Comment

The devil's workers

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The Catholic Church is at it again.

The decision in *Bird v DP* has the privileged, affluent and braggadocious church publicly thanking the High Court for a ruling that pierced the hearts of thousands of survivors who were, as children, raped or sexually assaulted by Catholic clergy.

The Bird who gave the case its name is Paul Bird, the current bishop of the Diocese of Ballarat in Victoria.

DP is the pseudonym of a man who was sexually abused in 1971 at the age of five by Father Bryan Coffey, the assistant parish priest at Port Fairy.

The Catholic Church insists that its clergy members are not employees. In *Bird v DP*, not only did the High Court agree with this, it held that the relationship between a clergy member and the institution is not even akin to an employment relationship. As such, the church cannot be found liable for the sex crimes of its clergy members.

The Catholic Church chose not to accept the decisions of the Supreme Court trial judge and the Victorian Court of Appeal – namely, that there did exist a relationship akin to employment between the clergy and the church. Instead of practising their teachings of compassion, they instead saw it as an opportunity to mount a complex legal challenge in the High Court.

The High Court relied on the black letter of the law and overturned the decisions of the lower courts. This decision means that thousands of survivors of Catholic clergy child abuse in Australia are denied justice.

Once again, the Catholic Church is getting away with it. In the eyes of the hierarchy, the church has been granted judicial approval to avoid its legal and moral obligations to right the odious wrongs of its criminal past.

The High Court decision has cleansed the Catholic Church with judicial absolution. No confession or penance is necessary for the institution that enabled the serious sexual offending of hundreds of paedophiles within its ranks, not even a mea culpa.

To fully appreciate the adverse consequences of this High Court decision, some context and history are in order.

One of the often-challenging legal requirements in an institutional abuse civil claim is establishing that the institution is legally liable for the crimes of the offender.

To establish such liability, there are two main legal hooks upon which we rely.

First is the law of negligence and second is the law of vicarious liability.

For an institution to be negligent, we must establish that not only did the institution have a duty to prevent reasonably foreseeable harm of the child but that the institution breached that duty.

Mostly, such a breach would involve the institution having prior knowledge of the offender but not acting on that knowledge.

We know from the Royal Commission into Institutional Responses to Child Sexual Abuse that much "complaint evidence" was either destroyed or not documented in the first place.

Without negligence, we turn to the second legal hook, vicarious liability. This was at the nub of the High Court's decision.

To prove vicarious liability, one must first establish that an employment relationship existed between the offender and the employer or institution. Second, the offender must have committed the crime "within the course of their employment".

The Catholic Church in Australia argues that Catholic clergy are not employed. If they are employed by anyone, it is by God.

Up until 1999, any teacher who sexually assaulted a child at a school was considered by the courts to be off on a frolic of their own and the employer could not be held vicariously liable. The sexual offending was not part of their role or duties as a teacher.

Since 1999, common law countries such as Canada and the United Kingdom have expanded and evolved the breadth of vicarious liability by adopting policy considerations and employing a contemporary filter through which to view cases. These courts have kept up with a changing world.

In 1999, initiating this evolution, the Supreme Court of Canada argued that if an organisation carries certain risks, the organisation should bear the loss if those risks materialise. In this case, a residential care facility for troubled children was an institution that "materially increased the risk of child sexual abuse". That is, the concept of an "enterprise risk" entered the lexicon of vicarious liability law.

Three years later, in a UK decision that also involved troubled children in a residential care facility, the legal concept of a "close connection" between the offender's duties or role and the sex crimes committed gained judicial approval.

Not in Australia, though. Despite the above advances, the High Court handed down a decision in *New South Wales v Lepore*, in 2003, which did not accept that state school authorities could be held vicariously liable for child sexual abuse by teachers.

Back to the UK and the law continued to evolve such that, in 2010, using the "close connection" test, it was found for the first time that a Catholic institution was vicariously liable for the sex crimes of its clergy.

In 2011, developing these ever-widening concepts of vicarious liability, a UK court went further and established that Catholic clergy are in a relationship "akin to employment".

In 2017, Irish common law imposed liability on religious institutions by adopting the transatlantic concepts of "enterprise risk" and "close connection" and also found the relationship between the clergy offender and the institution to be one that is "akin to employment".

Still not in Australia.

In 2024, the High Court was asked, for the first time, to consider whether a Catholic institution could be held vicariously liable for the criminal actions of its priests.

The High Court grappled with the question of whether an employment relationship is a threshold requirement of vicarious liability.

Nowhere in the decision was there doubt that DP had been sexually abused. The judges were not considering that question and had no reason to disbelieve him. The only question was whether he should receive financial compensation for the toll this abuse took on his life. The overwhelming response was "no".

Had the same abuse been committed by a lay teacher, the church would have to pay. The special relationship between priest and God was the only way out.

The lone dissenter, Jacqueline Gleeson, described this critical case as "a missed opportunity for the Australian Common Law to develop in accordance with changed social conditions and in tandem with developments in other common law jurisdictions".

Despite consecutive, congruent and sound legal developments elsewhere, Australia's High Court instead handed down a retrograde judgement that only serves to protect the church's assets.

The consequences of this decision are dire.

If a survivor cannot prove the institution had prior knowledge of the offender – an arduous and at times impossible challenge – they face a legal dead end.

Instead of declaring the law on vicarious liability to be in line with the rest of the common law world, the decision of the High Court has survivors hopelessly disenfranchised.

Bishop Bird, who lauds the biblical teachings of compassion, preferred a legal technicality to absolve his church of responsibility. The protection of the church's assets clearly eclipses the needs of those children who were sexually assaulted.

In an effort to rectify this anomaly in the law, the High Court handballed the problem to the states and territories.

Legislation can and must reverse this High Court decision by retrospectively expanding vicarious liability to ensure institutions can be held accountable for the actions of priests, religious clergy and volunteers acting under the authority of the religious institution, regardless of prior knowledge.

It must also capture the actions of volunteers working under the authority of all institutions into which children are entrusted into their care.

Such legislation is urgent.

A third of the abuse survivors I represent are currently impacted by this decision. It is estimated there are about 2000 survivors in Victoria alone whose chances of a civil claim are currently nought.

Many of these clients' claims will have been in the legal system for up to five years. In a recent Victorian decision, an application to vacate the trial date on the grounds that the matter now relied upon anticipated vicarious liability legislation was denied. This person and potentially many hundreds of others with matters currently before the courts are being forsaken.

Trials listed before the date of any legislative reform may have to be discontinued. Justice will forever be denied. Such an outcome would be calamitous.

A priest can go into a family home to provide pastoral care, which is part of his job, and while wearing his clerical collar, rape a child in their own bed, and unless there is evidence of prior knowledge, there will be no justice.

A priest can rape a child in their own church, but without prior knowledge there can be no justice.

To rely on such a legal technicality to avoid responsibility is unconscionable, immoral and wreaks of greed and abject cruelty.

Remember, the Catholic Church insists its members are not employed – unless, of course, it suits them.

During the pandemic, the Catholic Church successfully lobbied the government to amend the JobKeeper legislation to include members of religious organisations. JobKeeper payments were for "employees" who lost their jobs due to lockdowns. In all, $627 million in JobKeeper payments were made to about 3500 religious entities, including the Catholics. Churches confirmed this money was paid to priests.

There is additional evidence that clergy can be "employed" when it suits the church.

In 1994, the vicar-general of the Ballarat diocese signed an "employment separation certificate" for Father Paul Ryan, now a convicted paedophile. This enabled Ryan to apply for social security benefits.

The certificate noted that Ryan was "employed" between 1976 and 1993 and that his employment was terminated due to "unsuitability for this type of work". The vicar-general declined to tick the available boxes for "unsatisfactory work performance" or "misconduct".

Clergy members who are teachers comprise a special subset of those who are not "employed". This is despite these teachers being registered with state authorities, which mandates teacher training, accreditation and professional development requirements.

These teachers are appointed to teaching positions. They receive policy documents regarding the supervision and oversight of classroom teaching, as well as details of their teaching duties such as when and where their duties are to be discharged. They are remunerated by way of stipends and are entitled to sick and holiday leave, health insurance benefits, accommodation, keep and car.

Urgent action is needed. The Catholic Church has found another way to abuse survivors. It no longer pretends the molestation didn't happen, just that it's not their problem it did.