HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

BISHOP PAUL BERNARD BIRD
Appellant

and

DP (A PSEUDONYM)
Respondent

RESPONDENT'S SUBMISSIONS

PART I – CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II – ISSUES ARISING

2. *First*: The appellant represents the Roman Catholic Diocese of Ballarat, of which Bryan Coffey was, during his lifetime, a priest. The Diocese is an unincorporated association, and is not a legal person. By reason of not being a legal person, it could not literally have been Coffey's employer; yet it was empowered to exercise control over Coffey that was at least as great as, if not greater than, that enjoyed by an employer. By force of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), the respondent's claim was to be treated 'as if the [Diocese] had been incorporated and capable of being sued and found liable for child abuse'. Coffey was found to have abused the respondent in the course of his role as an assistant priest and a servant of the Diocese; and not as an independent contractor. Are the categories of 'employment' and 'true agency' the only categories of vicarious liability recognised by Australian law? Should the Diocese be vicariously liable for the acts of its servant, Coffey, in the course of his role as an assistant priest?

3. *Second*: The respondent put forward evidence, and the lower courts found, that the position of power and intimacy, invested in Coffey by the Diocese as an assistant priest, provided him not only with the opportunity to sexually abuse the respondent, but also the occasion for the commission of those wrongful acts. In the absence of any responsive evidence from the Diocese about Coffey's role as assistant priest, and in the absence of any challenge to the lower courts' factual findings, was any further precision needed about Coffey's role before vicarious liability could be established?

4. *Third*: Whether or not the Diocese is vicariously liable for Coffey's abuse, is it nonetheless liable to the respondent for breach of a non-delegable duty owed to him as a parishioner of tender years to protect him from the risk of sexual abuse by its priests, including Coffey, in the course of their functions and duties as a priest and as a representative, servant or agent of the Diocese?

PART III – SECTION 78B NOTICE

5. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV – FACTS

6. In addition to the facts set out in Part V of the appellant's submissions, the relevant findings establishing the Diocese's liability for its servant, Coffey, included that:

(a) the Diocese appointed Coffey to be assistant priest, and had ultimate control over the parameters of his appointment including its duration, location, general duties, responsibility of supervision and benefits: CAB 30-1, 61–2; SC[117], [235]–[237]; CAB 157, 160–1, 183-184; CA[8], [31], [124]–[126];

(b) Coffey's work was not carried out independently of the Diocese but as its representative, such that Coffey's work *was* the public manifestation of the Diocese in Port Fairy: CAB 63; SC[240]–[241]; CAB 184; CA[128];

(c) 'the Bishop at all times had and retained overriding authority, and thus the capacity to exercise power, over the priests in the Diocese', such that '[b]y appointing and maintaining Coffey as an assistant priest within the parish, the Diocese, by the Bishop, invested him with a degree of power and authority to enable him to achieve such intimacy with the respondent's family that he was able to exploit their trust in him in order to indecently assault the respondent': CAB 191; CA[155]; CAB 60; SC[228];

(d) Coffey was not engaged by the Diocese as an independent contractor: CAB 52–4; SC[193], [199]; CAB 172; CA[77];

(e) the Diocese provided for Coffey's livelihood, clerical garb and vestments, and clothed him with an aura of charisma and authority: CAB 60; SC[229]; CAB 184, 189–90; CA[129], [149];

(f) Coffey's duties as assistant priest involved a special role of intimacy with parishioners for pastoral care and guidance, including by visiting parishioners' homes and interacting with their families and children: CAB 61, 63–7; SC[233]–[234], [242], [245]–[246], [261], [264]; CAB 161, 189–91; CA[32], [149]–[150], [157];

(g) Coffey in his role as assistant priest did in fact regularly visit the homes of parishioners and interact with their families: CAB 66–7; SC[258]; CAB 190; CA[150];

(h) in particular, Coffey's visits to the respondent's family home 'were an integral part of his pastoral role as a parish priest': CAB 191; CA[157]; CAB 67;

SC[260]–[261];

(i) it was 'inconceivable', 'sheer nonsense', and 'an affront to common sense' to suggest that Coffey's visits to parishioners' houses were unconnected with his role as assistant priest: CAB 67; SC[260]–[261]; CAB 191; CA[157]; and

(j) Coffey's role as assistant priest placed him in a position of trust and authority vis-à-vis the respondent and his family, and it was in this position that he committed the assaults: CAB 68; SC[266]–[269]; CAB 189–90, 192–3; CA[149], [163].

PART V – ARGUMENT

Ground 1

7. **'Employment' and 'true agency' are not the exclusive categories of vicarious liability**. The abuse committed by Coffey against the respondent, for which the appellant was found to be liable, occurred in the distinctive context of the intimate pastoral bond between a Catholic priest and a vulnerable young parishioner who was, along with his family, brought up to trust the priest as a 'man of God': CAB 159, 192; CA[24], [162]. As the Court of Appeal rightly observed, '[t]he relationship between a diocese and a priest or assistant priest is, necessarily, *sui generis*': CAB 182; CA[120]. The Diocese whom the appellant represents is, by definition, an unincorporated association, and was never itself a legal person: CAB 170–2; CA[68], [73]–[76]. It could never in the literal sense have been Coffey's employer or his principal as a contractual agent; nor could it have engaged him as an independent contractor: CAB 56; SC[211]; CAB 172; CA[77]. Each of those roles presupposes an agreement between legal persons.

8. Nonetheless, as the undisputed factual findings set out in paragraph 6 above emphasise, the Diocese was 'permitted … to exercise control over Coffey that was at least as great as, if not greater than, that enjoyed by an employer': CAB 183; CA[125]. Coffey was '[i]n a real and relevant sense … the servant of the Diocese': CAB 184; CA[129]. He was engaged on the Diocese's central task of administering pastoral care to Catholic parishioners, including children such as the respondent: CAB 183, 189–91; CA[125], [149]–[157]. The finding, relied on in AS[8], that Coffey 'was not an employee of the Diocese' must be understood in that context.

9. Because the Diocese is not a legal person, there was no formal contract — never mind

one wholly in writing — between it and Coffey.[1] However, but for the Diocese being an unincorporated association, each of the usual indicia of an (informal or unwritten) employment relationship giving rise to vicarious liability was established:[2]

(a) Coffey was not a 'freelancer' having an 'independent career' outside the institutional church. He was not somehow 'running [his] own enterprise' as a Catholic priest independently of the Diocese:[3] CAB 52-4; SC[193]-[199]; CAB 172; CA[77].

(b) Coffey's work was subject to the right of control exercised by his superiors in the Diocese, including the Bishop: CAB 191; CA[155]; CAB 60; SC[228].[4]

(c) Coffey was presented to the public and parishioners as an emanation of the Diocese. He wore the uniform of a Catholic priest of the Diocese:[5] CAB 60, 65; SC[229], [247]; CAB 184, 189–90; CA[129], [149].

(d) The Diocese was in a position to deter wrongdoing through its ability to administer, supervise or discipline its priests:[6] CAB 60–3; SC[228], [235]–[238].

(e) The Diocese superintended Coffey's finances. Coffey's livelihood was provided for by the Diocese:[7] CAB 60; SC[229]; CAB 184; CA[129].

(f) The Diocese had considerable scope for the actual exercise of control, and not merely in incidental or collateral matters. Its 'whole business' was the exercise of pastoral and sacramental ministry by its priests, whose work was the 'very essence of the public manifestation' of the Diocese:[8] CAB 63; SC[240]–[241]; CAB 184; CA[128].

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1 Cf *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 at 489–90 [101] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at 192–3 [55]–[59] (Kiefel, Keane and Edelman JJ), 217 [136] (Gageler and Gleeson JJ), 234–5 [183], 238–9 [190] (Gordon J).

2 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 42–5 [48]–[57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29 (Mason J), 36–7 (Wilson and Dawson JJ), 49–50 (Deane J).

3 *Hollis* (2001) 207 CLR 21 at 42 [48] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

4 *Hollis* (2001) 207 CLR 21 at 42 [49] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

5 *Hollis* (2001) 207 CLR 21 at 42 [50]–[52] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

6 *Hollis* (2001) 207 CLR 21 at 43 [53] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

7 *Hollis* (2001) 207 CLR 21 at 43–4 [54]–[55] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

8 *Hollis* (2001) 207 CLR 21 at 44–5 [57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

10. In the case of ordinary legal persons — most obviously in the commercial context — there is plainly an important distinction between relationships of employment (in which vicarious liability may arise) and relationships of principal and independent contractor (in which it will not).[9] However, the existence of that dichotomy does not mean that 'employment' is the exclusive category of vicarious liability. To the contrary, 'true agency'[10] and partnership[11] also give rise to liability for the wrongful acts of another.

11. One can readily accept that the label of 'vicarious liability' can be seen as encompassing, or drawing upon, a number of different legal concepts and relationships.[12] That is hardly surprising: even in the central case of employment, the modern doctrine of vicarious liability 'was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy'.[13] The diversity of roles and workplaces;[14] the complexity of 'control' in 'borrowed worker' situations;[15] and the frequency of extended statutory definitions of 'employee' or 'worker',[16] mean that generalisation is difficult. Overly categorical statements are likely to mislead. The critical point is simply that 'employment' has never been the sole touchstone of those relationships in which one person is attributed with liability for wrongdoing committed by another.

12. Given the notorious barriers that have until recent times made it difficult to bring claims in relation to historical institutional child abuse,[17] this Court has not yet had the opportunity to consider how the law of vicarious liability applies to the distinctive relationship between Diocese and priest. The vicarious liability of a master for the acts

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9 *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 55 [12] (Kiefel CJ, Gageler, Gordon and Jagot JJ), 565 [66] (Edelman and Steward JJ), 571 [92]–[93] (Gleeson J); *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 167 [12] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

10 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41; *Soblusky v Egan* (1960) 103 CLR 215.

11 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366. The principle predates the *Partnership Act 1890*, 53 & 54 Vict c 39, s 10: see, e.g. *Ashworth v Stanwix* (1860) 3 E & E 701; 131 ER 701.

12 *Schokman* (2023) 97 ALJR 551 at 561–2 [49]–[54], 570 [82] (Edelman and Steward JJ).

13 *Hollis* (2001) 207 CLR 21 at 37 [34] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

14 See, e.g. *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561.

15 See, e.g. *TNT Australia Pty Ltd v Christie* (2003) 65 NSWLR 1; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471. The issue is not new: *Donovan v Laing, Wharton and Down Construction Syndicate Ltd* [1893] 1 QB 629.

16 See, e.g. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3 (definition of 'employer' and 'worker').

17 See, e.g. *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at 869–72 [29]–[45] (Kiefel CJ, Gageler and Jagot JJ); Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), 431–524.

of a servant has very ancient roots.[18] 'Status' has never been wholly displaced by 'contract'.[19] The authority of this Court is against the proposition that vicarious liability can arise *only* from the acts of an employee.[20] So much was rightly recognised by the lower courts: CAB 50; SC[187]; CAB 173, 181; CA[82], [114]. The respondent expressly pleaded that Coffey was an agent of the Diocese;[21] and the line of authority in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* was expressly drawn to the lower courts' attention. Those orthodox strands of authority were correctly applied by the lower courts in the distinctive circumstance of a hierarchical but unincorporated organisation given legal form by the Legal Identity Act.

13. No decision of this Court stands in the way of recognising the Diocese's vicarious liability for a diocesan priest who was its servant; who was subject to its power of control; who was presented to the public as its emanation; who was an integral part of its business or undertaking; who was plainly not an independent contractor, and yet who was not an employee. In all the circumstances, such a role is one capable of giving rise to vicarious liability, and was rightly found by the lower courts to have done so on the facts of this case: CAB 69–70; SC[278]–[279]; CAB 184; CA[130].

14. **The Legal Identity Act provides the statutory context for a finding of vicarious liability**. By reason of the Diocese not being incorporated, there could not have been any literal relationship of employment between it and Coffey, notwithstanding that each other aspect that would ordinarily go towards establishing vicarious liability was fulfilled. Hitherto, the lack of a legal person capable of being sued had been a notorious impediment to the redress of abuse occurring in the context of unincorporated organisations; even when those organisations controlled valuable property held by corporate trustees.[22] That circumstance has been remedied by the Legal Identity Act,

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18 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 169–70 [20] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Cf *Yewens v Noakes* (1880) 6 QBD 530 at 532–3 (Bramwell LJ): 'A servant is a person subject to the command of his master as to the manner in which he shall do his work'.

19 Cf Henry Maine, *Ancient Law* (London: John Murray, 3rd ed 1866), 170; *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 at 492 [113] (Gageler J); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 436 (McHugh and Gummow JJ).

20 *Colonial Mutual Life Assurance* (1931) 46 CLR 41; *Soblusky v Egan* (1960) 103 CLR 215.

21 Second Further Amended Statement of Claim at [2], [35], [45] (RBFM 7, 10–11, 12); Defence [2], [35], [45] (RBFM 16, 22, 24).

22 Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013), 511, 530–6; Royal Commission into Institutional

whose express purpose is 'to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-government organisations which use trusts to conduct their activities': s 1. Equivalent legislation exists in each Australian jurisdiction.[23] Those statutes are a frank legislative embodiment of Maitland's observation that 'our "unincorporate bodies" have lived and flourished behind a hedge of trustees'.[24]

15. The Legal Identity Act applies to an NGO where: (1) a plaintiff commences or wishes to commence a claim against an NGO founded on or arising from child abuse; (2) but for being unincorporated, the NGO would be capable of being sued and found liable for a claim founded on or arising from child abuse; and (3) the NGO controls one or more associated trusts. An NGO is 'a non-government organisation that is an unincorporated association': s 5. By definition, the statutory concept of 'NGO' does not include incorporated bodies that would otherwise be capable of being an employer.

16. Under s 7, there is a process for the NGO, in respect of a claim against it 'founded on or arising from child abuse', to 'nominate an entity that is capable of being sued' to 'act as a proper defendant to the claim' and to 'incur any liability'. Here, the relevant NGO is the Diocese; the appellant is the nominated 'proper defendant'; and the Roman Catholic Trusts Corporation for the Diocese, constituted by the *Roman Catholic Trusts Act 1907* (Vic) s 6, is the trustee of the most obvious 'associated trust'.

17. The critical substantive provisions are in ss 7(2) and 7(4) of the Legal Identity Act. Section 7(2) provides that where (as here) a proper defendant has been nominated, that person 'is taken to be the defendant in the claim on behalf of the NGO for all purposes' and 'incurs any liability arising from that claim on behalf of the NGO *as if the NGO had been incorporated and capable of being sued and found liable* for child abuse' (emphasis added). Equivalently, s 7(4) provides that '[a] court may substantively determine a claim in a proceeding founded on or arising from child abuse for which there is a proper defendant under this section as *if the NGO itself were incorporated and*

Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), 496–511; cf *Trustees of The Roman Catholic Church v Ellis* (2007) 70 NSWLR 565.

23 *Civil Law (Wrongs) Act 2002* (ACT) Chapter 8A, Part 8A.2; *Civil Liability Act 2002* (NSW) Part 1B Div 4; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) Part 3A Div 6; *Civil Liability Act 2003* (Qld) Chapter 1 Part 2A Div 3; *Civil Liability Act 1936* (SA) Part 7A, Div 4; *Civil Liability Act 2002* (Tas) Part 10C, Div 4; *Civil Liability Act 2002* (WA) Part 2A, Div 2.

24 Maitland, 'Trust and Corporation' in HAL Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge: Cambridge University press, 1911) vol 3, 353.

capable of being sued and found liable for child abuse in respect of the claim.'

18. The breadth of the kind of claim covered by the Legal Identity Act is evident from the wording of s 4(1),[25] and is made explicit in the Explanatory Memorandum and Second Reading Speeches for the relevant Bill, which each describe how s 4(1) 'means that any claim founded on or arising from child abuse can be brought in reliance on the provisions of the Bill, including negligence, *vicarious liability* or direct liability'.[26]

19. As *Hollis v Vabu Pty Ltd* itself illustrates, whether a relationship amounts to 'employment', and whether it gives rise to vicarious liability, may vary depending on the legal purpose and statutory context in which the question is asked.[27] It is commonplace for statutory intervention to shape the context in which vicarious liability falls to be determined.[28] Here, the provisions of the Legal Identity Act foreclose — by force of statute — the proposition that there could be no vicarious liability on the part of the Diocese simply because there was no corporate defendant capable of being the wrongdoer's employer.

20. It is not to the point (cf AS[36]–[38]) that in some jurisdictions other than Victoria there is further legislation (beyond the equivalents of the Legal Identity Act) that also addresses vicarious liability in the context of employment-like relationships. The Victorian legislation arose in response to a distinct local Parliamentary inquiry, in which the need to provide a means to establish vicarious liability was adverted to, and was encompassed within the Legal Identity Act.[29] In that regard, it may be accepted that s 7(2)(b) and the other provisions of the Legal Identity Act do not *deem* the Diocese to be vicariously liable for Coffey's actions. However, as the lower courts rightly

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25 See, e.g., *Catholic Archdiocese of Melbourne v RWQ (a pseudonym)* [2023] VSCA 197 at [56]–[71] (Beach, McLeish and Kennedy JJA).

26 Explanatory Memorandum, Legal Identity of Defendants (Organisational Child Abuse) Bill 2018 (Vic), 4; Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 2018, 596 (Martin Pakula, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Council, 1 May 2018, 596 (Gavin Jennings, Special Minister of State) (emphasis added).

27 *Hollis* (2001) 207 CLR 21 at 28–32 [13]–[22], 32–33 [23]–[24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). In a previous taxation decision, the couriers had been characterised as independent contractors, not employees: *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537.

28 See, e.g. *Broom v Morgan* [1953] 1 QB 597; *Married Women's Property Act 1882*, 45 & 46 Vict c 75, s 12; cf *Law Reform (Husband and Wife) Act 1962*, 10 & 11 Eliz 2 c 48, s 1. Australian examples include *Wrongs Act 1958* (Vic) s 61; *Partnership Act 1958* (Vic) s 14; *Legal Profession Uniform Law* (NSW) s 111; *Corporations Act 2001* (Cth) s 917C.

29 Explanatory Memorandum, Legal Identity of Defendants (Organisational Child Abuse) Bill 2018 (Vic), 1; Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013).

appreciated (CAB 31–2; SC[122]; CAB 171–2; CA[75]–[76]), they provide the statutory context in which the general law of vicarious liability had to be applied. That is what the lower courts properly did. As the Court of Appeal noted, the effect of the Act 'is to convert an unincorporated association (an NGO) to a fictitious incorporated entity, for the purpose, not only of the nomination of an appropriate defendant, but also to impose on the entity the same liabilities that would have applied had the entity been incorporated at the time of the abuse': CAB 172; CA[76].

21. The Legal Identity Act leaves open — as a factual question — 'the structure of the NGO at the time of the events giving rise to the cause of action, and the nature of relationships between the NGO, the plaintiff, the offender and other persons relevant to questions of duty, breach and vicarious liability.'[30] One can thus accept that the Diocese would not be vicariously liable for a wrongdoer over whom it did not exercise any right of control; or who was properly identified as being equivalent to an independent contractor; or whose wrongdoing was extrinsic to the role they occupied in relation to the Diocese; or whose role merely provided the opportunity, but not the occasion, for the wrongdoing.

22. Here, however, the emphatic findings of the lower courts — based on essentially unchallenged evidence — were that (1) the Diocese held, and exercised, the right to control the work of priests such as Coffey that was 'at least as great as, if not greater than, that enjoyed by an employer' (CAB 183; CA[125]); and (2) Coffey's role was the 'occasion' and not merely the 'opportunity' for the wrongdoing: CAB 57–70; SC[215]–[280]; CAB 192–3; CA[163]. In light of the terms of the Legal Identity Act, those findings were sufficient to establish the Diocese's vicarious liability for Coffey's wrongdoing. That conclusion is neither novel, nor an unwarranted extension of the principle of vicarious liability. The conceptual problem of allocating liability to a nominated defendant, where the actor in question lacked legal personality, is not new.[31] Nor is the problem of how the law should adapt to the widening classes of persons or organisations recognised as having legal personality, or as being capable of suing or being sued.[32]

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30 *O'Connor v Comensoli* [2022] VSC 313 at [156] (Keogh J).

31 See, e.g., Gai I.48–65, IV.69–80; Inst I.8–9, IV.7.

32 See, e.g., Inst IV.7–8; P W Duff, *Personality in Roman Private Law* (Cambridge: Cambridge University Press, 1938); Fritz Schultz, *Principles of Roman Law* (Oxford: Clarendon Press, 1936) ch 10; *Married Women's Property Act 1882*, 45 & 46 Vict c 75; *Chaff & Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd* (1947) 74 CLR 375; *Williams v Hursey* (1959) 103 CLR 30; *Taff Valley Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426; *Bonsor v Musicians' Union* [1956] AC 104.

23. **Consistently with the law of other jurisdictions, this Court should recognise relationships 'akin to employment' as giving rise to vicarious liability**. If the existing law of vicarious liability — read in light of the Legal Identity Act — does not already provide a means by which the Diocese can be vicariously liable in the absence of true employment, then the law should be extended to encompass relationships *akin* to employment, most obviously where the impediment to a finding of 'true' employment arises from the lack of legal personality on the part of the unincorporated organisation. This case does not require any wider restatement of the law of vicarious liability, nor any reinvestigation of its foundations in legal policy. Quite properly, the Diocese does not assert that vicarious liability is somehow unavailable for intentional torts constituting child abuse:[33] the absence of formal employment is the only point in issue. However, as the experience of other jurisdictions demonstrates, that need not — and should not — be an insurmountable barrier.

24. In England, vicarious liability extends to relationships 'akin to employment', such as those in respect of the clergy of a Catholic diocese;[34] prisoners working in a prison;[35] foster carers engaged by a local authority;[36] and lay elders of a church.[37] In each case, structural features (such as a lack of corporate legal personality) prevented the existence of a formal employment relationship between the defendant and the wrongdoer, notwithstanding that the wrongdoer was otherwise subject to the defendant's right of control, and was engaged about the defendant's (rather than the wrongdoer's own) enterprise or undertaking.

25. English law rightly still insists on the separateness of the category of independent contractor (or, more generally, relationships *not* akin to employment), in which vicarious liability will not arise.[38] For that reason, AS[32] raises a false issue: the distinction between relationships akin to employment and independent contractors is

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33 Cf *Schokman* (2023) 97 ALJR 551 at 556 [16] (Kiefel CJ, Gageler, Gordon and Jagot JJ).

34 *E v English Province of Our Lady of Charity* [2013] QB 722; cf *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441 at 1453 [36] (Lord Neuberger), where the point was conceded.

35 *Cox v Ministry of Justice* [2016] AC 660 at 673 [32] (Lord Reed; Lord Neuberger, Baroness Hale, Lords Dyson and Toulson agreeing).

36 *Armes v Nottinghamshire County Council* [2018] AC 355 at 378–80 [59]–[64] (Lord Reed; Baroness Hale and Lords Kerr, Clarke and Hughes agreeing).

37 *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] 2 WLR 953 at 975 [68]–[69] (Lord Burrows; Lords Reed, Hodge, Briggs and Stephens agreeing).

38 *Various Claimants v Barclays Bank plc* [2020] AC 973 at 986 [24] (Baroness Hale; Lords Reed, Hodge, Kerr and Lloyd-Jones agreeing).

not 'fraught'. Even in England, the question 'is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant.'[39] Equally, even in cases of employment or quasi-employment, English law properly insists on the need for the wrongdoing to be sufficiently connected to the worker's role (and not, for example, on a 'frolic of his own').[40] The mere existence of a relationship akin to employment is not, without more, enough to generate vicarious liability.

26. The leading case on non-employment relationships is *Various Claimants v Catholic Child Welfare Society*, which concerned the lay brothers of a religious institute. The Supreme Court determined that '[w]here the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is "akin to that between an employer and an employee".'[41] The relevant factors pointing to a relationship sufficiently akin to employment included (i) the hierarchical structure of the institute, which conducted its activities as if it were a corporate body; (ii) the power of the superior to direct the activities of the brothers; (iii) the brothers' work being undertaken in furtherance of the objective or mission of the institute; and (iv) the obligation on the brothers to conduct themselves in accordance with the institute's rules.[42]

27. As restated in *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses*, the factors for discerning 'whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment' include: (1) whether the work is being paid for in money or in kind; (2) how integral to the organisation is the work carried out by the tortfeasor; (3) the extent of the defendant's control over the tortfeasor in carrying out the work; (4) whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation; (5) what the situation is with regard to

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39 *Barclays Bank plc* [2020] AC 973 at 987 [27] (Baroness Hale; Lords Reed, Hodge, Kerr and Lloyd-Jones agreeing).

40 *Various Claimants v Wm Morrison Supermarkets plc* [2020] AC 989 at 1022 [47] (Lord Reed; Lords Hodge, Kerr and Lloyd-Jones and Baroness Hale agreeing); *BXB* [2023] 2 WLR 953 at 976–8 [73]–[82] (Lord Burrows; Lords Reed, Hodge, Briggs and Stephens agreeing).

41 *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at 18 [47] (Lord Phillips; Baroness Hale and Lords Kerr, Wilson and Carnwath agreeing), referring to *E v English Province of Our Lady of Charity* [2013] QB 722.

42 *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at 20 [56]–[60] (Lord Phillips; Baroness Hale and Lords Kerr, Wilson and Carnwath agreeing).

appointment and termination; and (6) whether there is a hierarchy of seniority into which the relevant role fits.[43] Far from leading to 'doubtful results' (cf AS[32]), that stable list of factors is strikingly similar to the list already identified by this Court in *Hollis v Vabu Pty Ltd*.[44] Each of those factors apply, mutatis mutandis, to the relationship between the Diocese and Coffey: it was a relationship akin to employment.

28. Similar principles to those in England are applied in Singapore[45] and New Zealand,[46] where the existence of vicarious liability does not presuppose the existence of an employment relationship, but the separate role of independent contractor is respected.

29. In Canada, vicarious liability depends on 'whether the employee's wrongful act was so closely connected to the employment relationship that the imposition of vicarious liability is justified in policy and principle'.[47] It can equally arise in the context of a relationship akin to employment. In particular, the relationship between the bishop and a priest in a diocese 'is not only spiritual, but temporal'. The bishop 'exercises extensive control over the priest including the power of assignment, the power to remove the priest from his post and the power to discipline him', which 'is akin to an employment relationship' and therefore 'sufficiently close' as to give rise to vicarious liability.[48]

30. In Ireland, it is recognised that — despite a lack of formal employment — the relationship between a religious order and its members is 'much more intense, constant and all pervasive than the relationship between an employer and an employee', and that, notwithstanding the absence of formal employment, 'a religious order (or its members) may be vicariously liable for acts of abuse which are sufficiently closely connected to the object and mission of the order.'[49]

31. Equally, in the civilian tradition, a defendant can be vicariously liable for the wrongs

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43 *BXB* [2023] 2 WLR 953 at 971 [58] (Lord Burrows; Lords Reed, Hodge, Briggs and Stephens agreeing).

44 *Hollis* (2001) 207 CLR 21 at 42–5 [48]–[57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

45 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [63]–[66] (Menon CJ; Chao, Phang, Prakash and Tay JJA agreeing).

46 *S v Attorney-General* [2003] 3 NZLR 450; *Nathan v Dollars & Sense Ltd* [2008] 2 NZLR 557; *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions* [2023] NZHC 3031 at [137]–[155] (Ellis J).

47 *Bazley v Curry* [1999] 2 SCR 534 at 567 [57] (McLachlin J; L'Heureux-Dubé, Cory, Iacobucci, Major, Bastarache and Binnie JJ agreeing).

48 *Doe v Bennett* [2004] 1 SCR 436 at 447 [27] (McLachlin CJ; Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ agreeing).

49 *Hickey v McGowan* [2017] 2 IR 196 223–4 [38]–[39] (O'Donnell J; Denham CJ, MacMenamin and Dunne JJ agreeing), 257–8 [100]–[102] (Charleton J).

committed by a person whom they entrust with a task on their behalf. There is no requirement, for example, that the relationship between a principal (in French law, a *commettant*) and the worker undertaking the task (the *préposé*) be one of employment or true agency.[50]

32. This case does not require the Court to undertake any elaborate re-examination of the policy rationales for vicarious liability.[51] In the case of a worker engaged by an unincorporated organisation in a role akin to employment, it suffices to say that vicarious liability can be justified on bases including that (i) the worker's role in the organisation clothed them with authority, power, trust, control and the ability to achieve intimacy with the victim;[52] (ii) the tort has been committed as a result of activity being undertaken by the worker on behalf of the organisation; (iii) the worker's activity is part of the activity of the organisation; or (iv) the organisation, by engaging the worker to carry on the activity has created the risk of the tort thereby committed.[53]

33. The Diocese's professed concern about 'enterprise risk' and 'altruistic institutions' (AS[41]) betrays exactly the 'narrow focus on semantics' that Lord Reed warned against in *Cox v Ministry of Justice*.[54] It is a melancholy reality that the sexual abuse of children has frequently occurred in religious institutions that, ostensibly, are not motivated by profit.[55] Nonetheless, a presupposition of the Legal Identity Act is that the relevant unincorporated institution — like the Diocese here — has the requisite sophistication and wherewithal to control substantial trust funds for its own benefit. The surprising assertion in AS[41] that the work of a diocesan priest does not 'involve actions for the Diocese's convenience in any true sense' must be rejected. In a hierarchical church

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50 *Code civil* (France) art 1242 (cf former art 1384(5)); *Bürgeliches Gesetzbuch* (Germany) §831–2; *Codice civile* (Italy) art 2049; *Obligationenrecht* (Switzerland) art 55; *Allgemeines Bürgerliches Gesetzbuch* (Austria) §1313a–1315.

51 Cf *Schokman* (2023) 97 ALJR 551 at 55 [13] (Kiefel CJ, Gageler, Gordon and Jagot JJ).

52 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 160 [81] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

53 *BXB* [2023] 2 WLR 953 at 976–8 [73]–[82] (Lord Burrows; Lords Reed, Hodge Briggs and Stephens agreeing); *Cox* [2016] AC 660 at 669 [20]; *Bazley* [1999] 2 SCR 534 at 548 [22], 567 [57] (McLachlin J; L'Heureux-Dubé, Cory, Iacobucci, Major, Bastarache and Binnie JJ agreeing).

54 *Cox* [2016] AC 660 at 672 [30] (Lord Reed; Lord Neuberger, Baroness Hale, Lords Dyson and Toulson agreeing). See also *John Doe v Bennett* [2004] 1 SCR 436 at 447–8 [24] (McLachlin CJ; Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ agreeing); *Blackwater v Plint* [2005] 3 SCR 3 at 20–2 [39]–[44] (McLachlin CJ; Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ agreeing).

55 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Nature and Cause* (2017), 10, 65–71, 98–101, 109–11 157–79; *Final Report: Religious Institutions* (2017).

organised on a worldwide basis, it is no abuse of language to say that the work of a priest is done for the benefit of the mission, or enterprise, of the wider church. Since that work is done in a role akin to employment, the uncontroversial experience of many jurisdictions around the world demonstrates that vicarious liability on the part of the Diocese ought to follow accordingly.

Ground 2

34. In the appellant's own submission, ground 2 concerns only the 'level of abstraction' or 'generality' at which a settled test was applied to particular facts (AS[55]). The respondent has never denied that the role occupied by the wrongdoer must be the 10 'occasion' and not merely the 'opportunity' for the abuse. The 'relevant approach' in *Prince Alfred College* is not in issue in this case. However, far from there being any 'failure to analyse the actual responsibilities with which the Diocese had charged Coffey' (AS[43]), or any lack of 'close examination' (AS[55]), the lower courts made a detailed examination of the role in which the Diocese placed Coffey as assistant priest (CAB 59–70; SC[225]–[282]; CAB 189–93; CA[148]–[164]),[56] including by reference to:

(a) uncontradicted evidence from Father Kevin Dillon about the actual role and duties of an assistant priest in a parish of the Catholic Church at the relevant time: CAB 59–67; SC[226]–[261];[57]

20 (b) uncontradicted evidence about canon law: CAB 59–63; SC[226], [230]–[240];[58]

(c) uncontradicted evidence from four witnesses, all of whom were also assaulted by Coffey at their homes during pastoral visits: CAB 23–7; 65–7; SC[92], [246]–[261];[59]

(d) uncontradicted evidence from a fellow school student: CAB 64; SC[243]–[244];[60]

(e) the respondent's own testimony: CAB 22–3, 63–5; SC[83]–[90], [242], [247];[61]

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56 Father Coffey record of appointments (RBFM 46).

57 Testimony of Fr Kevin Dillon: T591–629 (RBFM 171–209).

58 1917 or Pio-Benedictine Code of Canon Law (RBFM 47–55).

59 Statement of TFT (RBFM 87–9); statement of Michael Glennen (RBFM 90–3); statement of GMP (RBFM 94–105); statement of MJG (RBFM 112–15). Cf statement of DJ (RBFM 106–11).

60 Testimony of Margaret Jago: T891–902 (RBFM 213–24).

61 Testimony of DP: T311–30, T800–818 (RBFM 121–59).

and

(f) the Diocese's admissions on the pleadings: CAB 6, 30–1, 59; SC[2] fn 2, [117], [225].[62]

35. That occurred in circumstances where the Diocese elected to put forward no evidence of its own to contradict any of those matters. The trial judge rightly noted that '[i]f ever there was an occasion for the *Blatch v Archer* principle to be applied, it was here with the Diocese's failure to call contradictory evidence': CAB 60; SC[227]; cf CAB 183; CA[123].[63] It is inapt in such circumstances to criticise the 'level of generality' of the lower courts' findings (AS[58]), or to characterise them as concerning 'nothing more than general pastoral duties towards parishioners as a whole' (AS[59]).

36. The artificiality of the Diocese's position is further emphasised by its disregard of the uncontradicted finding at trial about the specific relationship of intimacy that existed between Coffey and families such as the respondent's: CAB 68–70; SC[268], [278]–[280]; CAB 191–3; CA[157], [163]. It also ignores the uncontradicted findings about the position of intimacy, trust and authority held by Coffey in his role as an assistant priest vis-à-vis the respondent personally: CAB 68–70; SC[268], [278]–[280]; CAB 192–3; CA[163]. The respondent was himself a Catholic parishioner attending Mass every Sunday, who received religious instruction from Coffey, and who was subject to Coffey's pastoral ministry: CAB 67; SC[263]; CAB 159–60, 191–3; CA[23]–[25], [157], [163].

37. The Diocese wrongly implies (AS[51], [54]) that the relevant 'special role' must be one that is in addition to, or more particular than, the role of assistant priest having pastoral responsibility in a given parish. But that is not what *Prince Alfred College* requires; and it is not what the lower courts found. The 'particular features' emphasised by this Court — including 'authority, power, trust, control and the ability to achieve intimacy with the victim'[64] — were the very things analysed by the lower courts, in detailed particularity, and in respect of the distinctive role held by Coffey as an assistant priest in the parish of Port Fairy within the Diocese: CAB 58–70; SC[222]–[282]; CAB 189–93; CA[148]–[164].

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62 Defence dated 9 June 2020, [3]–[7] (RBFM 16–17).

63 *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970 (Lord Mansfield).

64 *Prince Alfred College* (2016) 258 CLR 134 at 160 [81] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

38. It is inapt for the Diocese now to suggest that there was something distinctive about the arrangements in Port Fairy, or that the lower courts somehow considered only 'the practices of priests and dioceses generally' (AS[55]). The findings at trial expressly concerned Port Fairy (CAB 63–4; 69-70; SC[240]–[244], [278]), but in every case evidence 'is to be weighed according to the proof which it is in the power of one side to have produced and the power of the other to have contradicted'.[65] The evidence of Father Dillon went uncontradicted: CAB 60; SC[227]; CAB 183; CA[123]. The Diocese now makes no challenge to the lower courts' concurrent findings of fact.[66] It cannot now criticise the 'level' or 'generality' (AS[58], [60]) at which those findings were made.

10 39. The lower courts expressly addressed themselves to the 'relevant approach' in *Prince Alfred College*, and correctly applied it: CAB 58, 70; SC[221], [280]–[281]; CAB 190–1; CA[153]. They had a sufficient factual basis to do so. The Diocese's complaint about a lack of 'specific factual finding' (AS[44]) or a gap in the evidence must be weighed in light of its ability — and failure — to have filled any such gap (if it existed) at trial. Critically, the test in *Prince Alfred College* does not demand the standard of evidentiary and analytical perfection seemingly asserted by the Diocese. Rather, its purpose is to distinguish those situations in which a role involves pastoral intimacy with young people, from situations where that is outside the worker's role. One does not need to 'dissect' the servant's task.[67] As Gageler and Gordon JJ observed, the test 'is necessarily
20 general', and 'does not and cannot prescribe an absolute rule'; it 'will develop case by case'.[68]

40. The test was rightly satisfied here. The Diocese's assertion (AS[58]) that 'liability is likely to flow in respect of almost all offending' in religious institutions 'where a position of power can be harnessed to develop relationships which in turn facilitate offending' is inapt. It fails to acknowledge the specific circumstances that arose on the evidence in this case, and that — as the lower courts found — the role of a Catholic

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65 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [36] (Gleeson CJ, Gummow and Callinan JJ), referring to *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970 (Lord Mansfield).

66 Cf *Baffsky v Brewis* (1976) 51 ALJR 170 at 172 (Barwick CJ; Stephen, Mason, Jacobs and Aickin JJ agreeing); *South Australia v Johnson* (1982) 42 ALR 161 at 167 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ); *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 434–5 (Deane J); *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 618 [39] (McHugh J); *Bridgewater v Leahy* (1998) 194 CLR 457 at 471 [43]–[45] (Gleeson CJ and Callinan J); *Collins v Tabart* (2008) 82 ALJR 1521 at 1522 [9] (Kirby J; Gleeson CJ, Hayne, Crennan and Kiefel JJ agreeing).

67 Cf *Ilkiw v Samuels* [1963] 1 WLR 991 at 1004 (Diplock LJ).

68 *Prince Alfred College* (2016) 258 CLR 134 at 172 [131] (Gageler and Gordon JJ).

priest is distinctive, indeed, '*sui generis*': CAB 182; CA[120]. For the respondent and his family, Coffey occupied a position of implicit trust as 'a priest of the Church whose teachings and ministry they devotedly adhered to': CAB 69; SC[276]. The respondent was brought up to trust the 'man of God': CAB 159, 192; CA[24], [162]. As one of his schoolfriends put it, priests 'couldn't do anything wrong': 'you'd always trust a priest' and 'your parents would never believe that they would do anything wrong': CAB 64; SC [244]. In turn, the training of priests like Coffey emphasised 'the role of the confessional and the intimacy of priests with the members of their parish for pastoral care and guidance': CAB 64; SC[245].

41. Coffey's role was the quintessence of one having 'authority, power, trust, control and the ability to achieve intimacy with the victim.'[69] When Coffey abused the trust inherent in that role by assaulting the respondent, the Diocese justly became vicariously liable.

PART VI – NOTICE OF CONTENTION

42. The notice of contention engages the same emphatic factual findings of the lower courts about Coffey's particular role and the Diocese's power of control, in view of the respondent's vulnerability to Coffey's abuse in the course of his pastoral role as an assistant priest of the Diocese. Vicarious and direct — non-delegable — liability may arise from the same set of facts.[70] Of critical importance is the assumption of responsibility by the Diocese towards its flock of tender years; and its unique ability to clothe its servant, Coffey, with an aura of trustworthiness and authority, such that he was empowered in the course of his pastoral role on behalf of the Diocese to have physical contact — alone and unsupervised — with child parishioners in the most intimate places (most obviously, alone with the respondent in his own bedroom): CAB 22; SC[83]–[87]. For that reason, the Diocese is liable for breach of a non-delegable duty owed to the respondent to protect him from the risk of sexual abuse by its priests, including Coffey, in the course of their functions and duties as a priest, and as a representative, servant or agent of the Diocese.

43. The Diocese's reference (AS[63]) to *Suttor v Gundowda Pty Ltd* is inapt.[71] The notice

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69 *Prince Alfred College* (2016) 258 CLR 134 at 160 [81] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

70 See, e.g. the situations in *Commonwealth v Introvigne* (1982) 150 CLR 258; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471.

71 (1950) 81 CLR 418. See also *Hollis* (2001) 207 CLR 21 at 36 [31] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

of contention does not rely on any new factual claim, nor any new factual point capable of being met by further evidence. Every aspect of Coffey's role and the factual relationship between the Diocese and its clergy was in issue at trial; yet the Diocese barely challenged the evidence, and chose not to put on any responsive evidence. It cannot now prevent the respondent from raising a straightforward argument about the legal consequences of facts already found. Contrary to AS[64], none of the factors for restraint commonly associated with *John v Federal Commissioner of Taxation* have any genuine application.[72] If leave be needed, the respondent seeks leave to reconsider *Lepore*.

10 44. *Lepore* was notoriously a case in which a diversity of views was expressed. *Prince Alfred College* was a case in which it was held to be inappropriate to make any findings at all about the substance of the liability alleged by the plaintiff, on any of the bases on which it was put: the substance of the claimed non-delegable duty was therefore never addressed.[73] Any supposition that breach of a non-delegable duty could *only* arise from negligence (and not from intentional wrongdoing) has — since *Lepore* — been undone in Victoria by s 61 of the *Wrongs Act 1958* (Vic). Nor is there any evidence that the result in *Lepore* has been relied upon to achieve settlements favourable to the Church: to the contrary, any such settlements would be at risk of being set aside.[74] In such circumstances, the result in *Lepore* can hardly be said to be 'convenient'.

20 45. As Edelman and Steward JJ observed in *Schokman*, '[t]here is an obvious identity between the relevant factors to consider in this area of "vicarious liability" and the common factors relied on in establishing a non-delegable duty such as care, supervision, and control'.[75] Given the intimacy and control inherent in the pastoral relationship between a priest of a Catholic diocese and a vulnerable juvenile parishioner entrusted to his care, it is by no means an abuse of language or legal concepts to describe the situation as one involving the Diocese undertaking the 'care, supervision or control of the person or property of another'.[76] To adapt the words of the Supreme Court of Canada in *Doe v Bennett* — a vicarious liability case — it was the Diocese that provided Coffey

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72 (1989) 166 CLR 417 at 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

73 *Prince Alfred College* (2016) 258 CLR 134 at 169 [114] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

74 *Civil Liability Act 2002* (NSW) s 7D; *Civil Liability Act 1936* (SA) s 50W; *Limitation Act 1974* (Tas) s 5C; *Limitation of Actions Act 1958* (Vic) ss 27QD, 27QE; *Limitation Act 2005* (WA) s 92.

75 *Schokman* (2023) 97 ALJR 551 at 569 [81] (Edelman and Steward JJ).

76 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687 (Mason J).

with 'the opportunity to abuse his power'; that directed him to 'have a special care for the catholic education of children and young people'; that made 'involvement with children … clearly an expected role for a parish priest'; in which the situations for abuse 'came via his appointment and placement as parish priest' by the Diocese.[77]

46. Three analogies from the existing categories of non-delegable duties point towards the appropriateness of recognising such a duty on the facts of this case. First, there is a parallel with the hospital cases, in which a patient is vulnerable to, but has no say over, the terms on which a hospital engages its medical personnel.[78] As in the hospital cases, 'the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case.'[79] Here, the similar tripartite pastoral relationship between the (unincorporated) Diocese, its (non-employee) cleric, and the (vulnerable, child) parishioner, reveals a systemic problem caused by the structure of non-employment by the Diocese of its clerics — not capable of being chosen or avoided by the plaintiff — that ought not defeat legitimate claims.

47. Second, there is a parallel with the school cases.[80] One must frankly 'acknowledge that the law has, for various reasons, imposed a special duty on persons in certain situations to take particular precautions for the safety of others', particularly in relation to the 'immaturity and inexperience' of young people entrusted to the care of an institution.[81] As in the school cases, the Diocese ought be seen to owe a 'duty to ensure that reasonable care was taken for the safety' of the vulnerable young people, including the respondent, entrusted to its pastoral care.[82]

48. Third, there is a parallel with the cases about the non-delegable obligation to provide a safe system of work, which can indeed be breached by intentional wrongdoing committed against the plaintiff to whom the duty is owed.[83] That the wrongdoing is antithetical to the defendant-employer's interests is not to the point: what is relevant is

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77 *Doe v Bennett* [2004] 1 SCR 436 at 4479–50 [28] (McLachlin CJ; Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ agreeing).

78 See, e.g. *Gold v Essex County Council* [1942] 2 KB 293; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

79 *Gold v Essex County Council* [1942] 2 KB 293 at 301 (Lord Greene MR).

80 See, e.g. *Commonwealth v Introvigne* (1982) 150 CLR 258.

81 *Commonwealth v Introvigne* (1982) 150 CLR 258 at 271 (Mason J).

82 *Commonwealth v Introvigne* (1982) 150 CLR 258 at 269 (Mason J).

83 See, e.g. *Chomentowski v Red Garter Restaurant Pty Ltd* (1970) 92 WN (NSW) 1070; *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; *Karatjas v Deakin University* (2012) 35 VR 355.

the defendant's power to control the risk, and the plaintiff's vulnerability to the defendant's failure to control it. This, too, is the principled basis for distinguishing a criminal act of a stranger from the criminal act of an employee or delegate. The Diocese did not delegate its functions to strangers or passers-by: it delegated them to its servant, Coffey, whom it empowered, and over whom it exercised authority and control.[84]

49. As Mason J put it in *Kondis v State Transport Authority*, in all cases of non-delegable duty, 'the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised'.[85] That was an apt description of the relationship between the Diocese and the respondent as a vulnerable child of tender years, who as a parishioner was subject to the church's pastoral care.

50. Adapting the words of Lord Sumption in *Woodland v Swimming Teachers Association*: (1) the respondent was a child, and especially vulnerable or dependent on the protection of the Diocese against the risk of injury; (2) there was an antecedent relationship between him and the Diocese, independent of Coffey's wrong, (i) which placed him, as a parishioner, in the pastoral charge of the Diocese, and (ii) from which it was possible to impute to the Diocese the assumption of a positive duty to protect him from harm, and not just a duty to refrain from conduct which would damage him. Characteristically, the relationship involved an element of control, of an intense and substantial kind, given the moral authority with which the Diocese clothed Coffey; (3) the respondent had no control over how the Diocese chose to perform its pastoral obligations to him, whether through servants, employees or otherwise; (4) the Diocese delegated to Coffey as its servant the pastoral function that was the integral part of the positive duty which it had assumed towards the respondent; and Coffey exercised, for the purpose of the function thus delegated to him, the Diocese's custody or care of the respondent and the element of moral authority and control that went with it; and (5) Coffey was at fault not in some

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84 Cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 262 [14] (Gleeson CJ): 'where there is a problem as to the existence and measure of legal responsibility, it is useful to begin by identifying the nature of the harm suffered by a plaintiff, for which a defendant is said to be liable.' Here, the harm was assault by the Diocese's own delegate in the course of his delegated authority; not assault by a stranger.

85 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687 (Mason J).

collateral respect but in the performance of the very function assumed by the Diocese, and delegated by the Diocese to him: namely, the pastoral care of a young parishioner.[86]

PART VII – ORAL ARGUMENT

51. It is estimated that up to 2.5 hours will be required for the respondent's oral argument (including on the notice of contention).

Dated 9 February 2024

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[86] [2014] AC 537 at 583 [23] (Lord Sumption).

ANNEXURE

Pursuant to para 3 of *Practice Direction No 1 of 2019*, the particular constitutional provisions and statutes referred to in the appellant's submissions are as follows.

	Title	**Version**	**Provisions**
1.	*Allgemeines Bürgerliches Gesetzbuch* (Austria)	Current, 17 February 2024	§1313a–1315
2.	*Bürgeliches Gesetzbuch* (Germany)	Current, at 25 October 2023	§831–2
3.	*Civil Law (Wrongs) Act 2002* (ACT)	Current, at 10 December 2022	Ch 8A, Part 8A.2
4.	*Civil Liability Act 2002* (NSW)	Current, at 16 June 2022	Part 1B Div 4; s 7D
5.	*Civil Liability Act 2003* (Qld)	Current, at 2 March 2020	Ch 1 Part 2A Div 3
6.	*Civil Liability Act 1936* (SA)	Current, at 22 June 2023	Part 7A, Div 4; s 50W
7.	*Civil Liability Act 2002* (Tas)	Current, at 1 May 2020	Part 10C, Div 4
8.	*Civil Liability Act 2002* (WA)	Current, at 24 October 2023	Part 2A, Div 2
9.	*Code civil* (France)	Current, at 21 May 2023	art 1242
10.	*Codice civile* (Italy)	Current, at 6 December 2023	art 2049
11.	*Corporations Act 2001* (Cth)	Current, at 28 November 2023	s 917C
12.	*Law Reform (Husband and Wife) Act 1962*, 10 & 11 Eliz 2 c 48	As enacted, 1962	s 1
13.	*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic)	Current, at 1 May 2020	ss 1, 3, 4, 5, 7
14.	*Legal Profession Uniform Law* (NSW)	Current, at 1 July 2022	s 111
15.	*Limitation Act 1974* (Tas)	Current, at 1 May 2020	s 5C
16.	*Limitation Act 2005* (WA)	Current, at 24 October 2023	s 92

17.	*Limitation of Actions Act 1958* (Vic)	Current, at 11 October 2023	ss 27QD, 27QE
18.	*Married Women's Property Act 1882*, 45 & 46 Vict c 75	As enacted, 1882	s 12
19.	*Obligationenrecht* (Switzerland)	Current, at 1 January 2024	art 55
20.	*Partnership Act 1958* (Vic)	Current, at 1 March 2020	s 14
21.	*Partnership Act 1890*, 53 & 54 Vict c 39	As enacted, 1890	s 10
22.	*Personal Injuries (Liabilities and Damages) Act 2003* (NT)	Current, at 2 January 2024	Part 3A Div 6
23.	*Roman Catholic Trusts Act 1907* (Vic)	Current, at 24 October 2001	s 6
24.	*Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)	Current, at 1 September 2023	s 3
25.	*Wrongs Act 1958* (Vic)	Current, at 11 October 2023	s 61