Submission cover sheet

Inquiry into the Civil Law (Wrongs) (Organisational Child Abuse Liability) Amendment Bill 2025

Submission number: 002

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11 July 2025

Standing Committee on Legal Affairs,
ACT Legislative Assembly,
GPO Box 1020,
Canberra ACT 2601
By email: LACommitteeLegal@parliament.act.gov.au

Dear Members of the Standing Committee,

Inquiry into the Civil Law (Wrongs) (Organisational Child Abuse Liability) Amendment Bill 2025

Introduction

I am a barrister practising in New South Wales and an Associate Professor in the Law Faculty of the University of Technology Sydney.

I have published[1] and presented on the scope of vicarious liability for institutional child sexual abuse under Australian and UK law for over a decade. I was consulted on the scope of reforms to the *Civil Liability Act 2002* (NSW) (**CL Act**) in 2017 and was a member of the roundtable held by the Department of Communities and Justice in NSW prior to the enactment of Part 1B of that legislation addressing institutional liability for child sexual abuse.

In relation to current issues of law reform and policy concerning institutional liability for child sexual abuse, I am organising a public national conference on *Pathways to Justice for Survivors of Institutional Abuse* to be held in Sydney on 19-20 September 2025: https://pathways.openlaw.com.au/. The conference will be opened by the Hon Peter McClellan AM QC who was the Chief Royal Commissioner of the Royal Commission into Institutional Responses to Child Sexual Abuse from 2013 to 2017. The Conference will feature presentations by 50 leading experts in the field of redress and civil litigation in institutional abuse.

Thank you for the opportunity to make a submission in relation to this bill and on these matters generally.

Reform to reverse the outcome of the decision of the High Court in *Bird v DP*

In this submission, I support the aim of this bill and submit there is a need for legislative reform to the civil liability legislation of each State and Territory to introduce a statutory form of vicarious liability that extends to relationships that are 'akin to employment' within the meaning of the term as it has developed at common law by the Supreme Court of the United Kingdom, and to reverse the outcome of the decision of the High Court in *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349; [2024] HCA 41 (***Bird***). This proposed development of the common law was argued in, but rejected by, the High Court in *Bird.*

In my view, such targeted reform to the *Civil Law (Wrongs) Act 2002 (ACT)* enact an extension of vicarious liability for the liability of persons who are 'akin to an employee' with retrospective effect is justified for the reasons set out below. However, there are a number of critical issues to be taken into account in relation to the scope and form of any reform. These matters are important to ensure that reform does not inadvertently extend vicarious liability in unanticipated or unintended ways, or confuse common law concepts with an acquired meaning and create further uncertainty.

Executive Summary

For the reasons discussed below, I recommend that reforms to impose statutory vicarious liability upon institutions (organisations) in respect of liability for child sexual abuse in certain circumstances have the following features:

1. An organisation may be vicariously liable for the liability of a person for child sexual abuse where the person is:

   (a) an <u>employee</u> of the organisation, or

   (b) a person in a position that is <u>akin to an employee</u> of the organisation.

2. The definition of 'employee' should not *include* persons 'akin to an employee'. These are distinct concepts at common law that should not be elided. Vicarious liability under English law extends to both classes of worker, but does not do so by defining persons akin to employees to be included within the concept of an employee.

3. The definition of a person 'akin to an employee' should not include independent contractors. These are distinct concepts at common law that should not be elided. Common law vicarious liability does not extend to independent contractors operating a recognisably independent business. The extension of vicarious liability to independent contractors cannot be justified as reflecting what has already been done by the courts under English law, or the reversal of the effect of *Bird.*

4. The definition of a person 'akin to an employee' should include the elements that the person:

   (a) carries on activities as an *integral* part of the organisation's business activities and for its *benefit*;

   (b) the activities carried on by the person are not attributable to an independent business of the tortfeasor or third party; and

   (c) the activities assigned to the person by the organisation created the risk of commission of child sexual abuse.

5. The definition of a person 'akin to an employee' should be capable of applying to volunteers and carers in the circumstances of paragraph 4 above.

6. *Retrospective effect*: these reforms should have retrospective effect. If the High Court in *Bird* had accepted the common law extension of vicarious liability to persons akin to employee, it would have had retrospective operation as part of the common law.

Submission

This submission is structured as follows:

A. The scope of 'akin to employment' at common law - UK

The policy justifications for the extension of vicarious liability to relationships that are 'akin to employment,' and the scope of the concept as developed by the Supreme Court of the United Kingdom in five significant decisions from 2013 to 2024, may be broadly summarised as follows.

1. The modern justification for vicarious liability under the common law of England and Wales is said to centre on '*enterprise risk*' - that an enterprise taking the benefit of activities carried on by a person integrated into its organisation, should bear the cost of harm wrongfully caused by that person in the course of those activities. Consistently with this, the courts have accepted that a relationship that is '*akin to employment*' may give rise to vicarious liability as the same enterprise risk can arise from engaging a person in a position that is akin to employment as it can from a traditional relationship of employment: *Armes v Nottinghamshire County Council* [2018] AC 355; [2017] UKSC 60, [60]-[61] (***Armes***).

2. However, the 'akin to employment' extension does not apply to 'true independent contractors'. The classic distinction in vicarious liability between employment/employment-like relationships on the one hand, and independent contractor relationships on the other, has not been eroded by this extension: *Various Claimants v Barclays Bank* [2020] AC 973; UKSC 13, [24] (***Barclays Bank***).

3. As confirmed in *Cox v Ministry of Justice* [2016] AC 660; UKSC 10, [24] (***Cox***), a relationship may be 'akin to employment' where:

   a) an individual carries on activities as an *integral part* of the defendant's business activities and *for its benefit*.
   b) the activities are not attributable to an independent business of the tortfeasor or third party; and
   c) the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual.

4. A finding of 'akin to employment' will require the court to examine the *detailed features of the relationship*, focusing on those features that are similar to, or different from, employment contracts. Such features include:

   a) whether work is paid for (in money or kind);
   b) how integral the work is to the organisation;
   c) the extent of the defendant's control over the tortfeasor;
   d) whether work is carried out for the defendant's benefit or organisational aims;

e) appointment and termination arrangements; and
f) whether there is a hierarchy of seniority into which the role fits,

see *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567; [2023] UKSC 15; 2 WLR 953 (***BXB***).

5. The five policy incidents that were originally articulated by Lord Phillips in *Various Claimants v Catholic Child Welfare Society* (*Catholic Child Welfare*) [2013] 2 AC; [2012] UKSC 56 to explain why, in the majority of cases, it is fair just and reasonable for the law to impose vicarious liability for the liability of employees, may help identify relationships sufficiently analogous to employment to justify vicarious liability in doubtful cases (*Barclays Bank,* [27] (Lady Hale)).

   (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
   (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
   (iii) the employee's activity is likely to be part of the business activity of the employer;
   (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
   (v) the employee will, to a greater or lesser degree, have been under the control of the employer

   Of those, the three particularly important policy factors (ii)-(iv).

   However, as observed by the Court at [58] in *BXB*, the established tests that are applied by the courts 'invoke legal principles that in the vast majority of cases can be applied without considering the underlying policy justifications for vicarious liability.' The tests are a product of the policy behind vicarious liability and in applying the tests there is no need to turn back continually to examine the underlying policy. The Court noted that in difficult cases, having applied the tests to reach a provisional outcome on vicarious liability, 'it can be a useful 'final check' on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy.'

6. In *novel* cases, courts may also consider whether imposing vicarious liability would be "fair, just and reasonable" when applying these tests set out above (*Cox* at [41]-[42]).

B. The High Court of Australia's rejection of 'akin to employment'

In *Bird*, there were three questions on appeal, the first of which was "whether, under the common law of Australia, absent a relationship of employment between a wrongdoer and a defendant, vicarious liability applies — or should be extended — to a relationship which is not one of employment, a relationship sometimes described as 'akin to employment'".[2] The Court footnoted this phrase and expressly identified the relevant decisions of the UK Supreme Court referred to above.

The majority in the High Court (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ; Gleeson J dissenting) held that the position in Australia is that an employer may be vicariously liable for the acts of its employees, but there is no such liability for the acts of those who are not in an employment relationship but, instead, are, for example, independent contractors or in a relationship 'akin to employment'.[3]

The majority concluded at [62]-[63]:

> [62] In sum, the decision in Christian Brothers not only started from a different set of propositions, but the identified rationale for the expansion of the doctrine – being an assessment of what is fair, just and reasonable – depended on contestable policy choices and the allocation of risk, which are

[2] *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349; [2024] HCA 41 [4(1)] ('*Bird*').
[3] Ibid [5].

> matters upon which minds might differ[4] and which this Court has repeatedly rejected as a sound basis for determining and developing the law of vicarious liability[5] and duties of care.[6]
>
> [63] In light of this Court having rejected, on more than one occasion over the last 25 years, both the starting point and the basis on which the Supreme Court of the United Kingdom extended the law of vicarious liability, the issue is squarely in the hands of the legislatures. This Court should not, by developing the common law, deny the centrality of the employment relationship nor abandon that requirement. As this Court stated in Sweeney, "[w]hatever may be the logical and doctrinal imperfections and difficulties in the origins of the law relating to vicarious liability, the two central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out". Those deep roots of reliance on a threshold requirement of an employment relationship for a finding of vicarious liability extend to other Australian courts, the legislatures (including in relation to drafting employment legislation) and insurers. That list is not exhaustive. (**footnotes omitted**)

These reasons of the majority seemingly reject the extension of vicarious liability on three main grounds:

Ground 1: Criticism of the concept of 'Fair, just and reasonable'

The first is the suggestion that the 'akin to employment' extension under English law is justified by the vague rationale of what is 'fair, just and reasonable', a concept that has been rejected in the development of Australian tort law (particularly in the context of developing novel duties of care). The suggestion appears to be that this provides no sound basis for Australian vicarious liability to be extended to 'akin to employment'.[7]

<u>Comment</u>: With respect, as demonstrated above, vicarious liability under English law is not simply based on an assessment of what is 'fair, just and reasonable'. The UK Supreme Court has clarified that the rationale for the modern doctrine of vicarious liability for both the liability of employees and persons akin to employment is best explained by reference to the concept of 'enterprise risk,' and the courts have developed clear legal tests for when it will be imposed. The only role for considering what is 'fair, just and reasonable' is as aid in novel circumstances after established tests have been applied.

Ground 2: Not undermining the distinction between independent contractors and employees

The second reason (at [63]) that emerges from the reasons of the High Court seems broadly based on preserving the essential distinction between employment on one hand and independent contractors on the other. The majority stated '[t]his Court should not, by developing the common law, deny the centrality of the employment relationship nor abandon that requirement',[8] citing the dicta in *Sweeney v Boylan Nominees Pty Ltd (2006) 26 CLR 161* that, 'the two central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out.'[9] The implicit suggestion is that the extension to relationships akin to employment would risk undermining this distinction.

<u>Comment:</u> The extension of vicarious liability to persons akin to employment under English law does not deny or undermine the centrality of the concept of employment, or involve any blurring of the dichotomy between employment and independent contractors. Indeed, that distinction has been emphatically restated under English law.

The 'akin to employment' concept does not enlarge the concept of employment. It is a limited *extension* of vicarious liability to relationships that are clearly *not* employment relationships, but in which the nature of the work exhibits the underlying features of employment which justify the imposition of vicarious liability for the liability of an employees. This involves no departure from the essential distinction between employment and independent contractors.

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[4] Ibid fn [132], citing *Cox v Ministry of Justice* [2016] AC 660, 669 [20]-[21].

[5] Ibid fn [133], citing *New South Wales v Lepore* (2003) 212 CLR 511, 560 [128], 586 [212]; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148-150 [38]-[47].

[6] Ibid fn [134] see, eg, *Sullivan v Moody* (2001) 207 CLR 562, 579-581 [49]-[54], which rejected the test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617-618.

[7] Ibid [63].

[8] *Bird* (n 1) [63].

[9] *Sweeney v Boylan Nominees Pty Ltd* (2006) 26 CLR 161; [2006] HCA 19 [33].

The reasons of the majority in *Bird* focussed significantly on the initial acceptance of the extension in *Catholic Child Welfare*, and did not engage in detail with the subsequent development of the English law as summarised above and set out in Annexure A to this submission.

Ground 3: Perceived confusion and uncertainty as to scope of 'akin to employment' under UK law

The High Court observed at [60] that the decision at the time contributed to, and provoked, discussion and debate about whether departing from the classical paradigm of employer-employee would introduce too much uncertainty.

<u>Comment</u>*:* The passing of nearly 15 years has clarified and refined the scope of the 'akin to employment' test and addressed many of the questions raised by academics and lower courts at the time. Most recently in *DJ v Barnsley Metropolitan Borough Council and SG* [2024] EWCA Civ 841, [13-[20] (***DJ v Barnsley Council***), the Court of Appeal set out in concise form the settled elements and tests for 'akin to employment,' noting that in *BXB*, the development of vicarious law over the past 23 years had described comprehensively by Lord Burrows JSC at [30]-[57], and the modern law summarised in the same judgment at [58].

With respect, rejecting the 'akin to employment' extension on the basis of earlier questions as to its scope does not explain why it ought to now be rejected in light of its subsequent clarification.

Accordingly, while it is the case now that 'the issue is squarely in the hands of the legislatures', as stated by the High Court, I suggest that the reasons in *Bird* do not provide a clear basis for why the law should not be developed in a manner consistent with the development of English common law.

C. Existing statutory vicarious liability for 'akin to employment'

There are presently four existing statutory forms of vicarious liability for persons 'akin to an employee' that have been enacted into the relevant civil liability legislation in New South Wales, South Australia, Tasmania and the Northern Territory. The current provisions are set out in **Annexure "B"** to this submission.

There are differences in these formulations of the elements of who is a person 'akin to an employee' and the structure of the statutory form of vicarious liability. There are four observations I would make about these models.

1 *Defining an employee as inclusive of a person who is 'akin to an employee':* The drafting approach taken in NSW, South Australia and Tasmania was to define "employee" as <u>including</u> a person who is 'akin to an employee'. With respect, this formulation risks blurring the understanding of who is an 'employee'. The English common law of vicarious liability does not treat persons in a relationship 'akin to employment' as employees. As discussed above, at common law, the concept of an employee is *distinct from,* not inclusive of, a person who is 'akin to an employee' although vicarious liability can extend to both.

The *Personal Injuries (Liabilities and Damages) Act 2003* (NT) (**PI Act (NT**))provides a separate definition of an individual akin to an employee in s 17G(5) and pursuant to s 17G(1), an institution is vicariously liable for personal injury arising from child abuse perpetrated by '*an employee of the institution <u>or</u> an individual akin to an employee in accordance with that provision*.' This is consistent with the common law as discussed above.

2 *Prospective only:* All existing provisions are prospective only. As discussed below, if the same result were achieved by judicial development, it would have retrospective effect. This is a powerful reason to support retrospective effect for legislation that goes no further than common law developments in other jurisdictions.

3 *Common law elements:* The integers of the definition of an individual 'akin to an employee' in NSW and South Australia align closely with the common law of the United Kingdom, adopting most of the key phrases from *Cox* but for one. These are that:

a. the individual carries out activities as **an integral part** of the activities carried on by the organisation, and

b. does so **for the benefit** of the organisation,

c. but is not doing so for activities are carried out for a **recognisably independent business** of the individual or of another person or organisation.

The only element missing from the articulation in *Cox* is the element that the commission of the wrongful act is a *risk created by the defendant* by assigning those activities to the individual. For comparison, see *Cox* at [24] where Lord Reed (Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agreeing) stated:

> ..a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.[10]

The definition of 'akin to an employee' under Tasmanian and Northern Territory provisions use quite different language that is not drawn from the UK common law.

Section 49I of the CL Act (Tas) refers to a role that is 'for the aims or purposes of the organisation', regardless of whether the person plays an integral or peripheral role. Furthermore, the definition incorporates language of authority, power, control and ability to achieve intimacy which are concepts articulated by the High Court in *Prince Alfred College v ADC*[11] in relation to when vicarious liability might be imposed for the wrongdoing of an employee. These concepts were not used by the High Court in articulating an 'akin to employment' test.

Section 175G(5) of the PI Act (NT) refers to an individual who "carries out an activity .. that enables the institution to perform its functions… and carries out that activity "with the *intention* to benefit the institution." The common law concept has no reference to the intention of the individual.

4 *Exclusion of Foster Carers:* The concept of 'akin to employment' in NSW, South Australia and the Northern Territory legislation expressly excludes carers providing foster care (out-of-home care).[12] However, the English common law has developed to accept that foster carers and comparable authorised carers *are* within the scope of 'akin to employment': see discussion in Annexure A of *Armes*. More recently this has also been applied in the context of kinship care in *DJ v Barnsley Council*.[13]

The CL Act (Tas) does not expressly exclude or apply to carers so could arguably extend to carers who meet the definition of a person who is 'akin to employee'.

D. Justifications for Reform to the *Civil Law (Wrongs) Act 2002 (ACT)*

It is submitted here that there are now compelling reasons for reform to the *Civil Law (Wrongs) Act 2002 (ACT)* to reverse the effect of the decision in *Bird*. In particular:

- some of the criticisms of the High Court in *Bird* of the 'akin to employment' concept under English law are not borne out by a closer examination of the development of the law. In particular, it does not rest upon a rationale of what is 'fair just and reasonable' in a manner inconsistent with Australian law. This is simply an analytical tool that may be applied in novel cases.

[10] *Cox v Ministry of Justice* [2016] AC 660 [24].
[11] *Prince Alfred College Inc v ADC* [2016] HCA 37; 258 CLR 134, [80]-[81].
[12] See s 6G(3)(b) of the CL Act (NSW); s 50A(3) of the CL Act (SA); S 175G(5)(a)(1) of the PI Act (NT).
[13] The Court of Appeal accepted that the relationship between the family and the local authority was one that was akin to employment from the time the child was brought into care. Although the local authority had not recruited the family, they had assessed, selected, monitored and supervised the placement.

- this rejection by the High Court has left Australian law at odds with English and Canadian law in which vicarious liability may be imposed in relationships described as 'akin to employment' or where the relationship is 'sufficiently close'[14] despite not being relationships of employment.

- this is a matter of widespread community concern. Many survivors are presently unable to access the legislative reforms already made to remove limitation periods and for a proper defendant because they have no cause of action.

- the reform proposed here would go no further than what the courts have already been prepared to do for 15 years in the United Kingdom.

- the legislatures in Australia will have the benefit of the careful and incremental development of the common law in the United Kingdom in particular from which to model proposed reform.

E. Issues to consider in the form and content of any proposed reform

Drawing from the issues considered above, there are a number of issues that I would identify for consideration in the form of amending legislation to be drafted to reverse the effect of *Bird*.

I note that I support the broad aims and intent of the Civil Law (Wrongs) Amendment Bill 2025 (ACT). However, I suggest proposed reform should take the following matters into account and ideally be consistent between the States and Territories.

1. 'Akin to employment' should not include independent contractors

First, in my submission, independent contractors should not be included within the meaning of 'employee'. This is inconsistent with the common law meaning of 'employee' and also inconsistent with the common law concept of who is 'akin to employee'. Had the High Court in *Bird* accepted the extension of vicarious liability to persons 'akin to employment', this would not have applied to independent contractors. Accordingly, this is outside the scope of reform designed to achieve the reversal of *Bird* and ought to considered separately.

I note that under the Civil Law (Wrongs) Amendment Bill 2025 (ACT), the scope of 'akin to employment' *is* expressed to apply to independent contractors. This arises because persons 'associated with the organisation' are included within the definition of an 'employee,' and an individual 'associated with an organisation' includes a contractor. It provides:

> *Civil Law (Wrongs) Amendment Bill 2025* (ACT) cl 4, proposed s 114BC(1)-(3):
>
> **114BC Meaning of *employee*—pt 8A.1A**
>
> (1) In this part:
> <u>***employee***, of an organisation, includes an individual</u> <u>who</u>—
> (a) is akin to an employee of the organisation; or
> (b) <u>is associated with the organisation</u>.
>
> (2) For this section, an individual is ***akin to an employee*** of an organisation if the individual carries out activities that are—
> (a) a part of the ordinary activities carried out by the organisation; and
> (b) for the benefit of the organisation.
>
> (3) For this section, <u>an individual ***associated*** with an organisation includes</u>—
> (a) an office holder, officer, owner, volunteer or contractor of the organisation; and
>
> ..

At common law, the Supreme Court of the United Kingdom has expressly and repeatedly confirmed that independent contractors are *not* within the scope of the 'akin to employment' extension.[15] The exclusion of independent contractors goes to the heart of the policy justifications for vicarious liability as it has developed over centuries at common law.

[14] *John Doe v Bennett* 236 DLR (4th) 577, [2004] 1 SCR 436.
[15] *Various Claimants v Barclays Bank* [2020] AC 973; UKSC 13, [24] ('*Barclays Bank*').

Such an extension could not be justified on the ground of reversing the decision in *Bird* because it would enact something significantly different to the common law 'akin to employment' extension rejected by the court. The only question before the High Court in that case was whether to extend Australian common law conformably with the position under UK law which *excludes* independent contractors. It would require a different rationale.

The questions as to whether, why, or how institutions should be made statutorily liable for the wrongdoing of some independent contractors in the circumstances of institutional child sexual abuse, are complex and important. The issues may warrant an inquiry into the implications of such a proposal.

However, the question of liability for independent contractors should not delay or hinder law reform to reverse the effect of *Bird* and legislate for an extension to persons in positions 'akin to employment' within the accepted meaning of that phrase at common law.

2. *Avoid a statutory definition of 'employee' that is contrary to the common law concept as applied in vicarious liability*

Second, the definitions of 'employee' and 'akin to an employee' should be kept distinct.

I note that under the Civil Law (Wrongs) Amendment Bill 2025 (ACT), the definition of 'employee' *includes* a person who is 'akin to an employee' or also a person who is 'associated with the organisation'.[16]

However, as discussed above, it is respectfully suggested that this is undesirable and unnecessary. The issue is that vicarious liability should extend to both employees *and to* persons 'akin to employees', but not because the concept of an employee is used as an umbrella term. As mentioned above, these categories are distinct at common law.

By amendment so that vicarious liability is *extended* to the liability of a person who is not an employee, but who is in a position that is *akin* to employment, this retains the fidelity of the concept of an employee at common law and achieves the same end but in a manner more consistent with the common law.

3. *Desirability of coherence with the common law elements of 'akin to employment'*

Third, the definition of a person 'akin to an employee' should include the elements that the person:

(a) carries on activities as an integral part of the organisation's business activities and for its benefit;
(b) the activities carried on by the person are not attributable to an independent business of the tortfeasor or third party; and
(c) the activities assigned to the person by the organisation created the risk of commission of child sexual abuse.

These elements of the common law concept that have been applied repeatedly by way of judicial test and have an acquired meaning should be incorporated consistently to ensure the scope of 'akin to employment' is not unduly wide, and to achieve the stated aim of reversing the effect of *Bird*.

4. *Authorised carers*

The definition of a person 'akin to an employee' should not exclude foster carers (for example, as it presently appears in in NSW, South Australia and the Northern Territory legislation). This is inconsistent with the scope of 'akin to employment' as it has developed incrementally at common law in the UK, as discussed above in *Armes.*

I note that the Civil Law (Wrongs) Amendment Bill 2025 (ACT) does not exclude carers from the scope of an individual akin to an employee and this is consistent with the common law.

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[16] Wrongs Amendment (Vicarious Liability) Bill 2025 (Vic) cl 4, proposed s 93A; Civil Law (Wrongs) Amendment Bill 2025 (ACT) cl 4, proposed s 114BC(4)(a)-(b).

5. Volunteers

In certain circumstances, a volunteer may be a person who is ‘akin to an employee’ under English common law. In my view, this should also be possible under Australian law.

I note that under the Civil Law (Wrongs) Amendment Bill 2025 (ACT), the definition of ‘employee’ includes a person ‘associated with an organisation,’ and the definition of a person ‘associated with an organisation,’ includes a ‘volunteer’ without any further qualification as to the person’s role within the organisation (see, for example, as proposed in s 114BC(1)(b) and s (3)(a).)

A proposal for vicarious liability to extend to the liability for child sexual abuse of *any* volunteer in any circumstances, regardless of how tangential the association with the organisation might be, goes beyond the scope of ‘akin to employment’ under English common law.

English law requires evidence of ‘a real degree of integration of any tortfeasor into the employer’s business or relevant activity.’[17] For example, in *Blackpool Football Club v DSN* [2021] EWCA Civ 1352, the Court of Appeal upheld the football club’s appeal on the basis that it was not responsible for the abuse carried out by a volunteer in the circumstances of that particular case. Stuart-Smith LJ (with whom Sir Stephen Richards and Macur LJ agreed) observed at [103] that, ‘there is a strand running through the cases…which suggests that what one should look for is not merely a beneficial involvement with (or for) the “employer’s enterprise but a *real degree of integration of the primary tortfeasor into the employer’s business or relevant activity*.’ (emphasis added). His Lordship concluded that, ‘This is not capable of hard-edged definition in advance; but it may in appropriate cases provide an additional marker when seeking to distinguish between relationships that are properly to be regarded as "akin to employment" and those that are not.’

This reinforces the centrality of these core elements confirmed in *Cox* at [24] that a relationship may be ‘akin to employment’ where an individual carries on activities ‘as *an integral part* of the defendant's business activities and for its benefit.’ (emphasis added).

It follows that if the intention behind reform is to reverse the effect of the High Court’s decision in *Bird* and extend vicarious liability to persons who would be ‘akin to an employee’ within the meaning of the common law (if the High Court had taken that step), care must be taken in considering whether the form of what is enacted achieves this or goes further, and if so, what is the justification for going further than the common law concept of ‘akin to employment’.

6. Retrospectivity

I support the scope of the Civil Law (Wrongs) Amendment Bill 2025 (ACT) to apply with retrospective effect.[18]

There are a number of reasons for this:

- It is an accepted principle that judgments of courts in relation to the common law will generally operate with retrospective effect.[19] This is the effect of each of the decisions of the UK Supreme Court in this regard. Had the High Court accepted the first question on the appeal, the development of the common law of Australia would also have had retrospective effect. If the scope of the proposed legislative reform goes no further than what would have been achieved by a different outcome before the High Court, the legislation will not alter the previous rights of citizens any more than would have occurred had it been done by the courts.

- The practical effect of *Bird* is to disadvantage Australian survivors of historical abuse compared to survivors in the UK. If the policy justifications for the reforms are accepted as the same as

[17] *Blackpool Football Club v DSN* [2021] EWCA Civ 1352, [103].
[18] I note that the *Civil Liability Amendment (Organisational Child Abuse Liability) Bill* 2025 (NSW) seeks to achieve this by amendment to clauses 43 and 44 of Schedule 1 to the CL Act (NSW) to provide that they apply “at any time, including before the commencement of that section.”
[19] *Kleinwort Benson Ltd v Lincoln City Council* [l9981 3 WLR 1095, 1100 (Lord Browne-Wilkinson).

those that led to the common law development, there is no reason to deprive Australian survivors of the retrospective effect that would have been the result of a decision by the courts.

- The existing provisions of Part 8A.2 which deal with the appointment of unincorporated associations as defendants and the availability of trust property to satisfy an award of damages for vicarious liability, have retrospective effect under s 114BA. However, these provisions are of little practical value if survivors have no available cause of action by reason of the doctrinal restrictions to the scope of vicarious liability under Australian common law.

- It is also consistent with the ‘radically new context’ and ‘new normative structure’ under which limitation periods have been removed in all states, permitting historical institutional abuse to be the subject of proceedings.[20]

F. The desirability of consistent reform

It is highly desirable that the form of reform should be uniform across States and Territories to avoid survivors being subject to the sorts of inconsistencies that are already evident in a comparison of the existing and proposed reforms with respect to persons who are ‘akin to an employee’.

To that end, I am writing to the Attorneys-General in all States and Territories to urge consideration of nationally consistent reforms.

G. Conclusion

This issue is of widespread community importance and concern. It is capable of targeted legislative reform that does not require further inquiry or consultation. It can be implemented quickly to bring the law of Australian States and Territories in line with international development of the law of vicarious liability and to afford a meaningful pathway to justice for survivors of institutional abuse.

In my view, reform to reverse the effect of *Bird* should not be delayed by the complex policy, practical, doctrinal and insurance market implications of extending vicarious liability to true independent contractors.

Please do not hesitate to contact me for further information or to discuss any aspect of this submission.

Yours sincerely,

Allison

[20] *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; 97 ALJR 857, [40]-[43].

Annexure A

Background to the development of 'akin to employment' by the UKSC

In *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC; [2012] UKSC 56 *(**Catholic Child Welfare**)* the Supreme Court first accepted that the correct question for the identification of the relationship between the wrongdoer and the defendant was whether the relationship between the defendant and the tortfeasor was one of employment or one that was "*akin to employment*." Lord Phillips (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agreed), expressly adopted this terminology that had been employed by Ward LJ in *E v English Province of Our Lady of Charity*. It was held in that case that the relationship between a Christian Brother and the Christian Brothers Institute was akin to employment because it had the same essential features of an employment relationship which justified the imposition of vicarious liability despite the fact that there was no contract of employment.[21] The elements found to be relevant were that there was a hierarchical structure to the organisation, the Brothers were given direction in relation to undertaking the teaching activity, that they were doing so in furtherance of the objectives of the Institute, and they were required to conduct themselves as teachers within the rules of the Institute. As later noted by the UKSC in *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567 (***BXB***), "[i]t did not matter that the Brothers were not paid as such and that they were bound to the Institute by vows rather than by contract."[22]

In *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (***Cox***), the Supreme Court applied these principles from Lord Phillips' judgment in *Catholic Child Welfare* in a very different context – that of a prisoner working in a state prison kitchen as a kitchen hand. The prisoner was found to have negligently dropped a heavy bag of rice on the claimant's back causing her injury, after he had been instructed to stop working while a spillage was cleared. Reference was made to the five incidents of the relationship between employer and employee which had been identified by Lord Phillips in the *Catholic Child Welfare* case as usually making it fair, just and reasonable to impose vicarious liability, and which could properly give rise to vicarious liability where other relationships had the same incidents and could therefore be treated as 'akin to employment.'

Lord Reed (with whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agreed) found that:

> ..a relationship other than one of employment is in principle capable of giving rise to vicarious liability *where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question*.[23] (emphasis added)

In *Cox*, the extension of vicarious liability to relationships that are "akin to employment" focused on the five policy factors articulated by Lord Phillips in *Catholic Child Welfare*[24] that underpin the imposition of vicarious liability in an employment setting, and transposing the same factors onto relationships other than employment that demonstrate these same elements. Of those elements, his Lordship observed that the most helpful to understanding the modern doctrine were Lord Phillips' factors (ii)-(iv), namely:

> (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the

[21] *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC; [2012] UKSC 56, [56]-[57] ('*Catholic Child Welfare*').
[22] *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567; [2023] UKSC 15; 2 WLR 953, [36] ('*BXB*').
[23] *Cox v Ministry of Justice* [2016] AC 660; [2016] UKSC 10, [24] ('*Cox*').
[24] *Catholic Child Welfare* (n 20) [35]: "The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer …: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer."

> employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee…

In applying these, Lord Reed concluded that when prisoners work in places like the prison kitchen, or gardens or the laundry, they are:

> integrated into the operation of the prison. The activities assigned to them … form part of the operation of the prison, and are of direct and immediate benefit to the prison service itself.[25]

Lord Reed added that in applying the akin to employment test to circumstances that had not been judicially considered before, it may be valuable to consider "whether the imposition of vicarious liability would be fair, just and reasonable."[26]

In *Armes v Nottinghamshire County Council* [2017] UKSC 60 *(**Armes**)*, the Supreme Court again considered the application of the akin to employment test in a novel setting. This case concerned the liability of a local authority for the abuse of a child by a foster carer. Lord Reed (with whom Lady Hale, Lord Kerr and Lord Clarke agreed, Lord Hughes dissenting) applied the same tests as applied in *Cox*:

> [60] Although the picture presented is not without complexity, nevertheless when considered as a whole it points towards the conclusion that the foster parents provided care to the child as an <u>integral part</u> of the local authority's organisation of its child care services. If one stands back from the minutiae of daily life and considers the local authority's statutory responsibilities and the manner in which they were discharged, it is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare. In these circumstances, it can properly be said that the torts committed against the claimant were committed by the foster parents <u>in the course of an activity carried on for the benefit of the local authority.</u>
>
> [61] Considering next the issue of <u>risk creation</u>, the local authority's placement of children in their care with foster parents creates a relationship of authority and trust between the foster parents and the children, in circumstances where close control cannot be exercised by the local authority, and so renders the children particularly vulnerable to abuse. Although it is generally considered to be in the best interests of children in care that they should be placed in foster care, since most children benefit greatly from the experience of family life, it is relevant to the imposition of vicarious liability that a particular risk of abuse is inherent in that choice. That is because, <u>if the public bodies responsible for decision-making in relation to children in care consider it advantageous to place them in foster care, notwithstanding the inherent risk that some children may be abused, it may be considered fair that they should compensate the unfortunate children for whom that risk materialises</u>, particularly bearing in mind that the children are under the protection of the local authority and have no control over the decision regarding their placement. In that way, the burden of a risk borne in the general interest is shared, rather than being borne solely by the victims.

Lord Reed concluded that foster carers were within the scope of the akin to employment extension because the torts committed against the claimant were committed by the foster parents "in the course of an activity carried on for the benefit of the local authority."[27] His Lordship noted that in modern times, the most influential justification for the imposition of vicarious liability was that which was referred to as "enterprise risk", being that:

> "… an enterprise which takes the benefit of activities carried on by a person integrated into its organisation should also bear the cost of harm wrongfully caused by that person in the course of those activities."[28]

In *Various Claimants v Barclays Bank* [2020] AC 973, Lady Hale gave the leading judgment (with which Lord Reed, Lord Kerr, Lord Hodge and Lord Lloyd-Jones agreed). Her Ladyship observed that courts should avoid eliding the *criteria* or principles relevant to the test for a relationship that gives rise to vicarious liability (ie the "stage 1 test" under English law) with the five more generally stated *policy*

[25] *Cox* (n 23) [34].
[26] Ibid [42].
[27] *Armes v Nottinghamshire County Council* [2018] AC 355; [2017] UKSC 60, [60].
[28] Ibid [67].

reasons underpinning vicarious liability that had been articulated by Lord Phillips in *Catholic Child Welfare*. Lady Hale noted that the criteria applied by Lord Phillips were not the same as the policy considerations. The criteria applied by Lord Phillips focused on the features of the particular relationship and its closeness to employment. Her Ladyship held that it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents identified by Lord Phillips. However, in "doubtful cases", "the five 'incidents' identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability."[29]

Her Ladyship clarified that the acceptance of the "akin to employment" extension did not mean that the doctrine extended to rendering an employer vicariously liable for the torts of "true independent contractors".[30] This had already been made clear by the Court in *Cox* at [24], but the judgment of the Court of Appeal below in *Barclays* had demonstrated some uncertainty about it. This was corrected in no uncertain terms. Lady Hale observed:

> There is nothing, therefore, in [*Christian Brothers, Cox and Armes*] to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded."[31]

The principles discussed above were most recently summarised and applied by the Supreme Court in *BXB.* There, Lord Burrows (with whom Lord Reed, Lord Hodge, Lord Briggs and Lord Stephens agreed) traced the development of principle through each of these earlier UKSC cases and concluded that in applying the "akin to employment" test and stated:

> a court needs to consider carefully features of the relationship that are similar to, or different from, a contract of employment. Depending on the facts, relevant features to consider may include: whether the work is being paid for in money or in kind, how integral to the organisation is the work carried out by the tortfeasor, the extent of the defendant's control over the tortfeasor in carrying out the work, whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation, what the situation is with regard to appointment and termination, and whether there is a hierarchy of seniority into which the relevant role fits.[32]

[29] *Various Claimants v Barclays Bank* [2020] AC 973; UKSC 13, [27].
[30] Ibid [29].
[31] Ibid [24].
[32] *BXB* (n 21) [58(2)].

Annexure "B"

***Civil Liability Act 2002* (NSW)**	***Civil Liability Act 2002* (Tas)**	***Civil Liability Act 1936* (SA)**	***Personal Injuries (Liabilities and Damages) Act 2003* (NT)**
Part 1B Child Abuse – liability of organisations	**Part 10C – Child Abuse – Liability of Organisations**	**PART 7A--Child abuse - liability of institutions**	**Part 3A Institutional Liability for Child Abuse**
6G Employees include persons exercising functions akin to employees (1) In this Division— ***employee*** of an organisation includes an individual who is akin to an employee of the organisation. (2) An individual is akin to an employee of an organisation if the individual carries out activities as an integral part of the activities carried on by the organisation and does so for the benefit of the organisation. (3) However, an individual is not akin to an employee if— (a) the activities are carried out for a recognisably independent business of the individual or of another person or organisation, or (b) the activities carried on by the individual are the activities of an authorised carer carried on in the individual's capacity as an authorised carer.	**49I. Employees include persons exercising functions akin to employees** (1) In this Division – ***employee,*** in relation to an organisation, includes an individual who is akin to an employee of the organisation. (2) An individual is akin to an employee of an organisation if the individual's role within the organisation – (a) is for the aims or purposes of the organisation; and (b) gives the individual authority, power or control over a child or enables the individual to achieve intimacy with, or the trust of, a child. (3) Despite subsection (2) , an individual is not akin to an employee if the individual's role within the organisation is carried out for a recognisably independent business of the individual or of another person or organisation. (4) The regulations may, despite subsections (2) and (3) but without limiting the application of those subsections, prescribe additional circumstances in which an individual will be akin to an employee or not akin to an employee.	**S 50A "employee"** of an institution, includes a person who is akin to an employee of the institution; (2) For the purposes of the definition of "employee", a person is "akin to an employee of an institution if the person carries out activities as an integral part of the activities carried on by the institution and does so for the benefit of the institution, but a person is not "akin to an employee if— (a) the activities are carried out for a recognisably independent business of the person or of another person or institution; or (b) the activities carried on by the person are the activities of a designated carer carried on in the person's capacity as a designated carer. (3) The regulations may, despite subsection (2), prescribe circumstances in which a person will be akin to an employee or not akin to an employee. "designated carer" means a person in whose care a child is placed under the Children and Young People (Safety) Act 2017 but excludes a person who provides care at or on behalf of— (a) a children's residential facility (within the meaning of the Children and Young People (Safety) Act 2017); or (b) a residential facility established or licensed under the Family and	S 17G(5) In this section: **Individual akin to an employee**, in relation to an institution, is an individual who: (a) carries out an activity (whether a series of activities or a single act) that enables the institution to perform its functions, except for an activity: (i) in accordance with a placement arrangement under section 78 of the Care and Protection of Children Act 2007 in respect of a child; or (ii) carried out under a contract for services by an individual or corporation that is independent from the institution; and (b) carries out that activity with the intention to benefit the institution

		Community Services Act 1972 ; or (c) any other facility that provides non-family based care to children or young people;	
Division 3--Vicarious liability of organisations	**Division 3--Vicarious liability of organisations**	**Division 3--Vicarious liability of institutions**	**Division 3--Vicarious liability of institutions for child abuse**
6H Organisations vicariously liable for child abuse perpetrated by employees (1) An organisation is vicariously liable for child abuse perpetrated against a child by an employee of the organisation if— (a) the apparent performance by the employee of a role in which the organisation placed the employee supplies the occasion for the perpetration of the child abuse by the employee, and (b) the employee takes advantage of that occasion to perpetrate the child abuse on the child. (2) In determining if the apparent performance by the employee of a role in which the organisation placed the employee supplied the occasion for the perpetration of child abuse on a child, a court is to take into account whether the organisation placed the employee in a position in which the employee has one or more of the following— (a) authority, power or control over the child, (b) the trust of the child, (c) the ability to achieve intimacy with the child. (3) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability. ….	**49J. Organisations vicariously liable for child abuse perpetrated by employees** (1) An organisation is vicariously liable for child abuse perpetrated against a child by a person who is an employee of the organisation if, at the time at which the abuse was perpetrated – (a) the person, by virtue of being such an employee, had – (i) authority, power or control over the child; or (ii) the trust of the child; or (iii) the ability to achieve intimacy with the child; and (b) the person was able, by virtue of that authority, power, control, trust or ability, to perpetrate the child abuse on the child. (2) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability.	**50G—Institutions vicariously liable for abuse of child by employee** (1) An institution is vicariously liable for abuse of a child by an employee of the institution if— (a) the apparent performance by the employee of a role in which the institution placed the employee supplies the occasion for the abuse of the child by the employee; and (b) the employee takes advantage of that occasion to abuse the child; and (c) the abuse occurred while the child was under the care, supervision, control or authority of the institution. (2) In determining if the apparent performance by the employee of a role in which the institution placed the employee supplied the occasion for the abuse of a child, a court is to take into account whether the institution placed the employee in a position in which the employee has 1 or more of the following: (a) authority, power or control over the child; (b) the trust of the child; (c) the ability to achieve intimacy with the child. (3) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability.	**17G Vicarious liability of institutions for child abuse** (1) An institution is vicariously liable for personal injury arising from child abuse perpetrated by <u>an employee of the institution or an individual akin to an employee</u> if: (a) the institution places the employee or individual akin to an employee in a position or situation that gives occasion for child abuse of the child; and (b) the employee or individual akin to an employee uses that occasion to perpetrate child abuse of the child. (2) In determining whether the institution placed the employee or individual akin to an employee in a position or situation that gives occasion for the child abuse of the child, a court must take into account whether the institution placed the employee or individual akin to an employee in a position or situation where the employee or individual akin to an employee has: (a) authority, power or control over the child; or (b) the trust of the child; or (c) the ability to achieve intimacy with the child. (3) This section does not affect, and is in addition to, the law of the Territory with respect to vicarious liability.

			(4) If a court awards damages to an individual in respect of liability of an institution that is established in accordance with this section, the court must take into account any award of damages to the individual in respect of liability of the institution established in accordance with section 17E or 17F in determining the amount of damages the court awards for liability established under this section.
S 44 of Schedule 1 provides that Section 6H applies only in respect of child abuse perpetrated after the commencement of that section.	S 4(8) provides that Section 49J applies only in respect of child abuse perpetrated after the commencement of that section.	**50D—Application of Part** (1) This Part, other than Division 2 and Division 3, applies in relation to a cause of action whether it arose before or after the commencement of this Part.	Pursuant to Clause 2 of the Personal Injuries (Liabilities and Damages) Amendment Act 2022, the introduction of Part 4 of the (Amendments to Personal Injuries (Liabilities and Damages) Act 2003 which related to institutional liability for child abuse will commence on the day fixed by the Administrator by Gazette notice.