Comments on report on - Inquiry into the Civil Law (Wrongs) (Organisational Child Abuse Liability) Amendment Bill 2025

Comment number: 002

Submitter: Marist Brothers and Christian Brothers

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Ms Chiaka Barry MLA
Chair, Standing Committee on Legal Affairs
ACT Legislative Assembly
196 London Circuit
CANBERRA ACT 2601
via email | LACommitteeLegal@parliament.act.gov.au
cc | Committee Secretary, Kathleen de Kleuver

Dear Ms Barry,

We would like to reiterate our disappointment at the conduct of stakeholder engagement in this matter.

The Marist Brothers and the Christian Brothers were not invited to make submissions on the draft Bill despite being significant stakeholders.

The Archdiocese of Canberra-Goulburn was only invited by the Committee to make a submission after the report had been published.

It is evitable that many important stakeholders in the ACT such as volunteer groups, sporting associations, community organisations, volunteer rural and community fire services, Territory agencies with responsibility for children in any form, not for profits, political organisations, religious and non-religious organisations and others who will be profoundly impacted by the legislative change proposed by your Committee, are unaware of the Bill and your Committee's process.

Further, the recent report of the Committee on this draft bill does not include the feedback of any Catholic institution let alone the many religious and non-religious institutions and not for profit organisations likely to be significantly impacted by its provisions.

Consequently, we believe the stakeholder consultation process on this proposed bill has been seriously and irrevocably compromised and should recommence.

The only democratic and transparent way forward is to delay debate on this Bill until a proper consultation process has been conducted which is open to all stakeholders including those not supportive of the Bill rather than excluding them which appears to have occurred.

Br Darren Burge fms
Acting Provincial
Marist Brothers Star of the Sea Province

Br Gerard Brady cfc
Oceania Province Leader
Christian Brothers Oceania Province Centre

1. Introduction

The Marist Brothers and Christian Brothers alongside other Catholic religious congregations fully support compensation to the victims and survivors of institutional abuse.

We have worked very hard – prior to and following the Royal Commission – to provide just compensation and open acknowledgement to those who have been harmed. And we will continue to do so.

In addition to working through the civil legal process, we are also members of the National Redress Scheme.

Our response has included fully cooperating with any criminal processes, and we encourage referral to the police of any criminal allegations.

We have undertaken extensive work within our congregations and our works to ensure that they are child safe institutions with comprehensive child protection policies in place.

Our institutions are very different today and child protection is our highest priority.

2. Some relevant observations about Bird v DP

The draft bill considered by the Committee is the result of the earlier decision of the High Court in the matter of Bird v DP. It is useful to outline some important issues related to that decision.

a. *The High Court noted that the Royal Commission had considered and did not recommend expansion of vicarious liability or retrospectivity.*

The Royal Commission did not support the retrospective expansion of vicarious liability.

> *"If the liability was left to the development of the common law and applied retrospectively, in combination with the removal of limitation periods we recommend, relevant institutions would face potentially large and effectively new liability for abuse that has already occurred, potentially over many previous decades. If it were even possible to obtain insurance for retrospective liability on such a scale, the insurance would be likely to be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred."*
> **Redress Report Royal Commission, Page 55**

Further, in Bird v DP the High Court made detailed comments in respect of the consideration of the expansion of vicarious liability noting that the Royal Commission had:

> *"In dealing with the duty of institutions it dealt with both direct and vicarious liability of institutions, and non-delegable duties of care.[1] In so doing, it considered approaches overseas, namely in Canada and the United Kingdom.[2] It considered a range of options*

[1] Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) at 460.

[2] Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Ch 15.3.

for legislative reform.[3] *In that process it issued a Consultation Paper and consulted broadly with governments, organisations, and many representative bodies, and held a public hearing. The Royal Commission did not recommend, for example, that there be national (or any) legislative reform amending or extending the common law doctrine of vicarious liability to relationships other than the employment relationship".* – Jagot, J (Bird v DP).

b. *Bird v DP does not prevent religious being found to be employees*

There are numerous examples of cases where religious have been found to be employees (e.g. Ermogenous v Greek Orthodox Community of SA Inc) https://jade.io/article/68375; Solomon Woldeyohannes v Zion Church in Australia https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWC/2020/4194.html?context=1;query=Solomon%20Woldeyohannes%20;mask_path=)

The decision of Bird v DP was the first time post the legislative changes recommended by the Royal Commission that the issue of vicarious liability was considered in an institutional abuse claim by the High Court.

The case was determined on its facts and found that the plaintiff had not established that the perpetrator was in a relationship of employment based on the evidence the plaintiff put before the court.

This does not prevent any claimant from bringing a similar claim forward and seeking a ruling regarding the employment relationship of the alleged perpetrator based on the evidence brought before the court. In our experience many people currently seeking compensation for survivors continue to plead a claim in vicarious liability and appear to be preparing to establish the indicia of employment which was not done in Bird.

c. *Bird v DP does not close the path to compensation*

The characterisation of the Bird v DP decision as 'shutting out' victim survivors from common law compensation is plainly incorrect as a finding of negligence will afford a plaintiff to exactly the same damages regime in the ACT.

If an organisation has, through its own failures, caused an injury to a victim survivor, they will (and should) be required to pay compensation.

d. *The High Court was sound in its application of the law on vicarious liability*

The High Court decision was not an aberration, rather it confirmed the long-held view that vicarious liability could not be found in relationships other than that of employee/employer.

Given vicarious liability has a strong foundation in policy, the court adhered to those policy considerations not to expand the scope of vicarious liability – but that was a decision made applying the evidence before them.

[3] Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Ch 15.4.

It strikes us as unsafe to radically undermine centuries of common law to address the outcome of one decision, particularly when the unintended consequences of doing so are obvious and profound.

Given the different nature of vicarious liability compared to negligence, any attempts to conflate or combine the two needs to be carefully considered as they come from two very different policy backgrounds in the common law.

We fully support the High Court's decision to maintain the policy-based interpretation of the Australian law.

3. Observations on the Civil Law (Wrongs) (Organisational Child Abuse Liability) Amendment Bill 2025 and the Report of the Legal Services Committee

We make the following comments in relation to the draft Bill noting we are opposed to the proposed amendment.

a. *The unintended, national consequences of 'go it alone' legislation*

The report of the Legal Committee references the submission of the ACT Government which confirmed it was continuing to work with its state and territory partners on the Standing Committee of Attorneys General in developing a national response to the decision of Bird v DP.

> *"In its submission, the ACT Government indicated that the Attorney-General was engaging with counterparts in other jurisdictions through the Standing Council of Attorneys-General (SCAG) to discuss the impact of Bird and consider potential reform options. The ACT Government advised that it was actively considering possible legislative change".*

The position articulated by the ACT Government is obviously the sensible approach to be undertaken. We support a national approach to this issue as the only means of bringing certainty for victim survivors and for responsible institutions.

While legislative change is being considered by all States and Territories at the Standing Committee of Attorneys General with a view to adopting a uniform approach across the nation, adopting the Bill at a premature stage will create significant disadvantage and unfairness to survivors outside the Territory. A survivor in Queanbeyan will not have the same rights as a survivor in Canberra.

b. *The impact on the ACT's volunteer and community association culture*

The implications of expanding vicarious liability will be profound not just for religious congregations, but indeed for any and all not-for-profit organisations in the ACT.

The bill's effect is that:

> *"The bill expands the definition of 'employee' to include an individual who is akin to an employee of the organisation or who is associated with the organisation. Individuals are akin to employees if they carry out activities that are ordinary part of the activities carried on by the organisation, and for the benefit of the organisation".*

It defines an individual as:

> *"An individual who is associated with an organisation includes an office holder, officer, owner, volunteer or contractor of the organisation..."*

This means that in the ACT every local sporting association, rural fire service, council employer, public service employer, non-government agency or charity will be responsible for the criminal conduct of not just their employees, but their volunteers and contractors as well.

Further, any person who has held a voluntary office holder role will also face personal, individual liability.

Some relevant examples of volunteer and not for profit organisations who will be liable under the draft bill include but are not limited to:

- Every local ACT sporting association such as tennis, touch football, swimming, soccer, football, and other sports.
- All volunteer coaches, trainers, assistants and any person who is considered to be associated with an institution.
- Any person – such as parents, local community members and the like – who have ever been a voluntary office holder of an organisation where abuse may have occurred.
- Volunteers of any type in hospital or healthcare settings.
- Any local volunteer rural fire service fighter and or office holder.
- Any volunteer in a political party and or office holder.

The draft bill will have a crippling and devastating effect on the ACT's volunteer and not for profit community organisations.

The combined impact of the extension of personal liability to all office holders and the inability for such organisations to obtain insurance coverage will inevitably lead to the permanent loss of community organisations across the Territory and the valuable services they provide.

The Royal Commission specifically warned against a broad approach to legislative reform which this bill adopts:

> *"We consider it undesirable to impose the liability on not-for-profit institutions that are not providing particularly high-risk services because the risk of liability, or* ***the cost of insuring against it, may force them to cease providing services and activities for children"****.*

c. *The future financial impacts on Territory agencies*

The Committee (nor the Government) has provided modelling of the financial impacts on the ACT taxpayer of the introduction of this bill. These budget implications can be expected to arise in the following ways.

Firstly, the direct impact on the ACT Budget of the liability borne prospectively and retrospectively by government agencies and associated individuals as a result of the Civil Law (Wrongs) (Organisational Child Abuse Liability) Amendment Bill 2025.

Secondly, the financial impact on the ACT Government of needing to replace services lost by community and not for profit organisations which close as a result of the bill being passed, such as those unable to secure insurance coverage for their volunteers and their organisations. The increased liability risk and implications, financial and otherwise, from the draft bill will be profound for countless organisations and the capacity for many to continue to operate subject to such exposure, would be highly doubtful.

d. *The impact of retrospective legislation*

There is a general presumption against legislation being introduced with retrospective effect as it offends the rule of law. The Royal Commission explicitly recommended against retrospective expansion of vicarious liability.

ACT legislators must consider the inherent unfairness of introducing retrospective liability decades after the commission of any criminal offence they did not themselves commit.

Organisations such as our own, and the many hundreds and hundreds referenced by the Royal Commission as having had institutional abuse take place within them, would be forced to comply with a law that did not exist at the time of the tort for which they were unable to organise their affairs to guard against.

While it might be said that institutions should have always taken steps to guard against the abuse of children in their care, the fact is, that if they did not do so then negligence will be established – this underlines the primary point that the legislation is unnecessary in the first place.

Given the historical nature of the litigation, a retrospective law would have no deterrent effect when it could only apply to torts which occurred in the past.

Only prospective legislation could have a deterrent effect in a post Royal Commission legislative environment which already has much more stringent child protection laws in place reflective of the developments in society generally.

We would oppose any retrospectivity of any legislative change that may occur and remind the Committee of the clear recommendations of the Royal Commission:

> *"If the courts do this through the development of the common law, the liability will apply retrospectively to abuse that has already occurred. This is the position in the United Kingdom.* ***In our opinion this would not be appropriate****.*
>
> *"If the change is made by statute, the injustices that may arise if the change is left to the common law can be avoided. In particular, the burden that retrospective change would impose on insurers or institutions that will not have insured against this liability can be avoided.*
>
> ***"If the liability was left to the development of the common law and applied retrospectively, in combination with the removal of limitation periods we recommend in Chapter 14, relevant institutions would face potentially large and effectively new liability for abuse that has already occurred****, potentially over many previous decades.* ***Even if it were possible to obtain insurance in respect of retrospective liability on such a scale, the insurance would be likely to be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred".***

e. _*All institutions with any responsibility for children, must be subject to any legislative reform*_

All institutions, not for profits, community associations, sporting associations and government agencies with any responsibility for children, must be subjected to the provisions of any legislative reform.

To exclude certain categories of organisations from any proposed legislative reform will discriminate against victim survivors abused in those settings and create a two-tier system.

The targeting of only religious organisations, including Catholic institutions, would be categorically discriminatory.

It would also fly in the face of the work of the Royal Commission which found institutional sexual abuse against children occurred in schools, religious organisations, government care, health care providers, orphanages and out of home care providers, sport and recreational organisations, centres for the performing arts and defence cadets' forces – to name just a few settings.

The Royal Commission conducted 134 case studies, however, in its final report it said that it had evidence to have conducted 1000 case studies.

All of this points to the incontrovertible conclusion that to ensure that all survivor / victims of institutional child sexual abuse have equal access to remedies, then any proposed legislation must include all organisations that have any exposure to children including care – be they NGOs, Government agencies, Local Government, private, or public institutions.

f. _*Human rights*_

The Legal Services Committee has flagged in its report deficiencies in the draft Bill with respect to Human Rights.

> *"In the Scrutiny Committee's view this, together with the bill's expanded definition of 'employee', would mean the bill imposes obligations and liabilities directly on natural persons, which would give rise to the need for human rights considerations, such as the right to privacy and reputation".*

And:

> *"The Committee requests the Member presenting the Bill to address potential limitations on human rights by the Bill and to set out why any limitations (if applicable) should be considered reasonable and proportionate using the framework set out in section 28 of the HRA, and that this statement be included in a revised explanatory statement prior to the Bill being debated in the Assembly"*.

As of writing this submission, no detail has been provided as to how the human rights issues identified by the Committee are to be addressed.

g. _*Misunderstanding of the Recommendations of the Royal Commission*_

In addition to the Bill being explicitly counter to the recommendation of the Royal Commission that legislative reform not be made retrospectively, the Committee appear to have misunderstood Recommendations 91 and 92.

Those recommendations related to the imposition of a non-delegable duty of care and a reversal of the onus of proof, not vicarious liability. To quote the Royal Commission's report:

> *"We suggested that, if a broader duty were to be favoured in combination with the removal or substantial extension of the limitation period and if these changes were to be made retrospective,* ***it may be necessary to consider whether the damages available to a claimant should be limited".***

The Royal Commission specifically advised against changing the law with respect to vicarious liability and instead recommended the creation of a statutory duty.

This Bill is not only inconsistent with the recommendation not to introduce retrospective legislation, it misses the opportunity to adopt Recommendations 91 and 92 despite representing that is what it does.

Legislative changes to date have also overlooked the necessity to consider whether the damages available ought to be limited. The selective and inconsistent adoption of the Royal Commission's recommendations will result in an unsustainable litigation environment that will not provide long term benefit to survivors.

h. *<u>Proposed revisit of previously settled claims</u>*

The proposal to insert a new subsection to section 114J(1) which would allow settlements entered into before the Bill was enacted is unsustainable.

Chapter 8A Part 8A.3 of the Civil Law (Wrongs) Act is the most beneficially worded legislation of all the jurisdictions. As it is currently drafted and being interpreted by the Courts, no discretion or consideration is applied as to whether or not the legal impediments which existed (e.g. limitations periods) were actually relied upon in the earlier settlement. The mere existence of the impediment entitles previous settlements to be set aside – meaning that in circumstances where an institution did not rely upon a legal impediment, they will still be subject to further litigation in relation to the same claim.

To further expand this already highly beneficial legislation will compound the emerging unsustainable litigation landscape and should not be adopted in circumstances where the remedy aimed to be cured by the proposed statute stems from the common law.

i. *<u>Lack of stakeholder consultation</u>*

We believe that the stakeholder consultation undertaken by the Legal Services Committee has been inadequate and as a consequence, the report of the Committee and its recommendation of support for the bill, is without credibility.

The Chair of the Committee has identified a significant mistake in the consultation process undertaken, admitting that the representative Catholic body, the Archdiocese of Canberra-Goulburn, was not invited to participate in providing a submission to the Inquiry.

An invitation was made subsequently to the Archdiocese, but only after publication of the Committee's report which underlines the fact that only cursory but nonconsequential consideration will be given to the views of the Archdiocese or any other organisation such as our own, making a submission at the last moment before this bill comes before the Legislative Assembly.

We ask again that the Committee and the Legislative Assembly recognise that the fairest approach is to recommence stakeholder consultation on this bill, in order to provide all relevant stakeholders, the same opportunity to contribute to a proposed law that has such significant implications.

4. Conclusion

We again seek the opportunity to put our submission directly to you as Chair of the Legal Services Committee prior to this bill being brought before the Legislative Assembly for debate, which we understand is within the next week.

Yours sincerely

Br Darren Burge fms
Acting Provincial
Marist Brothers Star of the Sea Province

Br Gerard Brady cfc
Oceania Province Leader
Christian Brothers Oceania Province