

Vicarious liability reforms in Victoria post- *Bird v DP (a pseudonym)* [2024] HCA 41

Submission to the Hon. Sonya Kilkenny, Attorney-
General of Victoria, and the Department of
Justice and Community Safety

2 July 2025

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Who we are

The **Australian Lawyers Alliance (ALA)** is a national association of lawyers, academics and other professionals dedicated to protecting and promoting access to justice and equality before the law for all individuals.

Our members and staff advocate for reforms to legislation, regulations and statutory schemes to achieve fair outcomes for those who have been injured, abused or discriminated against, as well as for those seeking to appeal administrative decisions.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Our head office is located on the land of the Gadigal people of the Eora Nation. As a national organisation, the ALA acknowledges the Traditional Owners and Custodians of the lands on which our members and staff work as the First Peoples of this country.

More information about the ALA is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to make a further submission to Attorney-General the Hon. Sonya Kilkenny MP and to the Department of Justice and Community Safety (DJCS) on vicarious liability reforms in Victoria arising from the High Court of Australia's decision in *Bird v DP (a pseudonym)* [2024] HCA 41 ('*Bird v DP*').
2. ALA members are grateful for the engagement we have had with the Victorian Government and the DJCS on this matter, and we welcome the Attorney-General's announcement on 18 June 2025 that Victoria will legislate to address the issues raised by the High Court's decision in *Bird v DP* regarding vicarious liability.
3. The ALA remains deeply concerned about the real and ongoing impact of the High Court's decision on victim survivors of institutional child abuse and their ability to access justice. As legal practitioners who represent those victim survivors, we remain committed to ensuring access to justice for all victim survivors of abuse. We deeply appreciate the Attorney-General acknowledging that impact on victim survivors and the urgency for reforms in her statement on 18 June 2025.
4. Our submission will address:
 - a. Preliminary matters raised in discussions about vicarious liability reforms;
 - b. The scope of these reforms; and
 - c. Three options for retrospective legislative change in Victoria.

Preliminary matters

5. The ALA wishes to address the following matters which have been raised in discussions about vicarious liability reforms.

Establishment of a redress scheme

6. The ALA is opposed to the establishment of a redress scheme as an option to address the legal complexities that have arisen from *Bird v DP*.

7. There are many issues with the current National Redress Scheme, including that compensation and support for victim survivors are dependent on the method of abuse rather than the outcome of the abuse. This has left many victim survivors out of the National Redress Scheme or without adequate compensation.
8. We would not want to see these issues replicated in Victoria or in any other jurisdiction, including as part of a government response to *Bird v DP*.

Setting aside deeds

9. The ALA notes that the Victorian Government will need to decide how to address matters settled between the decision in *Bird v DP* and Victoria's legislative reform coming into effect.
10. This is complex – while the matters have been settled, there is a question as to whether victim survivors agreed to likely inadequate settlements based on the uncertainty as to whether there would be vicarious liability reforms.
11. Noting that the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') emphasised reducing legal barriers to victim survivors accessing proper justice, treatment and support, the ALA would welcome further discussion about whether there should be an option to set aside settlement deeds initiated between the decision in *Bird v DP* and this legislative reform coming into effect.
12. We note this as a preliminary point that will need to be considered; however, we would hope that it is not a barrier to ensuring that legislative change occurs as soon as possible.

Scope of the reforms

13. With regard to the scope of these reforms, the ALA submits the following:
 - a. That the reforms must be retrospective in order to address the barriers to accessing justice for victim survivors abused in Victoria before 2018.
 - b. That religious institutions must be covered under the new legislation; however, it would not be appropriate to limit the scope of these reforms to religious institutions only.

- c. That the State of Victoria must also be explicitly included in the scope of these vicarious liability reforms through amendments to the *Wrongs Act 1958* (Vic).
- d. That consideration must be given as to whether volunteer organisations or volunteers are covered under the new legislation:
 - i. ALA members are concerned about the impact on some victim survivors if volunteer organisations or volunteers in organisations/institutions are explicitly excluded from coverage under these reforms. It would seem contrary to the policy intent to – in the course of rectifying the post-*Bird v DP* two-tiered system of access to justice for victim survivors of abuse dependent on whether they were abused before or after 2018 in Victoria – create a different kind of two-tiered system of access to justice dependent on whether a victim survivor was abused, for example, by an institution’s/organisation’s employee or volunteer. There is still a traumatised victim survivor who needs support, treatment and justice.
 - ii. However, we acknowledge that the case law in Victoria has been clear that vicarious liability does not extend to volunteers.
 - iii. The ALA also notes that the Victorian Bar and the Common Law Bar Association have advocated for a legislative model whereby the legislative scope includes the State of Victoria but that other matters (including who is “akin to employment” for a “relevant organisation”) are left for the Courts to address.
 - iv. We will further cover matters relevant to coverage of volunteer organisations in the final section of this submission.

Insurance considerations

- 14. The ALA notes that concerns have been raised about the effect of making vicarious liability legislation retrospective on insurance for institutions and organisations.
- 15. The ALA does not consider that making vicarious liability legislation retrospective will have an effect on insurance access or premiums for institutions and organisations as the proposed

legislative reform simply places institutions back in the same position they were prior to *Bird v DP* being handed down in November 2024.

16. We note that the Catholic Church had its own insurance company, but this has entered voluntary liquidation. However, Cardinal Pell told the Royal Commission that his Archdiocese alone had billions in assets and income, and could readily meet any common law damages for child abuse. The wealth of the Catholic Church throughout Australia is undoubted. Cardinal Pell and the Archbishop of Melbourne gave an undertaking after meeting with victim survivors and on behalf of all elements of the Church to treat victim survivors properly.
17. In respect of other organisations, one might enquire whether insurers on the open market noted any increase in payouts for institutional child abuse between 2018 (prospective legislative change) and 13 November 2024 (*Bird v DP* was handed down in November 2024).
 - a. Since every appellate court short of the High Court had assumed that ‘akin to employment’ created vicarious liability (like the rest of the common law world) it would be interesting to understand that.
 - b. If the answer is that insurers do not keep statistics confined to institutional child abuse, then this suggests a lack of concern by insurers.
18. One might similarly ask what, if any, changes in claims and payouts for institutional abuse have occurred since *Bird v DP*.
 - a. If premiums were under pressure, then they should have fallen. Given the attitude of insurers, this seems unlikely.
 - b. Those enquiries and the responses – or their lack of direct response – should indicate whether insurance is a general problem or merely an attempt to evade responsibility at the cost of some of the pre-2018 victim survivors in Victoria and for other victim survivors across Australia.

Options for retrospective legislative change

19. The ALA considers that there are three options for legislative change in Victoria to address vicarious liability with retrospective application:

Option 1: Directly reverting to a pre-*Bird v DP* position

20. In this model, retrospective legislation is implemented to return the law to what was understood to be before the decision in *Bird v DP*, through amendments to the *Wrongs Act 1958* (Vic).
21. Victoria's courts would be empowered to determine matters regarding "akin to employment", as they have previously.
22. No extra coverage to what is available in the prospective legislation is sought under this option.
23. This option would be similar to that proposed by the Victorian Bar and the Common Law Bar Association.

Option 2: Directly reverting to a pre-*Bird v DP* position using existing language in the *Wrongs Act 1958* (Vic)

24. Similar to Option 1, this model proposes to return the law to what was understood prior to the decision of *Bird v DP* being handed down, through amendments to the *Wrongs Act 1958* (Vic).
25. However, this model proposes using the language found in section 90(1) of the *Wrongs Act 1958* (Vic) and applying it retrospectively, to outline and articulate the circumstances in which "akin to employment" might arise.

Option 3: Drawing on NSW civil liability legislation to define the scope of these reforms and to reverse the duty of care

26. If the Victorian Government sought to provide clarity and criteria for which organisations and institutions are covered under the retrospective application of vicarious liability legislation in Victoria, the ALA would recommend drawing on the relevant legislation from NSW.

- a. The amendments made to the *Civil Liability Act 2002* (NSW) in 2018 cover most but not all institutions organisations.²
- b. Crucially, the test is whether an organisation is of a sufficient size and substance to owe an appropriate duty of care. The ALA considers this a sensible test.

27. Further, the NSW reforms reversed the duty of care so that an organisation of a kind to which the legislation is limited is required to show with all due care – the plaintiff does not have to prove this. This makes proving negligence much easier.

- a. The ALA notes that there was always a duty of care as enunciated by the High Court in *Prince Alfred College Incorporated v ADC* [2016] HCA 37 where there was authority, power or control over the child, trust of the child and the ability to achieve intimacy with the child.
- b. However, the absence, inadequacy and destruction of records by certain institutions and organisations has meant that proving negligence (by prior complaints about the offender) is very difficult and institutions had been notoriously negligent in this respect.
- c. What section 6F of the *Civil Liability Act 2002* (NSW) does is to reverse the onus of proof for those organisations which should have kept accurate records of such matters and failed to do so. Not all organisations are required to keep records, but major institutions especially are.
- d. This is merely an extension of the existing duty of care giving rights to victim survivors of institutional negligence, and can reduce the number of and need for vicarious liability claims.

28. We note that the NSW reforms do not appear to have had any impact on insurance access or premiums.

² See: *Civil Liability Act 2002* (NSW) Part 1B Division 2 sections 6D, 6E and 6F and Part 1B Division 3 sections 6G and 6H <<https://legislation.nsw.gov.au/view/html/inforce/current/act-2002-022#pt.1B>>.

Conclusion

29. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to Attorney-General Kilkenny and to the DJCS on vicarious liability reforms post-*Bird v DP (a pseudonym)* [2024] HCA 41.

30. ALA members are available to further discuss the matters raised in our submission as well as any other matters related to these important and urgent reforms.

A handwritten signature in black ink, appearing to read 'Susan Accary', written in a cursive style.

Susan Accary

President, Victoria Branch Committee

Australian Lawyers Alliance