

Vicarious liability and legislative reform post-*Bird v DP (a pseudonym)* [2024] HCA 41

Submission to the Hon. Sonya Kilkenny,
Attorney-General of Victoria

31 January 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 provide a written submission to the Hon. Sonya Kilkenny, Attorney-General of Victoria, on vicarious liability and the urgent legislative reform needed after the High Court of Australia's decision in *Bird v DP (a pseudonym)* [2024] HCA 41 (*'Bird v DP'*).
2. ALA members across Australia are deeply concerned about the real and ongoing impact of the High Court's decision on victim survivors and their ability to access justice.
3. We understand that Victoria will be leading the discussion on this matter at the Standing Council of Attorneys-General meeting in February 2025. The ALA is hopeful that the following submission can be of assistance in the lead-up to and during that meeting.
4. The ALA would also welcome the opportunity to meet with the Attorney-General to provide further assistance on the issues raised in this submission.
5. Our submission addresses the following matters:
 - a. the High Court's decision in *Bird v DP* and its ramifications;
 - b. the impact on victim survivors, including 10 de-identified client case studies provided by ALA members; and
 - c. proposed legislative reform.

The High Court's decision in *Bird v DP (a pseudonym)* [2024] HCA 41 and its ramifications

6. In *Bird v DP*, the High Court decided that the Catholic Church cannot be held vicariously liable for the sexual abuse of a child committed by a priest because the priest was not an employee of the Diocese in Ballarat, Victoria.
7. The priest who committed the sexual abuse of the child survivor whilst carrying out pastoral activities as a representative of the Diocese was not an employee. There was no evidence of negligence by the Diocese, so the question was whether being 'akin to an employee' was sufficient to give rise to vicarious liability. It was held that vicarious liability does not arise in the absence of employment. That was so despite the Bishop having authority as great as an

employer over the priest and the work (pastoral home visits, which gave the opportunity for child abuse) being a fundamental function of the Diocese.

8. Current legislation in most states and territory jurisdictions, with the exception of the ACT and WA, is such that **this judgment creates two distinct categories of survivors of child sexual abuse, a distinct two-tiered system of justice in Australia impacting survivors of child sexual abuse by non-employees which is wholly dependent on when they were sexually abused – that is, in Victoria: before 2018 or after 2018.**
9. Australia is now distinctly at odds with decades of authority in the highest courts of other Commonwealth jurisdictions such as Canada, the United Kingdom, Ireland and New Zealand.
10. The ALA is also of the view that this decision is not in line with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'). One of the significant outcomes of the Royal Commission was to remove legal barriers for victims of historical child sexual abuse. This decision not only creates yet another legal barrier but also two classes of survivors of child sexual abuse.

The impact on victim survivors: 10 de-identified client case studies

11. ALA members have provided the following 10 de-identified client case studies which demonstrate the impact of the decision in *Bird v DP* on victim survivors of abuse and which underscore the need for urgent legislative reform.

Client case study: Client A

Client A was an altar boy for an assistant parish priest at his local church. Client A was sexually abused by an assistant parish priest in the sacristy while they were preparing for mass.

After the High Court's decision in *Bird v DP*, Client A can now no longer pursue a civil claim against the religious institution responsible for appointing the assistant priest to the parish and assigning him one-on-one supervision of Client A in the sacristy because the assistant priest was not an employee.

Client case study: Client B

Client B was a youth volunteer at a railway organisation. He was sexually abused by a train driver of that railway organisation. The abuse occurred on the train while the perpetrator was overseeing Client B's volunteer tasks. The perpetrator was criminally convicted of the abuse of Client B.

Client B lodged a claim in the Supreme Court of Victoria on the advice of his lawyers.

After the High Court's decision in *Bird v DP*, Client B has been advised that his vicarious liability claim has no prospects. This has caused a substantial delay to his claim so that his legal team can review the prospects of a direct negligence claim only. It is uncertain whether Client B's claim may continue.

Client case study: Client C

Client C was a youth member of a Guides organisation. After a period of grooming, Client C was sexually abused by her Guides leader at an event run by the organisation.

Client C received legal advice that she has an actionable claim against the organisation.

After the High Court's decision in *Bird v DP*, Client C has been advised that she can no longer pursue her claim against the organisation because the perpetrator was a volunteer.

Client case study: Client D

Client D and his family were members of a religious institution. Every Sunday, Client D attended 'Sunday school' run by a senior member of the church while his parents attended mass. This senior member took Client D and other children on day excursions as part of 'Sunday school' where he sexually abused Client D.

Due to the High Court's decision of *Bird v DP*, Client D can no longer pursue a civil claim against the religious institution responsible for appointing the perpetrator to run the 'Sunday school' because he was not an employee.

Client case study: Client E

Client E attended a Catholic primary school. He and his family attended the local parish and he served as an altar boy. He attended altar boy duties on weekends and was also removed from the classroom to attend to altar boy duties during the school day.

Client E was sexually abused by the parish priest in the course of completing altar boy duties. The priest is deceased and the Diocese has denied receiving reports of abuse by other victims.

Client E has been advised that he likely has no prospect of a claim in direct negligence and, after the High Court's decision in *Bird v DP*, Client E has been advised that his vicarious liability claim has no prospects. This has caused a substantial delay to his claim so that his legal team can review the prospects of proceeding on a non-delegable duty of care basis only.

Client case study: Client F

Client F attended a religious boarding school for several years during his secondary schooling. Whilst at the boarding school, he was subjected to physical and sexual abuse by several of his teachers, who were priests in the religious order that ran the school.

After the High Court's decision in *Bird v DP*, Client F has been advised that his vicarious liability claim has no prospects and that his claim in negligence is now unclear.

Client case study: Client G

Client G resided at an unmarried mothers' home, operated by a religious organisation, for several months as a pregnant teenager. Whilst at the home, Client G was subjected to physical abuse and was forced to engage in laborious tasks, including scrubbing floors and doing laundry – even in the advanced stages of her pregnancy.

After her baby was born, Client G was subjected to pressure and coercion by the nuns to give up her baby for adoption, despite her objections that she had been able to arrange stable accommodation for herself and her child by this time.

Client G has been advised that her claim against the religious organisation may not be able to proceed after the decision in *Bird v DP* and that her claim against the remaining entity, the hospital where she gave birth, may be significantly discounted.

Client case study: Client H

Client H attended Scouts with his brother (Z). Both boys attended a trip with their Scout leader. Both boys were assaulted on the trip by the same perpetrator. The offender was criminally convicted of the abuse of Z.

Z settled his case against the Scouts pleading vicarious liability prior to *Bird v DP*.

Client H reported the abuse to police at a similar time to Z but there were delays in the charges being laid, which prevented his civil case proceeding. The perpetrator has since been convicted for offences relating to Client H.

Client H has been advised that his claim against the Scouts may not be able to proceed after the decision in *Bird v DP*, unless direct negligence can be established.

Client case study: Client I

Much like thousands of others who did not bring their civil claims for compensation before the High Court's decision in *Bird v DP*, as they found addressing the childhood sexual abuse too difficult for them until recent times, Client I's claim for compensation is now uncertain and, unless there is legislative change in this space, Client I may not be compensated.

Client I, as a child, was sexually abused on multiple occasions by a priest performing so-called pastoral care in Client I's home on multiple occasions. Client I was encouraged to seek justice for the abuse by the brave legislative changes made by the Victorian Government in the 2010s, only to be let down by the recent High Court decision.

Like the thousands of others sexually abused by people and organisations that they trusted as a child, as an adult there is no part of Client I's life not affected by the effects of the sexual abuse.

Client case study: Client J

Client J attended a religious institution and was an altar boy. He was abused by the parish priest on a church camp, and on multiple occasions in the church. The priest is deceased, and the religious institution alleges that there have been no other complaints about him.

Proceedings have been issued in the Supreme Court, and an Informal Settlement Conference (ISC) was held after the High Court's decision in *Bird v DP*. The only offer made at the ISC was to withdraw the claim and bear his own legal costs.

Client J has been advised that his vicarious liability claim now has virtually no prospects. His legal team are reviewing the prospects of proceeding on a non-delegable duty of care basis only.

Proposed legislative reform

12. In its judgment, the High Court noted the following at [67]: *“Reformulation of the law of vicarious liability is properly the province of the legislature.”*
13. **The ALA urges the Victorian Government to bring about beneficial legislative change to ensure that all victim survivors of historical child sexual abuse are treated fairly before the law, having equal and proper access to justice in Victoria.**
14. We note that ALA members have developed legislative reform proposals for all jurisdictions across Australia – that is, proposals to make existing legislation retrospective in Victoria, NSW, Queensland, Tasmania, the Northern Territory and South Australia; and proposals to create new legislation (with both prospective and retrospective application) to address vicarious liability in the ACT and in Western Australia.
15. The ALA is providing those legislative reform proposals to Attorneys-General and Shadow Attorneys-General in each jurisdiction, and we are able to share those with the Attorney-General of Victoria if that would be of assistance.
16. **For Victoria, the ALA supports the following proposal for legislative reform**, developed by John Rule (Principal Lawyer, Maurice Blackburn Melbourne) and David Seeman (Barrister, 1815 Castan Chambers):

Addition of section 91A to the *Wrongs Act 1958* (Vic):

- (1) A relevant organisation cannot avoid vicarious liability for the conduct of an individual associated with the relevant organisation on the basis that the person is not an employee.

- (2) Subsection (1) applies to a claim founded on or arising from child abuse whether the child abuse occurred or occurs before, on or after the commencement of this section.
- (3) Subsection (1) cannot be relied on for the purposes of an application under sections 27QA–27QE of the *Limitation of Actions Act 1958*.

17. This proposed legislative change relies on the definitions of ‘relevant organisation’ and ‘individual associated with the relevant organisation’, which are already provided for in Part XIII of the *Wrongs Act 1958* (Vic).

18. However, this proposal deliberately addresses only the first limb of the vicarious liability test: employment. This addresses the problem created by the High Court’s decision in *Bird v DP* without widening the scope of what is captured – that is, the plaintiff does not automatically fall down at the first hurdle if there is no employment relationship. It is then up to the Courts to apply the balance of the vicarious liability test: power, intimacy and whether the role creates occasion for the abuse.

19. In this regard, we note Justice Gleeson’s dissenting judgment in *Bird v DP*. Justice Gleeson found that DP cleared the first hurdle of the test, as the priest was in a role akin to employment but failed the second limb because the role of assistant priest did not give occasion to the abuse.

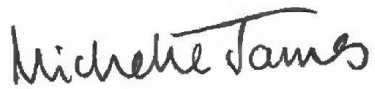
20. We also note that subsection (2) of the above legislative reform proposal mirrors the language used in the provisions of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) and the *Limitation of Actions Act 1958* (Vic) which ensure that the relevant sections of those pieces of legislation apply retrospectively.²

Conclusion

21. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to Attorney-General Kilkeny on vicarious liability and the urgent legislative reform needed after the High Court’s decision in *Bird v DP (a pseudonym)* [2024] HCA 41.

² See, eg, *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) 4(3).

22. The ALA would welcome the opportunity to meet with the Attorney-General to provide further assistance on the issues raised in this submission.



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