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Rape stats, Savile and a Royal Commission

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This year I spent 2 months in Australia arriving just as the terms of reference for a Royal Commission into institutional responses to child sexual abuse were published. Ironically, the terms were published on the same day as the report into abuse by the late DJ Jimmy Savile and in the same week as a study by the UK Ministry of Justice, Home Office and Office for National Statistics found that in the UK up to 500,000 people are victims of sex crimes every year. The statistics are awful but, the sad truth is there is no rape epidemic; it's just that finally rape has become big news. Rape is endemic across the world and has been for generations. It occurs in homes, in institutions, in the street and is a war crime. Ask any criminal barrister and they'll tell you that the Criminal Courts are full of serious cases of rape, abuse and sexual violence but for years the public gallery has been empty. Ironically, the glut of cases is the inevitable consequence of improvements in data collection and in prosecuting offences. As counsel, we deal with matters that should have been tried decades ago but people were inhibited or prevented from complaining. It is the secrecy of abuse that allows it to perpetuate. The public may not like it but my prediction for 2013 is that they will hear a lot more about abuse and that knowledge should inevitably inform their day to day conduct. "Dirty old men" and abusive women will be exposed far more than they ever were in the past.

Launching the terms of the Royal Commission in Australia, Justice Peter McClellan AM said *"The Royal Commission has been charged with examining the sexual abuse of children in the context of institutions throughout Australia. Having regard to what is already publicly known of these problems the task before the Commission is large. However, until the Commission has commenced its work and people come forward to give us an account of their personal circumstances we cannot gauge the full extent of that task". He said that six commissioners would "endeavour to gain a complete understanding of the problems in various parts of Australia in the most efficient manner possible..... our task is complex and will take significant time"*. It is an interesting evidence gathering process: Vulnerable witnesses will need to be accommodated, the Commission has powers to compel the production of evidence, including documents, and Justice McLellan indicated that the commission will expect *"all institutions that may have entered into confidential agreements with individuals will cooperate with the Commission in relation to the disclosure of those matters"*. This will place a heavy burden on church and teaching organizations who may have dealt with abuse "in house" in the past.

The Commission is not a prosecuting body but it *"will establish links with the appropriate authorities in each State and Territory to whom a matter may be referred with the expectation that where appropriate prosecutorial proceedings may commence"*. To encourage victims to come forward, some parts of the proceedings will take place in private, with restrictions on naming individuals and on reporting. However, public understanding of what has gone on is a *"fundamental objective"* of the Commission so it is likely that, where possible proceedings will be in public. My view is that, subject to the appropriate funding and providing it is made clear that the process is to improve

things for the future not to get bogged down in the past, this is a process that would be worth mirroring across the world.

Men like Jimmy Savile offended with impunity. Priests and other professionals systematically abused children. Witnesses who must have been aware of what was going on did nothing and now seek to blame the system and the system has a lot to answer for. Early in the Operation Yewtree investigation, I wrote in the Times: *"Those who failed to act will have to live with themselves forever but arguably the courts and the justice system were not to blame. Parliament made the laws that so failed to protect young women and those laws were debated by men who mixed with the likes of Jimmy Savile. Parents, friends and colleagues passed by inappropriate conduct and failed to act. The courts can only sort out the philanderers from the paedophiles if given the opportunity"*. It now seems that some people did complain to the authorities but a prosecution of Savile was not pursued. There must have been failures at every level, long before any criminal proceedings were contemplated.

Not everyone is a rapist and it is important that evidence collected is reliable and the right suspects are identified. It is just as bad to be falsely accused of sexual abuse as to be a victim of it. Nevertheless, it is equally important that the law reacts to any findings by an inquiry. Law makers across the world have taken a long time to react to sexual offending. In England and Wales, for many years, the maximum sentence for indecently assaulting a female child was 2 years, unlawful sexual intercourse was time barred after a year and the idea that a man could rape his wife without sanction remained good law until as recently as 1991. The weak laws effectively allowed sexual offences to be committed behind closed doors with no proper police intervention. Much of the old law and sentencing has now changed. For example, on the 24th of October 1991, The Times front page read: *"Wave of prosecutions will follow"* as five law lords unanimously swept away the principle established by Chief Justice Hale in 1736 that by marriage, a woman gave her body and irrevocable consent to sexual intercourse with her husband in all circumstances. Lord Keith of Kinkel said that the principle was "anachronistic and offensive" and that the common law could change in the light of social, economic and cultural developments. Lord Lane declared that "a rapist remains a rapist and is subject to the criminal law, irrespective of his relationship with his victim"¹¹. According to The Times report at the time; "the ruling caused uproar in the public gallery, and cheering supporters of Women Against Rape were evicted.... its spokeswoman, Claire Glasman said: *"This is a fantastic day for women everywhere. The law lords have finally nailed a legal lie which has somehow survived for nearly three centuries. This is really a step towards making it clear legally that women have the right to say 'no' to sex, even if they are married. It overturns 250 years of legal sexual slavery based not on a court case but on a 18th century judge's decision that a husband could not rape his wife."* Times have definitely changed and the process of improving the law to provide protection for individuals is not over.

The importance of the Savile investigation and the Australian Royal Commission is not findings that that individual prosecutors were "unjustifiably cautious" or that Church confessions were kept secret in the past but to learn from those past mistakes in order to inform future cases. Statistics on child abuse are not an exact science as abuse takes so many forms ranging from grooming to violence. A Royal Commission is a useful process to collect information. The truth is that, although there were complaints against Savile that were not properly followed up, there were nothing like the complaints that have been made since his death. Suddenly people are complaining and the good news is that they are being heard. Ironically, like most criminal barristers, I have been listening to these people in court for years – the prostitute violently raped by her pimp, the step daughter

¹¹ *R v R* [1992] 1 A.C. 599, House of Lords

systemically abused by her step father, the young boy abused by his care worker and the school children whose headmaster admitted in evidence that he had a fetish for little girls' knickers. All of these are real cases. All resulted in convictions and long sentences. Often the evidence is historic, sometimes it is more recent. It is common for complaints to be delayed through fear, trauma and just an old fashioned belief that victims will be ignored. There are some fabulous police officers out there who really try to make sure that their cases are prosecuted, there are lawyers who take a chance on flaky evidence from a vulnerable witness and there are advocates who give their all in court to try to make sure such cases are properly and fairly tried. Jimmy Savile would have had a complete defence under the old UK law to some of the allegations against him. He knew it and had a "policy" to react to any allegation that kept him from a robust prosecution. In the UK the law has been much improved and in Australia, by launching the Royal Commission, the Prime Minister, Julia Gillard has given victims an opportunity to be heard.

The high profile cases are the tip of an enormous problem that will place great strain on any criminal justice system in any part of the world but it is important that men, women and children can go about their lives with as much safety as possible and that sex offenders are identified and locked away, whether they are celebrities or not. We can learn lessons from the dead suspects but it's the live ones we need to catch and collecting evidence, information and data is a good place to start².

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² please note, parts of this article appeared in Felicity's Weekly "Scuttlebutt" Column in Criminal Law & Justice Weekly