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Complicity as Legal Responsibility

Honni van Rijswijk

Abstract. Complicity is emerging as a key cultural and critical term for understanding settler responsibility in postcolonial contexts – especially in thinking through the sense of responsibility arrived at through transitional justice processes. But what sense can we make of complicity within more pedestrian legal processes? Here, I examine an emergent narrative of complicity in “everyday law” through the framework of evaluating harms provided by the Royal Commission into Institutional Responses to Child Sexual Abuse (“the Commission”). I analyze one case study in particular – the 19th public hearing of the Commission was held between October 22 and 31, 2014, and on November 14, 2014 (“the Bethcar Case Study”) – to provide a reading of complicity in the context of everyday legal proceedings that took place within the wider context of Australia’s postcolonial reckoning of harms suffered by the Stolen Generations. This article focuses on the role and conduct of lawyers, and of law, in the civil proceedings relating to institutional responsibility for abuse, a process at a seeming distance from the scene of original trauma. I argue that the Commission makes available a narrative of the lawyers’ role in the ongoing violence against survivors – one story and case study that, as it concerns abuse in the context of the removal of Aboriginal children, is part of wider structural violence against Aboriginal people. The Commission provides a rich source for analyzing these legal processes and provides an archive of lawyers’ responsibility that is not normally made available through law. It examines the complicity of the legal profession in harms produced by the legal system itself.

Keywords. Royal Commission into Institutional Responses to Child Sexual Abuse, Bethcar, complicity, legal process

This article considers the framework of evaluating harms provided by the Royal Commission into Institutional Responses to Child Sexual Abuse (“the Commission”) through the conceptual lens of complicity. I analyze one case study in particular – the 19th public hearing of the Royal Commission was held between October 22 and 31, 2014, and on November 14, 2014 (“the Bethcar Case Study”)¹ – to provide a reading of complicity in the context of everyday legal proceedings that took place within the wider context of Australia’s postcolonial reckoning of harms suffered by the Stolen Generations. This means the case is significant not only as a narrative of quotidian legal violence, but also in how this quotidian violence relates to national

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narratives concerning the Stolen Generations. A number of legal and quasi-legal processes have been central to the framing and understanding of the harms suffered by the Stolen Generations. These processes include the *Bringing Them Home* (1997) report,² “The Sorry Books,”³ a handful of cases at common law, and Prime Minister Kevin Rudd’s “Apology to Australia’s Indigenous People” in 2008.⁴ I argue that the Commission generates an alternative archive of the violence committed against the Stolen Generations – one that emphasizes the wider violence and complicity of Australian publics and institutions, including legal institutions. Further, the Commission’s ambit includes the 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. The Bethcar Case Study provides a thick description of the ways in which Australian lawyers may become complicit or “implicated [legal] subjects,” to adopt and transform Michael Rothberg’s term,⁵ through routine case management.

Complicity is emerging as a key cultural and critical term for understanding settler responsibility in postcolonial contexts. Complicity potentially emphasizes temporal and spatial proximities to colonial violence by reworking traditional analysis of responsibility to highlight continuing structures and networks. In his work on the connection between South African intellectuals and apartheid, Mark Sanders argues that complicity means “actively affirming a complicity, or a potential complicity, in the ‘outrageous deeds’ of others.”⁶ 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. These failures are more elusive to capture under law’s account of responsibility, which is better at redressing positive acts that cause damage in contrast to harmful omissions.⁷ Complicity also connects individual responsibility to the responsibility of a collective. Hannah Arendt’s *Eichmann in Jerusalem* (1994) posits complicity as a feature of modernity, and as a concept that incorporates a framework that is wider than the law’s: “complicity is not determined by a relation to law but is a moral criterion of judgment.”⁸

But what sense can we make of complicity within more pedestrian legal processes? Here, I examine an emergent narrative of complicity in “everyday law” – not in the context of transitional justice or extraordinary justice, but regarding a relatively routine civil case. This article focuses on the role and conduct of lawyers, and of law, in the civil proceedings relating to institutional responsibility for abuse, a process at a seeming distance from the scene of original trauma. I argue that the Commission makes available a narrative of the lawyers’ role in the ongoing violence against survivors – one story and case study that, as it concerns abuse in the context of the removal of Aboriginal children, is part of wider structural violence against Aboriginal people. The Commission provides a rich source for analyzing these legal processes and provides an archive of lawyers’ responsibility that is not normally

made available through law. It examines the complicity of the legal profession (and law) in harms produced by the legal system itself.

The harms at the centre of the Bethcar Case Study concern sexual abuse suffered by a number of former residents of the Bethcar Children's Home in New South Wales (NSW) ("Bethcar"). Bethcar was a home for Aboriginal children, which was run first in Brewarrina and later in Orange by Mr. Burt and Mrs. Edith Gordon. In February 1969, the Gordons 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 the Gordons; and some were placed voluntarily by their families.⁹ The Commission examined a number of aspects of relevant institutions' poor responses to this 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 about the abuse. A particular focus of the Bethcar Case Study was the civil proceedings brought by 15 former residents of Bethcar in 2008, and the poor handling of these proceedings by the Department of Youth and Community Services (now known as the Department of Family and Community Services – "the Department"), and its legal practitioners, including the NSW Crown Solicitors Office (CSO) and barristers retained by those solicitors.¹⁰ 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 also members of the Stolen Generations. The violence of these kinds of everyday civil proceedings is usually hidden, especially as there are few venues in which the wider postcolonial context could be narrated.

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 (Cth),¹¹ which provides *sui generis* powers of investigation that are in many ways more extensive than the powers of a court.¹² 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.¹³ Institutionalized child sexual abuse has been the subject of investigations, reports and commissions in a number of jurisdictions.¹⁴ Significantly, 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.¹⁵ Letters patent establishing the current Commission and its terms of reference were released on January 11, 2013,¹⁶ authorizing and requiring the Commission to inquire into "institutional responses to allegations and incidents of child sexual abuse and related matters."¹⁷ 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.

STRUCTURES OF COMPLICITY

The Commission into Child Abuse has solicited thousands of hours of public and private survivor testimony, which has been important for the recognition of survivors' experiences and to the production of evidence. However, as an archive, the Commission has also produced an enormous archive of responsibility, in addition to the archive of suffering – through testimony given by lawyers, priests, teachers, institutional leaders etc., who are called on to give an account of their actions.

Case Study 19: Bethcar Children's Home

The harms at the centre of the Bethcar Case Study took place in the context of the harms suffered by the survivors as members of the Stolen Generations. Almost 20 years have passed since *Bringing Them Home* initiated a reparative process in response to the harms suffered by the Stolen Generations. The report made strong political and legal claims,¹⁸ and it did important work in documenting “the everydayness and bureaucratization of genocide and of massive human rights violations in the liberal democratic state,”¹⁹ making a significant intervention into the silence of both the legal domain and the public sphere of that time. But despite the recommendations of *Bringing Them Home*, no federal reparations scheme has been implemented. The effect of this failure is particularly stark, considering there has been only one successful action in law,²⁰ 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.

Compounding the effects of the absence of clear legal and political responsibility is the strength of the public, affective narrative that subordinates questions of state and public responsibility for harms to the Stolen Generations, to discourses of reconciliation and empathy. In Australian public life, the lexicon of responsibility has been limited to concepts of reconciliation²¹ and positions of regret, empathy or apology.²² In both *Bringing Them Home*²³ and the Apology,²⁴ a public, affective response has been shaped through the dominance of the survivor testimony as a key form in which Stolen Generations' harms are explained and communicated. This testimonial approach structures these harms as “scenes of suffering” rather than as “scenes of injustice.”²⁵ In Raymond Williams' terms, this sentimental narrative is dominant, and “has effectively seized [...] the ruling definition of the social.”²⁶

Further, responsibility in *Bringing Them Home* 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?” 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.”²⁷

A number of the Commission’s case studies cover institutions that were also the focus of *Bringing Them Home* (including *Case Study No. 7: Parramatta Training School for Girls and the Institution for Girls in Hay*; *Case Study 17: Retta Dixon Home*; and *Case Study 19: Bethcar*).²⁸ The focus of this paper is on the Bethcar Case Study, which elucidates the violence within legal processes experienced by survivors of child sexual abuse who tried to redress their claims. Although the original harms of sexual abuse, which resulted in criminal convictions, took place in the 1960s and 1970s, the civil legal proceedings were recent – taking place between 2008 and 2013.

LEGAL COMPLICITY

How do we explore the implicated position of lawyers working within the framework of state law? Placing the lawyer at the center of inquiry, productively opens up questions regarding lawful conduct, ethical conduct, micro-aggressions, and failures to act and respond – to reframe moments in which lawyers use the legal process in ways that adhere to the letter of the law, but perhaps not to its spirit of justice. The unique form of the Commission brings out, in specific, material ways, the networks and structures operating within and between legal institutions. The Commission has strong powers to call people to give evidence, and has significant flexibility in how that evidence is given. Its focus 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 focus on institutional responsibility has meant that narratives of responsibility are formed using a wider lexicon of figures beyond victim and perpetrator.

Legal practitioners in NSW, as in other Australian jurisdictions, are required to conduct themselves with reference to specific obligations to their clients, as well as to the court.²⁹ 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 not only lawfully but also “ethically, fairly and honestly to model best

practice.”³⁰ 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 apologizing when the state has acted inappropriately.³¹ 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 which 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 unnecessary and would only embarrass them.³²

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.³³ A solicitor employed by the CSO, Evangelos Manollaras, was allocated the proceedings under the supervision of a senior solicitor, Helen Allison. Manollaras was the lowest-grade solicitor employed by the CSO and had “never before acted in a case involving allegations of child sexual abuse.”³⁴ In July 2008, the principal solicitor of the Women’s Legal Service of NSW (WLS), Janet Loughman, filed a statement of claim on behalf of 13 plaintiffs (including Kathleen Biles, Jodie Moore, Amelia Moore, Leonie Knight, and plaintiffs given the pseudonyms AII, AIE, AIG, AIO, AIH, AIN, AIQ, QID and AIF), which was also allocated to Manollaras.

The matter came before Knox DCJ in May 2009. His Honor 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.³⁵ By the time the final mediation occurred on December 17, 2013, and all proceedings were resolved, the Department’s expenditure on the litigation was approximately A\$3.7 million. The bulk of these costs comprised legal costs of around A\$2.2 million³⁶ and only about one-third of this total went to the claimants as damages. At the mediation, each of the former residents who was still a party to the proceedings agreed to settle their claims for approximately A\$107,000 in damages and an apology.

Extraordinary revelations about the conduct and attitudes of the legal practitioners were made during the Commission’s proceedings. The correspondence of 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, Manollaras wrote to the retained junior counsel for the CSO, Patrick Saidi, regarding a request from the WLS for mediation. 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.”³⁷ On July 6, 2010, Manollaras

wrote to Saidi commenting on allegations that Leonie Knight had made that Mr. Gordon had “comforted her by hugging her, kissing her and fondling her breasts.”³⁸ 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 Eggs 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.³⁹

In August 2010, Manollaras spoke with Saidi and Paul Arblaster (another barrister retained by the CSO to assist Saidi), and recorded a file note of the meeting that stated that “counsel advised that the ‘best bet’ for the defendant was to ‘knock off’ as many plaintiffs as possible on the limitation question.”⁴⁰ 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 defense – in order to draw out the process as much as possible. 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 it. The model litigant policy explicitly outlines that the CSO should not rely on limitation defenses.

There was also evidence that the CSO actively hid information about important witnesses from the victims. Manollaras contacted an investigator, Peter Maxwell, in mid-2008 to perform some investigatory work for a matter involving Bethcar.⁴¹ 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.⁴² However, 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.”⁴³ Maxwell knew of at least 70 relevant people who were not mentioned in his two affidavits.⁴⁴

The Commission elicited statements of guilt and acknowledgments of responsibility from the legal practitioners and from the Department. It also elicited a detailed account of the affective states of those complicit actors – asking questions that would compel the witnesses to articulate their understanding of the impact of

their actions on the survivors. Counsel Assisting the Commission asked Michael 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 criminal conviction and incarceration of Mr. Gibson were yet asked by the state to prove their allegations in the civil forum:

Question. [...] 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?

Answer. It would have been baffling.⁴⁵

Coutts-Trotter also admitted that he felt “ashamed” that the Department requested particulars from the plaintiffs their criminal histories.⁴⁶

Allison, the senior solicitor supervising Manollaras at the time of the proceedings, was subjected to significant examination, given that Manollaras was the lowest-grade solicitor employed by the CSO and had “never before acted in a case involving allegations of child sexual abuse.”⁴⁷ The Commission asked Allison a number of questions, seeking 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 Allison to articulate an expansive concept of responsibility, beyond her technical responsibilities as a solicitor, to include moral considerations, as well as consideration of the significance of her behavior in the wider context of harms suffered by the Stolen Generations. The Commission also wanted Allison to articulate her understanding of the model litigant policy as a directive that had “deep” rather than “surface” requirements. At each turn, Allison rejected the Commission’s attempts, insisting on a narrower reading of her role.

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?⁴⁸

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.”⁴⁹ Allison disagreed that litigation involving allegations of child sexual abuse differed from other litigation.⁵⁰ When asked about the fragility of victims of child sexual abuse, it became clear that she 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.⁵¹

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.⁵²

When asked whether the crown, as a model litigant, should do what it can to avoid delays in litigation, and when the chair summarized the CSO's approach as of one of prevarication and delay, 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.⁵³

Allison insisted on reading the questions in a technical way, upholding the letter of the law and trying to limit her answers to technical questions – and at each point, resisting invitations to reflect on the affective or moral consequences of her actions. She refused 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. Nevertheless, counsel assisting the Commission continued to ask her questions that went beyond questions of technical legal compliance, broadening the concept of "responsibility" that applied to her role as a legal practitioner in these circumstances:

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.⁵⁴

Counsel assisting the Commission drew Allison's attention to a document requesting particulars signed by Manollaras. The document asked the plaintiffs whether they had committed any criminal acts. The chair put it to 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.⁵⁵ Allison agreed that while the question should never have been in the letter, it was still "incumbent on the plaintiffs" to provide particulars.⁵⁶

When asked whether it was 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), Allison said, "I think it's available and can be pleaded."⁵⁷ Commissioner Fitzgerald asked 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."⁵⁸ In Allison's final statement she acknowledged that she saw 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, 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."⁵⁹ This kind of distinction – the distinction made between what a person thinks or does "personally" compared with 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 behaviors. When finally asked whether she would behave differently with hindsight in cases such as Bethcar, she said, "Yes, I think so."⁶⁰

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 also 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 Allison, and feel shame. We imagine ourselves in her same position. This imaginative act creates a bond between us, as readers, and 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 position of being complicit in that suffering, and as responsible in ways that are both marked and unmarked.

The tactics carried out by the legal practitioners that counsel assisting the Commission characterizes as being problematic – including requesting particulars that were already known to the Department, requiring plaintiffs to plead their statements of claim separately, 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 histories⁶¹ – 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 (publicly) apparent is the impact of these tactics on claimants, particularly vulnerable claimants, and the part that these tactics play in the wider context of harms to survivors of sexual abuse and child removal. These legal processes are usually not subject to public scrutiny; solicitors who breach their obligations may be subject to disciplinary professional proceedings and/or judicial proceedings, but the range of such an investigation would not be as wide as that under the Commission. The inquisitorial and public forum of the Commission allowed it to ask questions that went beyond legal technicality, and to frame judgment of the lawyers' behavior using wider concepts of morality and fairness. The Commission case studies are open to the public, and they 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 domain 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 the civil litigation system in protecting the state from the perpetuating structural inequalities and by 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.”⁶²

The Commission has used the inquisitorial form to obtain a nuanced account of the responsibility of actors – not only the responsibility of perpetrators of sexual abuse, but also the responsibility of more complexly implicated subjects including the bystanders and facilitators of abuse: institutional colleagues and even leaders who knew about the abuse and did nothing. The Commission’s focus and processes have produced a thick description of the operation of extra-legal power – the ways in which legal responsibilities to report crimes, for example, were ignored in favor of local cultures and alliances, intended to preserve the reputation of a 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 in addition to therapeutic and empathic modes, the Commission also explicitly elicited from witnesses statements about their moral and legal culpability, demanding acknowledgements of their wrongdoing, guilt and shame. At different points the Commission sought the responsible party to demonstrate that they understand and acknowledge their culpability, as well as seeking acknowledgments that they would do things differently given the chance, and would change their approach and policies into the future. The institutional responses to child abuse examined by the Commission have ranged from incompetence and mismanagement of complaints to a range of behaviors that could lead to liability under criminal and civil law, including non-disclosure and deliberate cover-ups. Witnesses to the Commission provided testimonial statements, and then were subject to interrogation by counsel assisting the Commission, as well as by counsel of other interested parties, including survivors. These interrogations covered 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. The Commission’s concept of responsibility went beyond the roles of perpetrator and victim to involve a more complex and subtle lexicon of figures, including the bystander, accomplice, culpable witness, and irresponsible caretaker, negligent or ill-intentioned institutional head, the corrupt priest or school principal who held the interests of the church or the school ahead of the interests of a child/survivor, and, the focus of this article, the legal practitioner who was merely “doing their job,” but who failed to take into account the impact of their actions on survivors, and failed to evaluate their own actions according not only to their professional and legal obligations but also according to a wider ethical framework.

The Bethcar Case Study examined the actions, file notes, correspondence, and state of mind of the Department, and its solicitors and barristers. It considered together both civil and criminal proceedings, when these would otherwise be evaluated separately. The legal practitioners’ file notes and actions became evidence of conduct,

but did not comprise the complete picture of conduct: the Commission treated past notes and actions as a prompt, demanding practitioners to provide a narrative – as an occasion for expansion, rather than as a point that spoke for itself. 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.

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 organizations across time. In contrast to law’s linear conceptualization 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 December 15, 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 LEGAL NARRATIVE

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. 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, generating narratives that explicitly address the role of lawyers in legal violence, remembering that

if genocide takes place, it takes place *as* law and not simply *dis-*
guised as law – law understood as a system of meaning and a social

practice. [...] From within its logic, it will not look like genocide at all: it will look just like any other law.⁶³

This practice is part of what Desmond Manderson names “the apocryphal,” which “attempts to reclaim those aspects of law hidden by law’s power to name and unnamed.”⁶⁴ In postcolonial contexts such as Australia, settler lawyers are implicated legal subjects in ways that are just beginning to be explored and marked.

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 time 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 metaphor of culpability compared with the linear model of reconciliation, which would make a clean break with the past, and would try falsely to suggest that settler institutions are untouched in the present (and into the future).

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author.

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10. Ibid., 3.
11. Royal Commissions Act 1902 (Cth) (hereafter "RC Act").
12. 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 (Stephen Donaghue, Royal Commissions And Permanent Commissions Of Inquiry. [Australia: Butterworths, 2001])); 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).
13. The Royal Commissions Act 1902 was the subject of a report by the Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* 10 February 2010. <http://www.alrc.gov.au/report-111> (accessed June 24, 2017). The report concluded 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; *ibid.*, 111.
14. Kathleen Daly, "Conceptualising Responses to Institutional Abuse of Children," *Current Issues in Criminal Justice* 26, no. 1 (2014): 1-4, 5-9.
15. 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," (Chris Greer and Eugene McLaughlin, "The Sir Jimmy Savile Scandal: Child Sexual Abuse and Institutional Denial at the BBC," *Crime Media Culture: An International Journal* 9, no. 3 (2013): 243-64), in part because the establishment of these inquiries and commissions is motivated by concerns about the failures of institutions and authorities (Daly, 8-11).
16. For a copy of the Letters Patent and details of the Royal Commissioners, along with other information about the Royal Commission, see www.childabuseroyalcommission.gov.au/.
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