

Wednesday, 31 July 2019



Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

By email: haveyoursay@justice.tas.gov.au

Dear Sir or Madam,

Consultation on the Justice Amendments (Organisational Responsibility for Child Sexual Abuse) Bill 2019

Thank you for the opportunity to meet with representatives of the Attorney-General and of the Department of Justice recently, and to provide feedback on the draft Bill.

The Anglican Diocese of Tasmania is the organisation responsible for Anglican Churches throughout Tasmania, and also provides services through various Anglican organisations around the State – most significantly through chaplaincies in hospitals and prisons under the auspices of Anglican Health and Welfare.

The Diocese has a close relationship with Anglicare Tasmania and with the three Anglican schools – Hutchins, Collegiate and Launceston Grammar – however these organisations are independent of the Diocese. This submission therefore does not address any concerns that they might have.

The Diocese and the Bishop of Tasmania has long been supportive of the national response to the problem of child sexual abuse, which found particular expression in the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). The Diocese welcomes the amendments made by the Bill.

There is one matter on which the Diocese wishes to comment and make submissions. That matter relates to the extension of the concept of vicarious liability to cover a person 'akin to an employee', where the 'apparent performance by the employee of a role ... supplies the occasion' for the child abuse. While the Diocese welcomes this extension in principle, it wishes to make submissions about the scope of this new liability.

'person akin to an employee'

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The concept of a person akin to an employee came from UK case law which had in view the situation of a member of clergy. Members of the clergy in the UK are not considered employees, but rather as holders of a public office. This concept has been carried into common law in Australia. This is not a hard rule, and the courts have held that each case will turn on its own facts.

The Diocese welcomes the extension of the principles of vicarious liability to its clergy and stipended lay ministers.¹ Their engagement as office holders in receipt of a stipend is instrumental in the Diocese being able to carry out its mission, and also gives the Diocese a level of control over them. These two factors are important aspects of the justification for vicarious liability in law.

The Diocese notes that the draft Bill has a very wide definition of a person akin to an employee (p. 12 – s. 49(2)). As well as covering the case of clergy, it is wide enough to cover the situation of volunteers in many church activities, given that there is no reference to receipt of a wage, salary or stipend in the section. The Diocese's capacity to exercise control of a volunteer varies depending on the nature and location of their volunteer engagement. I will return to this matter below.

'apparent performance ... supplies the occasion'

The Bill extends vicarious liability to situations where the 'apparent' performance supplies the occasion for the abuse to occur. This seems to be both an extending and a limiting factor, in that it:

- Extends liability into circumstances where the abuse is not within the scope of a person's employment; and
- Limits liability to situations where there is a real causal or relational connection between the person's role in an organisation, and the opportunity to perpetrate abuse.

The Diocese observes that this has the potential to extend into connections that are tenuous. This is best illustrated with a series of hypothetical examples, with the Diocese's comments about whether the Diocese should be vicariously liable in such circumstances. These examples pick up the concepts of whether the 'apparent performance' of the role should be seen to 'supply the occasion' for abuse, as well as whether the person should be seen to be a person akin to an employee.

1. Volunteer working with children at an overnight camp, where abuse occurs during the camp
2. Volunteer working with children during a church activity, where abuse occurs outside of the church activity

¹ A lay minister is a person who is engaged in ministry in the church, but who is not ordained as a deacon, priest or bishop. A stipended lay minister is a lay minister who is in receipt of a stipend from the church as payment for their ministry.

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3. Choir leader (with children involved in the choir), where abuse occurs in the context of the activity
4. Adult volunteer in church, e.g. Choir leader of an adult choir, or prayer leader, where abuse occurs outside of the activity
5. School chaplain, where abuse occurs at the school
6. Church member, where abuse occurs outside of church activities
7. Retired member of clergy, holding a Bishop's Authority to Officiate²
8. Retired member of clergy not holding a Bishop's Authority to Officiate.

I have set out in a table attached to this letter each of the scenarios, and how the new legislation should, in the Diocese's submission, treat liability arising under each scenario.

As you will see from the scenarios, the current drafting of s. 49J(2) may lead to circumstances in which quite tangential connections with the organisation may result in vicarious liability for abuse. The current drafting invites consideration of the *result* of placing the individual in the position, rather than the *scope* of the individual's position. By way of example, a volunteer in a church, who has been placed in a position that does not involve work with children, may incidentally gain the trust of a child. This would appear to bring that individual into the category of an 'individual akin to an employee', and (if that individual were to perpetrate abuse) would seem to provide that the placement of that individual in that position supplied the occasion for abuse, even though the organisation did not contemplate that person having any connection with children in the course of his or her role. Some possible drafting amendments are noted below, underlined and struckthrough.

The other matter that is unclear on the current drafting is how a role 'akin to an employee' comes to an end, and thus when the apparent performance by the employee supplies the occasion for abuse. It may be possible to address this by amending subs. 49J(2) to make it a non-exhaustive list of factors that the court should take into account. One possible insertion is underlined below.

The Diocese recommends that the language of subs. 49J(2) be changed to read:

In determining if 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 on a child, without limiting the other factors that a court may consider, a court is to take into account whether the organisation placed the employee in a position in which the employee ~~has~~ is given one or more of the following:

- (a) Authority, power or control over the child;*
- (b) The ability to gain the trust of the child;*

² An Authority to Officiate is the Bishop's permission to take services and exercise ministry in the Diocese of Tasmania.

(c) The ability to achieve intimacy with the child.

It is our submission that this would set the right limits on vicarious liability, without inadvertently drawing in volunteers whose connection with the church and with children under its care is quite tangential. In making this submission, we submit that, where abuse occurred during a church activity or on church premises, liability under negligence principles would be more appropriate.

I would be very happy to meet again with you to discuss any aspect of this submission if that would be helpful.

Yours Faithfully,



James Oakley

General Manager/Registrar

Encl:

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Scenario	'akin to an employee'	'performance ... supplies the occasion'	Comments
1. Volunteer working with children on a camp	<p><i>An individual is akin to an employee of an organisation if the individual's role within the organisation –</i></p> <p>(a) <i><u>Is for the aims or purpose of the organisation; and</u></i></p> <p>(b) <i><u>Gives the individual authority, power or control over a child or enables the individual to achieve intimacy with, or the trust of, a child.</u></i></p>	<p><i>In determining if the apparent performance ... supplies the occasion for the perpetration of the 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:</i></p> <p>(a) <i><u>Authority, power or control over the child;</u></i></p> <p>(b) <i><u>The trust of the child;</u></i></p> <p>(c) <i><u>The ability to achieve intimacy with the child.</u></i></p>	<p>In a scenario where this sort of volunteer perpetrates abuse whilst on a camp, it is clear that the Diocese ought to be vicariously liable for any abuse that occurred.</p>
2. Volunteer working with children during a church activity	<p><i>An individual is akin to an employee of an organisation if the individual's role within the organisation –</i></p> <p>(a) <i><u>Is for the aims or purpose of the organisation; and</u></i></p> <p>(b) <i><u>Gives the individual authority, power or control over a child or enables the individual to achieve intimacy with, or the trust of, a child.</u></i></p>	<p><i>In determining if the apparent performance ... supplies the occasion for the perpetration of the 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:</i></p> <p>(a) <i><u>Authority, power or control over the child;</u></i></p> <p>(b) <i><u>The trust of the child;</u></i></p> <p>(c) <i><u>The ability to achieve intimacy with the child.</u></i></p>	<p>In this scenario, a volunteer with a children program during a church activity would ordinarily be able to achieve a level of trust, or of authority, power or control, over a child.</p> <p>Where abuse occurred outside of the church activity, but with a sufficient connection to the relationship established through the church activity, it would be appropriate for the Diocese to be vicariously liable.</p>

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<p>3. Choir leader with children in the choir</p>	<p><i>An individual is akin to an employee of an organisation if the individual's role within the organisation –</i></p> <p><i>(a) <u>Is for the aims or purpose of the organisation;</u> and</i></p> <p><i>(b) Gives the individual <u>authority, power or control over a child</u> or enables the individual to achieve intimacy with, or the trust of, a child.</i></p>	<p><i>In determining if the apparent performance ... supplies the occasion for the perpetration of the child abuse on a child, a court is to take into account whether the <u>organisation placed the employee in a position</u> in which the employee has one or more of the following:</i></p> <p><i>(a) <u>Authority, power or control over the child;</u></i></p> <p><i>(b) The trust of the child;</i></p> <p><i>(c) The ability to achieve intimacy with the child.</i></p>	<p>This situation would be akin to scenario 2, with the difference that the relationship between the choir leader and the child is not intended to be a pastoral relationship with hallmarks of trust and/or intimacy, or notions of spiritual authority. In such circumstances, contact <i>outside</i> the activity (rehearsals, services or performances) would not be contemplated by the Diocese, and so the placement by the Diocese of the volunteer in the role would not be intended to create a position where trust or intimacy could be achieved, nor where the authority of the leader would continue to run.</p> <p>In circumstances where abuse occurs <i>outside</i> the activity, e.g. if the child's parents had invited the choir leader into their home to provide music lessons, then the Diocese ought not be vicariously liable for such abuse.</p> <p>In circumstances where the abuse occurred in the context of the activity, e.g. at or in immediate proximity to a rehearsal, service or performance, then the Diocese ought to be vicariously liable.</p>
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<p>4. Adult volunteer in church, e.g. Choir leader of a choir <u>not</u> involving children; prayer leader</p>	<p><i>An individual is akin to an employee of an organisation if the individual's role within the organisation –</i></p> <p><i>(a) <u>Is for the aims or purpose of the organisation;</u> and</i></p> <p><i>(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.</i></p>	<p><i>In determining if the apparent performance ... supplies the occasion for the perpetration of the 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:</i></p> <p><i>(a) Authority, power or control over the child;</i></p> <p><i>(b) The trust of the child;</i></p> <p><i>(c) The ability to achieve intimacy with the child.</i></p>	<p>In this scenario, the choir leader ought not be considered akin to an employee, or if he or she is, then the apparent performance ought not be considered to have supplied the occasion for abuse. This is because the placement of the person in the position does not have a sufficient connection with the child or the abuse.</p> <p>The question of whether this scenario enables a person to achieve the trust of the child is quite subjective. There should be some capacity for the court to consider the scope of the individual's role in the organisation, and whether that role would involve the individual in gaining a child's trust (as would happen in pastoral relationships). Mere incidental development of trust, because of the recognition factor that arises due to seeing a person in church repeatedly, should not be sufficient to ground vicarious liability in these circumstances. In circumstances where abuse occurs in the context of church services or activities, vicarious liability ought not apply (although liability in negligence may appropriately apply).</p>
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			In a circumstance where abuse occurs <i>outside</i> the activity, e.g. if the child's parents had invited the choir leader into their home to provide music lessons, then the Diocese ought not be vicariously liable for such abuse.
5. Chaplain at a school	<p>An individual is akin to an employee of an organisation if the individual's role within the organisation –</p> <p>(a) <u>Is for the aims or purpose of the organisation;</u> and</p> <p>(b) Gives the individual authority, power or control over a child or <u>enables the individual to achieve intimacy with, or the trust of, a child.</u></p>	<p>In determining if the apparent performance ... supplies the occasion for the perpetration of the 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:</p> <p>(a) Authority, power or control over the child;</p> <p>(b) The trust of the child;</p> <p>(c) The ability to achieve intimacy with the child.</p>	<p>School chaplains in the Anglican system are employed by the Schools independently of the Anglican Diocese, and so the vicarious liability principles should connect those chaplains with the school.</p> <p>One area of complexity is that most school chaplains are ordained Anglican clergy, and all are licensed by the Bishop.³ As such, there is a connection between the Diocese and the individual that could see them as akin to an employee of the Diocese. The Diocese would submit, however, that the second limb (supplies the occasion) ought not apply in these circumstances, and the Diocese does not have a power to appoint a school chaplain to his or her position – the only authority the Bishop has is whether or not to withhold a licence.</p>

³ A Bishop's licence is the Bishop's permission to a person to exercise Anglican ministry in the Diocese of Tasmania.

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			As the Diocese does not have any capacity to exercise the sort of oversight or control over a chaplain that is the usual hallmark of an employee under vicarious liability, the legislation ought to be clear enough to exclude extended vicarious liability in this scenario.
6. Church member	<p>An individual is akin to an employee of an organisation if the individual's role within the organisation—</p> <p>(a) Is for the aims or purpose of the organisation; and</p> <p>(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.</p>	<p>In determining if the apparent performance ... supplies the occasion for the perpetration of the 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:</p> <p>(a) Authority, power or control over the child;</p> <p>(b) The trust of the child;</p> <p>(c) The ability to achieve intimacy with the child.</p>	<p>Church members will often exercise 'unofficial' or ad hoc ministries, such as praying together, or meeting together in home groups of small groups. Where this occurs, the individual involved ought not to be considered as an individual akin to an employee.</p> <p>There are circumstances in which such appointments might occur with the approval of the local church and/or the Diocese. In these circumstances, the situation would be similar to 3 or 4 above, depending on whether it was intended that children would be involved in the activity.</p>
7. Retired member of clergy – ATO or Licence	<p>An individual is akin to an employee of an organisation if the individual's role within the organisation –</p> <p>(a) Is for the aims or purpose of the organisation; and</p>	<p>In determining if the apparent performance ... supplies the occasion for the perpetration of the child abuse on a child, a court is to take into account whether the organisation placed the employee in a position in which the</p>	<p>When clergy retire, they retain Holy Orders (i.e., they remain a Deacon, Priest of Bishop). To undertake ministry in the Diocese, they require a Bishop's Licence or Authority to Officiate.</p>

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	<p><i>(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.</i></p>	<p><i>employee has one or more of the following:</i></p> <p><i>(a) Authority, power or control over the child;</i></p> <p><i>(b) The trust of the child;</i></p> <p><i>(c) The ability to achieve intimacy with the child.</i></p>	<p>There are a variety of licences that enable voluntary ministry, from very regular ministry to fairly remote ministry. Where a clergy person is licensed for regular ministry in a congregation including children, then it could be held that the person's position brought with it elements of authority, trust and intimacy, and vicarious liability would be appropriate.</p> <p>Where a clergy person is only licensed for ad hoc ministry, where their connection with children is incidental or tangential, then it should be open to a court to hold that there is insufficient connection between that person's engagement with the Church and the abuse that occurred for vicarious liability to apply.</p>
<p>8. Retired member of clergy – not licensed</p>	<p><i>An individual is akin to an employee of an organisation if the individual's role within the organisation –</i></p> <p><i>(a) Is for the aims or purpose of the organisation; and</i></p> <p><i>(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.</i></p>	<p><i>In determining if the apparent performance ... supplies the occasion for the perpetration of the 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:</i></p> <p><i>(a) Authority, power or control over the child;</i></p>	<p>When clergy retire, they retain Holy Orders (i.e., they remain a Deacon, Priest or Bishop). To undertake ministry in the Diocese, they require a Bishop's Licence or Authority to Officiate.</p> <p>Where a Bishop wishes to prevent a member of clergy from exercising ministry, the usual mode to achieving this is to deny that person a licence. Stripping a person of Holy Orders, in the absence</p>

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		<p><i>(b) The trust of the child;</i> <i>(c) The ability to achieve intimacy with the child.</i></p>	<p>of criminal conduct, is often very difficult, and so the primary protective mechanism where there might be concerns for fitness would be denial or revocation of a licence. In such circumstances, the legislation is unclear what steps an organisation such as the Diocese might need to take to make it clear that the individual no longer held a position with the organisation, thus putting an end to vicarious liability exposure.</p> <p>This comment applies to volunteers who no longer maintain volunteer endorsement or involvement as well.</p>
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Notes:

- Where extracts from the legislation are underlined, it is the submission of the Diocese that these parts of the legislation are particularly relevant to the scenario
- Where extracts from the legislation are ~~struck through~~, it is the submission of the Diocese that these elements would be absent from the scenario
- In scenarios that appear to be captured by the legislation, but where the Diocese submits that they should not be, this has been highlighted in the comments column.

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