



## Précis Paper

### Royal Commission into Institutional Responses to Child Sexual Abuse

A discussion of the recent Royal Commission into Institutional Responses to Child Sexual Abuse

#### Discussion Includes

- Background
- Mandatory reporting
- A new criminal offence: to create one, or to not?
- Lessons to be learned from the Royal Commission: culture, compliance & training
- Sex offenders as monsters

## Précis Paper

### Royal Commission into Institutional Responses to Child Sexual Abuse

1. In this edition of BenchTV, Penny Crofts (Associate Professor, University of Technology Sydney, NSW) and David Carter (Lecturer, University of Technology Sydney, NSW) discuss the recent Royal Commission into Institutional Responses to Child Sexual Abuse.

#### Background

2. The Royal Commission into Institutional Responses to Child Sexual Abuse was requested by the Federal Government.
3. The aim of the Commission was to look at:
  - why institutions have failed to respond to child sexual abuse
  - how they have failed
  - how there might be better regulations/legislation/policies put in place to protect against, and respond to, child sexual abuse within institutions
4. Its focus was not upon child sexual abuse within homes, but upon child sexual abuse within institutions. The Commission looked into all types of institutions.
5. The problem was found to be endemic across all types of institutions. More than 8000 victims of child sexual abuse within institutions came forward to speak in private hearings. There were also thousands of witnesses who turned up to public hearings to talk about their experiences.
6. Penny Crofts herself was an expert witness in one of these sessions. Penny was there as an expert witness on corporate/organisational responsibility. Penny was brought in because of a criminal justice consultation paper, which was hundreds of pages long – but, oddly enough – only had 10 pages on organisational liability.
7. This was very much a distraction from what was supposed to be a Royal Commission into institutional responses to child sexual abuse. The focus of this consultation paper was on the perpetrators (i.e. the sex offenders) and the victims, which was all completely appropriate, but it was shocking that they only devoted 10 pages to organisational liability.

*The Commission was about institutional child abuse: so why the blind spot?*

8. This is a problem that is endemic to criminal law at the moment. Criminal law is great at focusing on the individual. The criminal law is really bad at holding responsible the people 'around' the perpetrator. We do have old doctrines like complicity, and new offences like mandatory reporting offences, however, historically criminal law has been really bad at responding to organisational liability.
9. There are theorists who say that organisational liability is 'tolerated', rather than encouraged.

*What makes people uncomfortable about targeting organisations rather than individuals for criminal liability?*

10. There are a variety of reasons, one of which is that the government itself can be held liable, so governments really do not want to pass legislation by which they will end up being found criminal.
11. Another reason is our focus on subjectivity in intentional wrongdoing. The problem we encounter is: how can a corporation have an intention? It has no brain, and no body, for which it can be punished. This is the central argument in relation to organisational liability.

#### Mandatory reporting

12. Mandatory reporting is important. All states in Australia have mandatory reporting duties, some of which are criminal offences.
13. But there have been almost no prosecutions for mandatory reporting. This is again the upshot of the reluctance to criminalise officials who do not actually perpetrate the offence, but who are aware of it.
14. One of the problems of mandatory reporting is that it requires knowledge or suspicion. There were definitely some cases in the Royal Commission where it would have been appropriate for people to have been charged.
15. There is no question that mandatory reporting is important. However, what the Commission revealed was that a lot of people do not know or suspect that offending is taking place, so that there is no way that these people could be prosecuted for mandatory failure to report, simply because they do not know. The reason that they do not know is structural.
16. It was revealed that the higher up a person was in an organisational hierarchy, the less likely it would be that they would know that sex offending was taking place. It reflects a theory

that the higher up in an organisation a person is, and the larger the organisation is, the less likely that that person will be held responsible.

17. The other reason why people did not know or suspect was because they were not trained to know or suspect.
18. People think sex offenders have these incredible insidious powers. The Commission was careful to disrupt this idea, and insist that these sex offenders are ordinary people, and ordinary measures work. One of those measures is to train staff to be able to recognise grooming. It is not hard for an adult who is trained to recognise grooming behaviours.
19. It was throughout almost all the case studies that people said 'I didn't know' – so we are looking at a systemic problem, not an individual one.

#### A new criminal offence: to create one, or to not?

20. The question faced by the Commission was: if we had some sort of criminal offence for this, would that necessarily result in
  - more pressure being placed on organisations to develop the training, policies, procedures and sensitivity that is currently so lacking, and
  - the impeding nature of such organisational structures to be addressed?
21. Criminal law does not solve everything. For example, there have been laws against murder for a very long time, and murder still happens of course. However, criminal offences do focus the mind. So if corporations recognise that this is something that they have to obey, or there will be penalties attached, their minds will be focused.
22. Criminal law communicates right and wrong – it punishes what is wrong. The failure to criminalise, and therefore the failure to punish, is a message in and of itself. At the moment, there is no criminal offence available in relation to institutional child sex offending.
23. It takes a while both to pass legislation, and to then see the impact of that legislation. If there was to be a criminal offence implemented in relation to child sex offending, then at least organisations would start to pay attention to these blind spots.
24. Establishing a criminal offence was proposed in the consultation paper. Two were suggested:
  - a negligence offence – which is a classic legal doctrine, requiring a legal duty, a criminal breach of that duty (which would be wicked or gross negligence), and as a consequence of that breach, a criminal wrong to have occurred

- corporate culture failure – the idea with corporate culture being to look beyond the procedures and policies of an organisation that are on paper, and look instead at how the organisation really behaves
25. There were some organisations with many policies and procedures, none of which were being implemented. Often the reality was that lip service was simply being paid to these policies and procedures. It was recognised by the Commission that the policies and procedures themselves were incredibly complex.
  26. An example of culture that failed to protect against child sexual abuse was at a school in which staff were afraid to report suspicions of sex offending because there was a bullying culture that protected the sex offender.
  27. It is important to look at who is rewarded and who is punished because a key question arises over how to know what the culture is, and whether or not it is in fact 'culture' rather than an individual/select few individuals.
  28. At the school in the example above, the abuse went on for years, and those who suspected it, and reported their suspicions, were the ones who got in trouble. So peering into corporate culture might be difficult, but it is going to provide more of a real sense of what is actually happening within the organisation, so that people may then be held to account.
  29. Armed with this information/evidence, it is not that hard to work out whether an organisation simply pays lip service to their protections and procedures, or whether it takes them seriously.
  30. When corporate culture was instated in the model Criminal Code in 1995, people were very excited about it, and saw it as really cutting-edge, but it just has not taken off. One of the reasons why it has not taken off is because it is so innovative and radical, whereas criminal negligence fits with a doctrine that people can understand. One of the big problems is that people struggle to imagine being culpable for corporate failure.
  31. There is a classic theory of wickedness that focuses upon absence, lack or failure, instead of intentional wrongdoing – concepts like absence, lack and failure, have been referred to as the 'knot in the twines'. Concepts as these do not refer to something actual, physical, or positive, but rather an absence of, lack of something, or failure to do something, for which an entity can be found culpable.
  32. Penny argues that in modern times it is not enough to focus on intentional wrongdoing, and that organisations have a tremendous capacity for harm and systemic failure. We need to think about a way of holding them responsible for it, and regarding their culpability and

blameworthiness as sufficient. If an organisation is guilty for lacking something, a need is created for something positive to be done to fill that void.

#### Lessons to be learned from the Royal Commission: culture, compliance & training

33. It emerged from the Commission's findings that it is extremely important for organisations to:
- train staff to recognise grooming
  - have really clear processes of reporting (who to report to, what the implications are)
  - have appropriate mechanisms in place to respond to such reports
  - not allow staff to be alone with children
34. All of this is not that difficult to achieve - it's not rocket science, that's for sure.

#### Sex offenders as monsters

35. It is very common to hear in the media, and elsewhere of course, pedophiles being referred to as monsters. Penny has used an analysis of law and horror to write a paper on this topic. One of the themes that surfaced in the Royal Commission was that people thought they had the ability to recognise a sex offender, or at least know what one looked like, which is often a trope of horror.
36. Another trope of horror is that the monster is not recognised until it is too late. The same two tropes can be seen as having underpinned the Commission's inquiry. Another trope of horror is that the monster is assumed as being an outsider or stranger.
37. All of the Commission's cases concerned offenders who were known and trusted by the other members of their organisation. In relation to sex offenders, organisations were arguing that there was nothing that they could do, and that any other organisation would have fallen victim to the same people.
38. The Commission demolished this argument, saying that:
- these sex offenders are ordinary people
  - ordinary situational crime prevention would work
  - if an organisation has zero tolerance for sex offending, then the offender would most likely have picked up on that, and not had an opportunity to offend
39. People often think these cases are just tragic accidents, or one-offs - they are wrong. These cases are ongoing. Often they go on for years either without people reporting, or with people reporting, but with nothing being done. One thing is for sure - these cases are not simply tragic accidents.

## **BIOGRAPHY**

### Penny Crofts

Associate Professor - University of Technology Sydney, NSW

Associate Professor Crofts is an international expert on criminal law, models of culpability and the legal regulation of the sex industry. Many of her recommendations for the legal regulation of brothels have informed Parliamentary debates, influenced council planning policies and shaped proposed law reforms. Her analysis of criminal legal models of wickedness has contributed to a jurisprudence of blameworthiness.

### David Carter

Lecturer - University of Technology Sydney, NSW

David Carter is an expert in the legal, regulatory and governance challenges involved in the delivery of safe, effective and sustainable healthcare services. Prior to joining UTS, David worked in a variety of management roles in the healthcare and not-for-profit sector, ranging from primary healthcare services in remote Australia, rural and metropolitan health infrastructure development projects, the management of private hospitals and an iconic inner-city homelessness service, The Wayside Chapel.