more broadly the violence of our legal system—to demonstrate the complicity of this system in both perpetuating structural inequalities and furthering the suffering of claimants who are already vulnerable. The Bethcar Case Study draws together the collective role of lawyers in the civil litigation and the impact of their actions on increasing the suffering of victims of child abuse. The Commission called witnesses and documents to investigate the six long years of litigation that the survivors endured before a settlement was achieved in 2008. In the words of the Chair of the Royal Commission, 'this is about the quality and integrity of the course taken by the State in defending a common law claim' (RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 95) 10014).

The Bethcar Case Study examines the actions, file notes, correspondence, and state of mind of the Department and its solicitors and barristers in the past and present. It considers together both civil and criminal proceedings, when these would otherwise be evaluated separately. The legal practitioners' file notes and actions become evidence of conduct, but do not comprise the complete picture of conduct: the Commission treats past notes and actions as prompts—as occasions for narrative expansion rather than as points that speak for themselves. The Commission demanded responses within frameworks of morality, considerations of 'fairness', and affect, requiring legal practitioners to go beyond a technical reading of the law.

### **An Archive of Complicity**

In May 2008 two former residents of Bethcar brought proceedings against the Department based on allegations of sexual abuse by Mr Gordon, Mr Gibson and another resident. They claimed that the Department was vicariously liable for

their abuse, and also liable in negligence for failing to act despite knowledge of the abuse (RCIRCSA, *Public Hearings: Case Study 19*, Submissions of Counsel Assisting 21). A solicitor employed by the Crown Solicitor's Office (CSO), Mr Evangelos Manollaras, was allocated the proceedings under the supervision of a senior solicitor, Ms Helen Allison. Mr Manollaras was the lowest grade solicitor employed by the CSO and had 'never before acted in a case involving allegations of child sexual abuse' (21. See also RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 99) 10337). In July 2008, the principal solicitor of the Women's Legal Service of NSW (WLS), Ms Janet Loughman, filed a statement of claim on behalf of thirteen plaintiffs (including Kathleen Biles, AII, AIE, Jodie Moore, AIG, AIO, AIH, AIN, Amelia Moore, Leonie Knight, AIQ, QID and AIF), which was also allocated to Mr Manollaras.

The matter came before Knox DCJ in May 2009. His Honour described the Department's approach to the litigation at that point as taking 'every root and branch objection' to the plaintiff's claim, which, he indicated, was out of line with the NSW Model Litigant Policy for Civil Litigation (RCIRCSA, *Public Hearings: Case Study 19*, Submissions of Counsel Assisting 25-6). By the time the final mediation occurred on 17 December 2013, and all proceedings were resolved, the Department's expenditure on the litigation was approximately \$3,700,000, with the bulk of these costs comprising legal costs of around \$2,200,000 (56) and only about a third of this total going to the claimants as damages. At the mediation, each of the former residents who were still parties to the proceedings agreed to settle their claims for approximately \$107,000 in damages and an apology.

Extraordinary revelations about the conduct and attitudes of legal practitioners were made during the Commission's proceedings. The correspondence of Mr Manollaras, the solicitor in charge of the matter at the CSO, revealed problems in his understanding of sexual violence, as well as his attitude about the victims' motivation in bringing an action (and that of their legal practitioners). In November 2009, Mr Manollaras wrote to the retained junior counsel for the CSO, Mr Patrick Saidi, regarding a request from the WLS for mediation. Mr Manollaras wrote that, in his opinion, the WLS understood mediation as 'a situation where the defendant turns up with a cheque book and after some polite conversation ... and several cups of coffee ... the plaintiffs walk off with damages' (RCIRCSA, *Public Hearings: Case Study 19*, Submissions of Counsel Assisting 31). On 6 July 2010 Mr Manollaras wrote to Mr Saidi commenting on allegations made by Ms Leonie Knight that Mr Gordon had 'comforted her by hugging her, kissing her and fondling her breasts'. Mr Manollaras made the following observation:

I am wondering whether a report by Leonie Knight either may have been an exaggeration or, if not an exaggeration, whether Eggins and Robinson [Department officers] had formed the wrong conclusion, by

making a quantum leap between the child being comforted by Gordon on the one hand, all the way up to sexual interference by Gordon of Leonie Knight.

For example, a distressed child could be comforted in a normal manner by a hug and a kiss. Granted I am having a problem with fondling of breasts, but I still think it is a quantum leap, even if there was some fondling of breasts, to conclude sexual interference. (Quoted in RCIRCSA, *Public Hearings: Case Study 19*, Submissions of Counsel Assisting 35)

In August 2010 Mr Manarollas spoke with Mr Saidi and Mr Paul Arblaster (another barrister retained by CSO to assist Mr Saidi), and recorded a file note of the meeting which stated that ‘counsel advised that ‘the “best bet” for the defendant was to “knock off” as many plaintiffs as possible on the limitation question’ (RCIRCSA, *Public Hearings: Case Study 19*, Submissions of Counsel Assisting 33). In other words, in 2010, the view of the liability question was that the Department would likely fail, and so counsel was suggesting that the Department should push technical questions—such as the question of the limitation period and the time bar defence—in order to draw out the process. This strategy went against the Model Litigant Policy, which would suggest that the CSO should have been encouraging the Department to settle this case because the liability question was likely to be decided against them, and the Policy outlines that the CSO should not rely on limitation defences.

There was also evidence that the CSO hid information about important witnesses from the victims. Mr Manollaras contacted an investigator, Mr Maxwell, in mid-2008 to do some investigatory work for a matter involving Bethcar (RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 101) 10607). Mr Maxwell was later asked to prepare an affidavit in relation to the searches he had conducted regarding witnesses who he was either unable to locate, who were deceased, or who may not have been in a position to provide evidence in court (10608). However, Mr Maxwell omitted references to other, relevant witnesses in his affidavits, those who would have been able to give evidence, and who obviously would have been very important to the survivors’ case, despite ‘everyone in the team... [knowing] that there were other witnesses’ (Transcript (Day 102) 10726). Mr Maxwell knew of at least 70 relevant people who were not mentioned in his two affidavits (Transcript (Day 98) 10271).

The Commission elicited statements of guilt and acknowledgments of responsibility from the legal practitioners and Department. It also produced a detailed representation of the affective states of those complicit actors—asking questions that would provoke the witnesses to understand the impact of their

actions on the survivors' experience of litigation. Counsel Assisting the Commission asked Mr Coutts-Trotter, Secretary of the Department at the time of the hearing, to reflect on the point that the survivors who had earlier (and successfully) given evidence for the State that had led to the conviction and incarceration of Mr Gibson were yet asked by the State to prove their allegations in the civil forum:

Q. ... Sitting there today, it's a matter which those women who had the courage to make complaints to the police and give evidence, resulting in convictions, would find particularly difficult to understand in circumstances where, in one forum, the State had been upholding their evidence in order to indict and incarcerate Mr Gibson, but, in another forum, the State was making them prove the very things that had been upheld in that other forum?

A. It would have been baffling.

(RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 98) 10323)

Mr Coutts-Trotter also felt 'ashamed' that the Department requested particulars from the plaintiffs their criminal histories (Transcript (Day 98) 10325).

Ms Allison, the senior solicitor who was supervising Mr Manollaras at the time of the proceedings, was subjected to significant examination, given that Mr Manollaras was the lowest grade solicitor employed by the CSO and had 'never before acted in a case involving allegations of child sexual abuse' (RCIRCSA, *Public Hearings: Case Study 19*, Submissions of Counsel Assisting 21. Also Transcript (Day 99) 10337). The Commission asked Ms Allison a number of questions, trying to obtain admissions from her concerning her understanding of the victims' painful experiences of litigation, and her own culpability in this. In effect, the Commission was asking Ms Allison to expand her understanding of responsibility, beyond her technical responsibilities as a solicitor, to include moral considerations. It was also wanting her to comprehend the Model Litigant Policy as a directive that had 'deep' rather than 'surface' requirements. At each turn, Ms Allison rejected the Commission's attempts, insisting on a narrower reading of her role.

Ms Allison was asked about the Department requiring the plaintiffs to prove allegations that the State had already tried and convicted:

Q. Can I ask this question, Ms Allison? If it were the position that it was known within the Crown Solicitor's Office at the time the defences were filed that there had been convictions of Mr Gibson in respect of the sexual abuse that was the subject of the allegations in the litigation, assume that was known at the time the defences were put on, can you

comment on this proposition: there is, it might appear, a rank hypocrisy where the State has indicted and convicted a person in respect of allegations of sexual abuse for the State to later, in civil proceedings, put the plaintiffs to proof in respect of those same matters; would you comment on that? (RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 97) 10181)

Ms Allison responded that 'if it was known, it should have been admitted', though she refused to agree with Counsel assisting the Commission that the proposition was 'hypocritical' (10182). Ms Allison disagreed that litigation involving allegations of child sexual abuse differed from other litigation (10182-3). When asked about the fragility of victims of child sexual abuse, it became clear that Ms Allison had not read the medical reports of the case:

Q. Can I ask you to comment on some general propositions about allegations or litigation involving allegations of child sexual abuse. Do you agree that litigation, where there are allegations of child sexual abuse, differs in a number of important respects with other what might be called more garden-variety personal injury type litigation?

A. No, I don't.

Q. You don't agree with that?

A. No.

Q. One of the things about litigation brought by victims of child sexual abuse is often they are very damaged and fragile people; would you agree with that?

A. Yes—well, to be honest, I'm not an expert and I don't know. I mean, I accept that's probably the case, but...

Q. You would have seen plenty of reports from psychiatrists over the years in cases where plaintiffs allege child sexual abuse, talking about the effect of that abuse on their psychiatric condition, wouldn't you?

A. No, I haven't.

Q. You did in this case, didn't you?

A. I haven't read the medical reports. I have had summaries of them.

Q. So you're not able to comment whether, as a general proposition, one aspect of litigation involving people who have suffered child sexual abuse is that they will often present in the sort of fragile state that we saw some of the Bethcar ladies present yesterday?

A. They may, and so may other plaintiffs. (10182-3)

She suggested that the Department's 'thinking back in 2008... and even a number of years ago' did not contemplate the issues of proof and credibility in relation to historic child sexual abuse (10183-4).

When asked whether the Crown, as a model litigant, should do what it can to avoid delays in litigation, and when the Chair summarised the CSO's approach as of one of prevarication and delay, Ms Allison insisted that the 'Crown is entitled to maintain its position in an adversarial system':

Q: You see, looking at this file—and you're familiar with it now—there appears to be possibly a reflection of a culture which affects many of our adversarial processes. People write letters, people bring motions, Judges are required to resolve matters that could be, or should be, sorted out between practitioners. Do you understand what I am saying?

A: Yes, I understand what you're saying Your Honour.

Q: Do you think it's incumbent upon the Crown, as a model litigant, to do what it can to avoid those sorts of matters, those sorts of issues troubling litigation?

A: No, I don't Your Honour. I think the Crown is entitled to maintain its position in an adversarial system. (RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 97) 10223)

Ms Allison plays the part of the lawyer who insists on reading the questions in a technical way, upholding the letter of the law and trying to limit her answers to technical questions—resisting invitations to reflect on the affective or moral consequences of her actions. However, her position is untenable—the more she insists on this limited point of view, the more culpable she appears. She refuses the Commission's suggestion that, in the case of vulnerable plaintiffs pursuing a claim relating to sexual abuse, the CSO should take a broader approach that takes account of issues of the context of this vulnerability:



Q. And do you think it would have been useful, then, for you to know in 2008, 2009 and 2010 that it is very common for children who are sexually abused not to make a complaint until many, many years later?

A. Again, that's why they're referred to psychiatrists for a professional opinion.

Q. And you don't consider that that should be something that you should know of, as a solicitor, when you're making a decision to plead the Limitation Act in defence of a claim?

A. That's correct.

...

Q. Ms Allison, do you accept, then, that on the plaintiffs' view of the evidence, in circumstances where the State's breaches of duty led to these children being abused, children who were born into poverty and continued to live lives of poverty and were impecunious when they brought their action, in circumstances where children who are sexually and physically abused suffer injury not only at the time of the abuse but also lifelong consequences, those subject to a model litigant policy should not just consider whether the Limitation Act is an available defence but whether it is also proper and fair for the very department, very State department, that may have caused those injuries, to plead it as a bar to their actions?

A. I think it's available and can be pleaded. The department—if the department, on a policy basis, doesn't want us to plead the limitation defence, then we will not plead the limitation defence. (RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 98) 10290; 10292)

Counsel assisting the Commission drew Ms Alison's attention to a document requesting particulars signed by Mr Manollaras. The document asked the plaintiffs whether they had committed any criminal acts. The Chair put it to Ms Allison that the questions contained in the document 'could only be there to embarrass' the plaintiffs, and that the answers were already within her client's knowledge (RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 97) 10198). Ms Allison agreed that while the question should never have been in the letter, it was still 'incumbent on the plaintiffs' to provide particulars (10200).

When asked whether it is proper and fair for the State department that may have caused the lifelong injuries to the plaintiffs to plead the passage of time as a bar to

their actions, (through a defense based on the *Limitation Act*), Ms Allison said 'I think it's available and can be pleaded' (RCIRCSA, *Public Hearings: Case Study 19*, Transcript (Day 98) 10292). Commissioner Fitzgerald asked Ms Allison whether she actively considered her actions were fair and proper in her conduct of the case, to which she responded that she did, by 'applying the law to the facts', and when preparing for mediation, putting in 'a great deal of effort' to settle in a way that 'would help the plaintiffs get some closure' (10293). In Ms Allison's final statement there is an acknowledgment that she sees herself as playing a part, as a lawyer, but that in her capacity as a non-lawyer, she would draw upon other, wider standards of evaluation. Upon being excused, Ms Allison stated that she had 'been in the witness box defending the actions of the State... as a lawyer' but appreciated that 'what happened at Bethcar was horrible', and that she tried 'to handle that as sensitively as possible to give... some sort of closure to these plaintiffs' (10295). This kind of distinction—the distinction made between what a person thinks or does 'personally' and what one does in one's role as a lawyer, teacher or priest—is a theme brought out across the Commission's proceedings, and is a distinction that seems important in producing complicit behaviours. When finally asked whether she would behave differently in hindsight in cases like Bethcar, she said 'Yes, I think so' (10295).

As public listeners and readers of this transcript, the focus on institutional action—and on the actions of individuals working within institutional structures—directs not only our attention, but our affect. The treatment of participants in the Commission proceedings invites us to identify with the witness who is explaining their irresponsibility. We perhaps cringe for Ms Allison, and feel shame. We imagine ourselves in her same position. This imaginative act creates a bond between us, as readers, and Ms Allison. While the testimonial culture of *Bringing Them Home* and the Apology places us as readers and listeners at a distance from suffering, looking on in pity at the suffering of others but not provoked to act, the Commission proceedings place us in the uncomfortable readerly position of being complicit in that suffering, and as responsible in ways that are both marked and unmarked.

The above examination of an element of the Bethcar Case Study is only one part of a very complex case, and there are many cases comprising the Royal Commission's proceedings. However, the above descriptions provide an indication of the network of complicities that the Royal Commission is revealing through its investigations. The focus on institutions—including institutions that might seem removed, such as the CSO, which became involved some years after the initial events of sexual abuse—demonstrates the implication of individuals and organisations across time. In contrast to law's linear conceptualisation of responsibility, the Bethcar Case Study offers a model of responsibility that can be thought of metaphorically as acting laterally, through networks and entanglements.

There are some qualifications to the Royal Commission's framework, however—for example, some abuse lies outside its scope, since the Royal Commission focuses on institutional abuse, not abuse inflicted in foster homes, and it also focuses on sexual abuse rather than on the range of harms. The context of removal of Aboriginal children is also largely missing from the Commission's framing of these Case Studies. The Commission is still in process, and final reports are some time away—the duration of the inquiry was extended by two years in November 2014, and the Commission now has until 15 December 2017 to report on the inquiry and make recommendations based on its findings. One of the dangers of the Royal Commission is that, like the earlier and significant Royal Commission into Aboriginal Deaths in Custody, any recommendations, even if they are excellent, will not necessarily be implemented through legislative and policy changes.

### **From Case Study to Australian Imaginary**

Complicity more effectively represents the nature of responsibility in a settler state, in contrast to reconciliation. Reconciliation works within a teleological concept of responsibility, where violence is seen to be confined to discrete events, which can be resolved and put behind us. Complicity potentially emphasises temporal and spatial proximities to violence, and points to continuing structures and networks that are not so easily discarded. In his work on the connection between South African intellectuals and apartheid, Mark Sanders argues that complicity means 'not washing one's hands but actively affirming a complicity, or a potential complicity, in the "outrageous deeds" of others' (3-4). Complicity also captures responsibility for *failing to act*—it points to culpability that goes beyond guilt for direct actions, to include omissions, thoughtlessness and failures to take notice or to consider the harm caused by one's actions. These failures are more elusive in law's account of responsibility, which is better at redressing positive acts that cause damage in contrast to omissions that are also harmful, but not as easily captured by law (Crofts). Complicity is a concept that connects, and considers actions that occur in the context of others—it connects individual responsibility to that of a collective. Hannah Arendt's *Eichmann in Jerusalem: The Banality of Evil* posits complicity as a feature of modernity, and as a concept that incorporates a framework that is wider than law's: 'complicity is not determined by a relation to law but is a moral criterion of judgment' (293).

Michael Rothberg's term 'implicated subject' is also helpful here, and is an attempt to think through a subject position, politics and ethics beyond the binary figures of perpetrator and victim in the imaginary of responsibility for historical violence and continuing inequality—to make visible the forms of participation that link modern subjects to violence and exploitation (on complicity, see also Sanders). The term 'implication' marks the ways in which we are responsible beyond actions

of direct agency. For example, it marks the ways in which, in democracies, law is enacted in our name, and historical and contemporary state actions are still our actions, even if they seem to operate at a distance. In Australia, we belong to legal contexts of injustice where we are neither criminally responsible as perpetrators nor innocent as uninvolved bystanders. Rather, we are the inheritors and beneficiaries of legal, economic and social systems that have denied Aboriginal sovereignty and title, and that have inflicted legal violence upon Aboriginal people. The Bethcar Case Study provides a thick description of the ways in which we are complicit or ‘implicated [*legal*] subjects’, to adopt and transform Michael Rothberg’s term.

A problem relevant not only to the current Commission and *Bringing Them Home*, but of truth commissions and similar processes more generally, is the role of the state in mediating and authorising the truth, becoming what Orford describes as ‘the commissioned truth through institutional mediation—through the institutions of language, of the state, and of liberal internationalism’ (851). However, despite these limitations, the archive of complicity that is being publicly produced through the Commission’s proceedings, is, I think, one step in the direction of establishing a deeper sense of responsibility in the Australian imaginary of responsibility. This article has examined just one small element of the network of complicity that is being mapped through the Commission’s investigations—a process that is, in this sense, more significant at this stage than the Commission’s findings, and the legal and political consequences that may (or may not) ensue from these findings. These proceedings provide an analogy for the ongoing sense of responsibility, across temporal and spatial boundaries, that is meaningful in the settler context. Networks, spirals and connecting loops of responsibility threaded across our institutions and implicating government, legal and private practices at every stage: this is a much better image of culpability than the linear model of reconciliation, which would make a clean break with the past, and would try to falsely suggest that settler institutions are untouched in the present (and into the future).

We are implicated legal subjects in a much deeper sense even than this, in Australia, in ways that are as yet unexplored and unmarked. The relation of white settler subjects to law on this land is complex, because there are multiple Aboriginal laws operating over and through Australian territories, but the state only recognises one state law. As in other settler nations, we need to think of law in at least two ways: there is state law, consisting of common law cases and legislation; but in its wider and more proper sense, ‘law’ also refers to legalities that are not yet recognised by the state—namely, the authorities operating through multiple Aboriginal sovereignties that also call us to account. However, responsibility for past violence in Australia has only been conceptualised by reference to a state-based responsibility. What would responsibility look like in

reference to a wider framework of law, one that meaningfully engaged with the Aboriginal sovereignties and laws operating on this land, but not yet recognised by the state? Our task must be to go beyond complicity to write the metaphors for this deeper, and proper, culpability.

**DR HONNI VAN RIJSWIJK**, BA LLB (Hons), LLM, MA, PhD (UW), is a Senior Lecturer in the Faculty of Law, University of Technology, Sydney. She is a graduate of Sydney Law School and received her PhD from the University of Washington, where she was a Fellow in the Society of Scholars at the Simpson Center for the Humanities. She researches at the intersections of law, literature and legal theory.

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