Managing the litigation and/or resolution of claims of sexual abuse made against an Anglican Diocese – the Brisbane experience.

Introduction

1. The purpose of this paper is to provide, in propositional form, an insight into the recent experience in the Anglican Diocese of Brisbane ("Brisbane") of the conduct of litigation and the resolution by way of mediation of disputes in relation to claims of sexual abuse against institutions in Brisbane. Throughout this paper the expression "the Church" is used to compendiously describe the Anglican Church in its several dioceses in Australia, including institutions under its control.

2. The form that the paper takes is to describe, approximately in chronological order, how claims were managed over the last year in respect of three institutions in Brisbane. All of these claims had a history dating further back, but the purpose of the paper is to examine what was instructive about how they have been managed in the last 12 months.

3. The claims[1] being considered are as follows:-

REDACTED

(b) claims by some 26 former students of an Anglican School in an outer Brisbane suburb by one Lynch;

REDACTED

[1] How Brisbane handled complaints in relation to the perpetrators who gave rise to these claims is the subject of an independent inquiry currently being conducted by Mr Peter O'Callaghan QC and Professor Freda Briggs. It has been necessary to recount very briefly some essential facts in relation to the claims for the purpose of this paper. It is expected they are uncontroversial matters, however the ultimate statement of the facts will be as found by Mr O'Callaghan and Professor Briggs. Nothing in this paper should be seen as pre-empting or contradicting any findings they ultimately make.

4. Before turning to deal with each of these claims it is appropriate to give particular attention to two matters at the outset. The first is the terms of the policies of insurance relevant to each of these claims. The second is the creation in Brisbane of a Litigation Committee in the aftermath of the award by the jury in the REDACTED case and the attendant adverse publicity experienced by the Church.

The policies of insurance

5. The insurance in each of the cases that are the subject of this paper was under a policy that had been written some years prior to the time of the claim. While policies will undoubtedly vary from time to time it is instructive to look at the terms of the policies in place the subject of current claims. In my opinion, there are aspects of the policies that warrant serious consideration as to how well suited they are to providing cover to the Church for such risk.

6. A typical example is the policy that was in place in Brisbane for schools in the Diocese in the 1989/1990 year. Relevantly, it contained the following policy wording:-

"SECTIION 1 – PUBLIC LIABILITY
The Company will pay to or on behalf of The Insured all sums which The Insured shall become legally liable to pay for compensation (which expression in this Policy does not include punitive or exemplary damages) in respect of

> *(a) bodily injury (which expression in this Policy includes death and illness)*

...

occurring during The Period of insurance as a result of an accident and happening in connection with the The Business and no other for the purposes of this insurance carried on at and from the situation shown in The Policy Schedule, Insurance Certificate, Renewal Invitation or Revised Policy Schedule as the case may be.

...

CLAIMS

3. (a) The Insured shall not without the consent in writing of the Company make any admission offer promise or payment in connection with any occurrence or claim and the Company if it so desires shall be entitled to take over and conduct in the name of The Insured the defence or settlement of any claim.

...

(d) The Company shall have full discretion in the conduct of any proceedings in connection with any claim and The Insured shall give all information and assistance as the Company may require in the prosecution defence or settlement of any claim

...

REASONABLE CARE
6. The insured shall
(a) exercise reasonable care that only competent employees are employed...
(b) take all reasonable precautions to
(i) prevent bodily injury
...
(iii) comply and ensure that his employees servants and agents comply with all statutory obligations by-laws or regulations imposed by any Public Authority in respect thereof or for the safety of persons or property
...
CANCELLATION
9.The Company may also cancel this Contract by giving The insured written notice to the effect where –
...
(vi) The Insured failed to notify the Company if any specific act or omission where such notification is required under the terms of this Contract; or

(vii) The Insured acted in contravention of or omitted to act in compliance with any condition of this Contract which empowers the Company to refuse to pay, or reduce its liability in respect of a claim, in the event of such contravention or omission.

...
CHILD MOLESTATION EXCLUSION
This policy does not apply to any bodily injury sustained by any person arising out of or as a result of the molesting or interfering with minors by:
1. Any Insured,
2. Any employee of any Insured, or
3. Any person performing any volunteer service for or on behalf of the Insured.
The Company shall not have any duty to defend any action suit or proceeding against the Insured either directly or vicariously seeking damages on account of such bodily injury.

This exclusion will apply to the amount in excess of $5,000,000.
..."

7. A number of issues arise in relation to how best to insure the Church in the future regarding claims of sexual abuse. The issues, as I can see them identified by recent experience, may be summarised as follows.

8. Firstly, the policy wording in relation to dealing with claims of this nature was clumsy. It is expressed as an exclusion, in effect to the general words in relation to bodily injury. However, given it is a policy that is referable to accidents[2] and has conditions in relation to the requirement to employ appropriate staff,[3] in a practical sense it appears be an extension of the policy rather than an exclusion. Whatever might be the case, there is undoubtedly an argument in favour of precisely identifying the nature of the cover being provided.

9. Secondly, the policy indemnified Brisbane for "...all sums which The Insured shall become *legally liable* to pay for compensation..."[4] (emphasis added). Obviously, a policy cast in these terms leaves the Church exposed to the situation where the insurer declines to be involved in the defence of the claim and says it will review the position once there is a legal liability of the Church.

10. Whilst the *Insurance Contracts Act*[5] offers some protection this is limited to allowing the insured to compromise the action in the face of a 'no admission' clause where the insurer is not indicating its attitude to indemnification. This is perhaps less an issue for the Church as on the whole the experience is that it wants to have more control over the proceedings rather than less.

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[2] See Section 1
[3] See Condition 6
[4] See Section 1
[5] s 41

11. It nonetheless remains a serious issue in the event that the extent of the claims were very substantial. The Church might find itself in a position where it was forced to have its legal liability determined, whether by curial proceedings or binding settlement, and then be left to turn and endeavour to enforce its rights against an insurer. In such a case there would undoubtedly be public pressure on the Church to pay the legal liability in the meantime.

12. The potential for the making of a very substantial pay out before the monies were recouped might have a significant effect in an individual Diocese. A ruthless insurer might also see it as a strategy for minimising exposure in the face of massive claims.

13. Thirdly, the policy only responds to "the molestation or interfering with minors".[6] Consequently no cover was provided in relation to the sexual abuse of persons 18 years or older.[7] Given it was policy for schools this is perhaps understandable, however it would not therefore respond to, say, the molestation of an 18 year old senior student.

14. However, more significantly in parishes and other Church institutions it is important to ensure the cover is not limited only to the molestation of minors.

15. Fourthly, the policy is an 'events based' policy rather than a 'claims made' policy. Prima facie, the ordinarily shortened period for claims in relation to personal injuries should prevent the situation where a claim is made on the policy many years after the policy was taken out. However, there are circumstances particularly in relation to schools, where time actually may not start to run for a considerable number of years after the event. There also remains the issue of an extension of time granted by a court.

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[6] See Child Molestation Exclusion clause

[7] a minor in English Law being a person under the age of 18; see generally Clark, *Dictionary of Insurance & Finance Terms*, Prospect Media, 1999; Nygh and Butt, *Butterworths Australian Legal Dictionary*, Butterworths, 1997

16. Given the nature of these claims there is therefore the prospect that claims might be brought many years after the policy was taken out. This actually has been the experience in Brisbane.

17. This raises the issue of whether such claims are best covered by an 'events based' policy or a 'claims made' policy. That said, I have not investigated whether in fact it would be possible to place cover on a 'claims made' basis. The concern is that at the time claims are made they might conceivably be against a policy ten years or more old. In terms of monetary cover that policy might be quite inadequate to deal with what in the contemporary setting would be necessary to resolve a number of cases or be likely to be awarded in the event that they went to judgement.

18. Fifthly, there is the special character of the Church as an insured, given that in resolving claims like these its interests are not consistent with the interests of the insurer in resolving the claim simply for the minimum financial outcome. The Church's approach is plainly a more pastoral and holistic one. Consequently there is an inbuilt tension. The policy wording ideally needs to make allowance for the special nature of the Church as an insured to take into account some of those considerations.

19. One example will suffice. An issue that arose in Brisbane in one case, in stark terms, was a refusal initially by the insurer to allow counselling upon the issue of abuse first being raised. These are the sorts of issues that the policy conditions of adequate insurance cover for the Church needs to address.

20. Finally, there is the issue of whether there should be some form of "QC clause" in the policy such that in the case where an insurer wished to run the litigation but the Church, on reasonable grounds, thought it was a case inappropriate to run, there is a mechanism in the contract of insurance for resolving that issue.[8]

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[8] See generally *West Wake Price & Co v Ching* [1957] 1 WLR 45 per Devlin J, as his lordship then was; *Halsbury's Laws of England*, 4th Ed, Vol 25 para 695; Enright, *Professional Indemnity Insurance Law*, Sweet and Maxwell, 1996 paras 3.111-3.112

21. At present, on a policy such as the one being discussed, the insurer has the right, but not obligation, to take over the claim and, subject to its obligation of good faith to the insured[9], run the litigation as it pleases. Similar considerations to those that cause professionals to require such a clause in professional indemnity policies apply in relation to why such a clause would be beneficial for the Church.

REDACTED

important to be able to give instructions rapidly so the momentum for settlement was not lost.

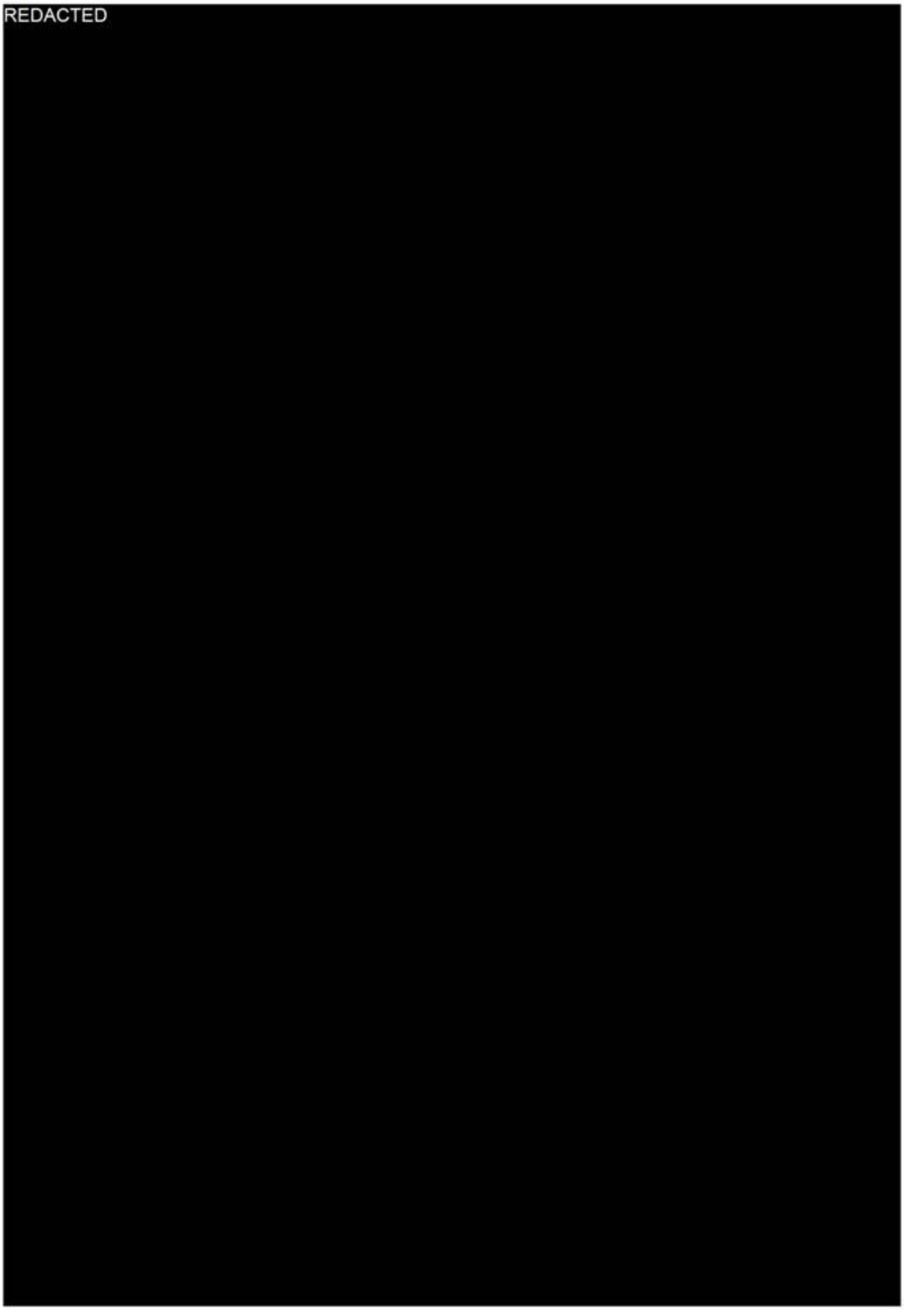
27. Secondly, the existence of the committee, and the fact that Brisbane's solicitors in fact deal regularly with the committee to obtain instructions in relation to these cases, has undoubtedly had a positive effect on the robustness of the decision making. Dealings with the solicitors have at all times been extremely co-operative, so in that sense there is nothing adversarial in the manner adopted. However, it is unmistakable that the fact that Brisbane's solicitors are aware and are part of a process where decision making to arrive at instructions is exposed to constructive discussion has been useful.

28. Thirdly, all of what is said above applies with even greater force to dealings with the insurer. The insurer and its solicitors are well aware of the existence of the committee. Where appropriate, when difficult matters have arisen, a member of the Litigation Committee will be present at meetings between the solicitors for the insurer and the solicitors for Brisbane. There plainly have been, and potentially are, areas where tension may arise in this relationship. Obviously, however, it is important to make it as productive as possible.

29. The existence of the committee again has been useful for focusing the insurer on the resolution of such claims in a manner satisfactory to the Church.

30. Whereas the dealings with Brisbane's own solicitors are obviously always on a very constructive note, as a result of the decision in REDACTED and a view as to how that litigation had been handled by the insurer, some more forthright discussions were necessary between Brisbane and the insurer. The committee has provided a useful vehicle to assist in that regard.

31. When difficult issues have arisen with the insurer it has been useful for a member of the committee to attend and express concern about a potential course by the insurer. This has helped to share the burden of Brisbane's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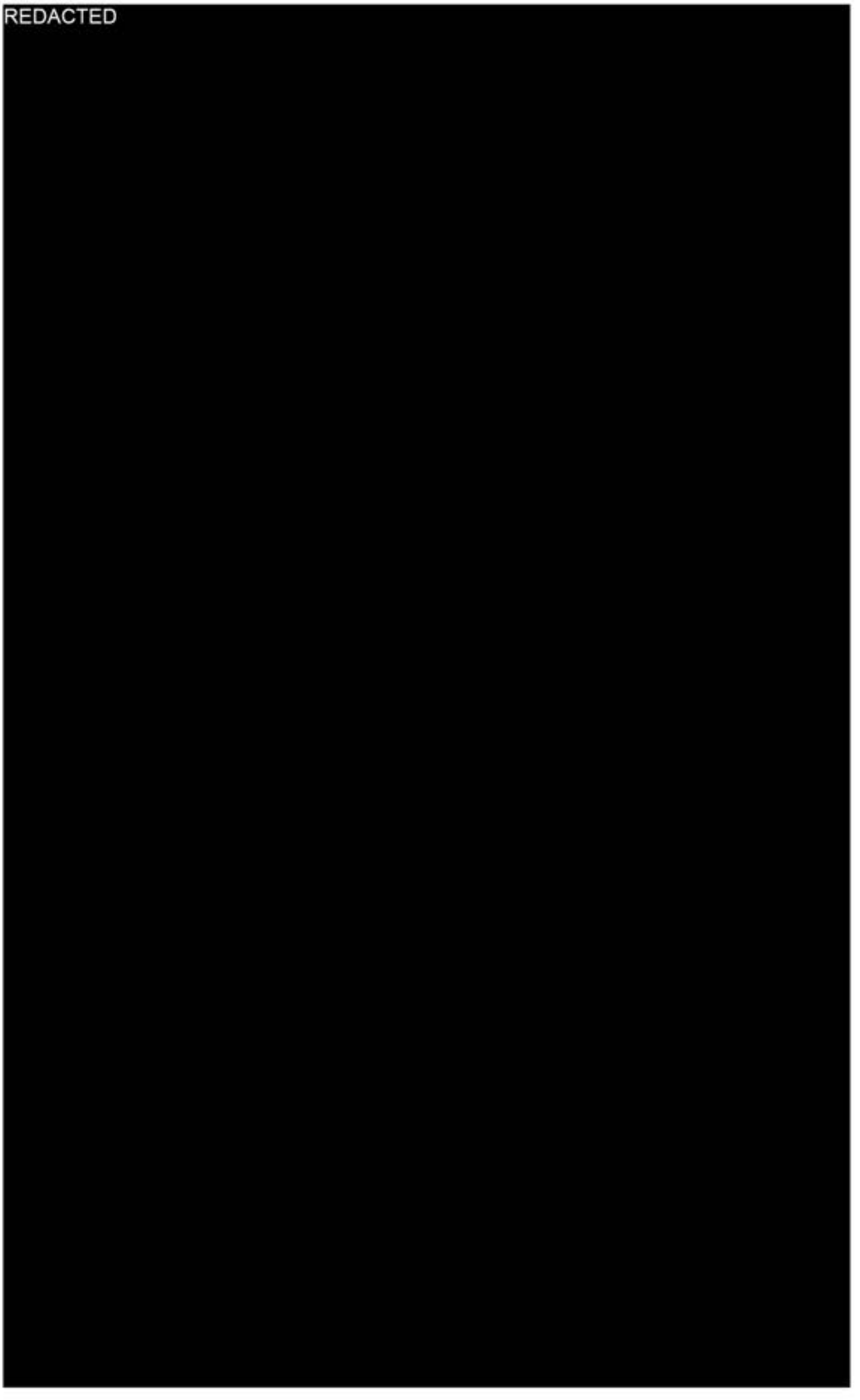
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The claims in relation to Lynch

46. Some 26 claims were commenced against an Anglican school in Brisbane regarding the alleged molestation of these individuals by one Lynch, a counsellor at the school. With striking similarity to the situation in relation to REDACTED once a formal complaint had been made to the police and Lynch was charged he committed suicide shortly afterwards.

47. Civil proceedings were commenced, most by the same solicitors who acted for REDACTED They were aggressively promoted, including in various public fora.

48. There were some added complications in this litigation in as much as apparently good time limitation defences existed in respect of a certain number of the claims.

49. All of these claims were settled at mediation earlier this year. The existence of the settlement is publicly known, but the various amounts of

settlement remained confidential. The settlements were made on terms satisfactory to Brisbane.

50. The essential facts situation underlying these claims were strikingly similar to those in relation to the REDACTED case. Indeed, to the extent there was any real difference factually the instant cases were more problematic cases than REDACTED The matters which were instructive from how these cases were handled may be summarised as follows.

51. Firstly, it was in the face of these cases so shortly after the REDACTED litigation that the Litigation Committee was formed. It was realised that for any attempt at settlement to be successful there had to be a mechanism for providing sufficient latitude and authority to an individual at the mediation to given instructions for the settlement of these proceedings, but with appropriate checks and balances.

52. Secondly, separate representation for the Diocese proved invaluable. The Litigation Committee instructed Brisbane's solicitors to retain the services of a highly regarded personal injuries counsel, who was himself an experienced mediator, Mr Ross Stenson. Whilst there was a significant cost in Mr Stenson's involvement in the preparation and five days of mediation it proved a prudent investment. Mr Stenson's involvement was critical in the final outcome both in terms of his dealings with the representative for the plaintiffs but also, privately, with the insurer when it came to negotiating a contribution on occasions to see a particular case settle. In these mediations there was obviously the spectre of exemplary damages so it was appreciated from the outset some contribution from Brisbane would be required.

53. This separate representation extended to Brisbane having its own independent assessment of what was a reasonable figure for each plaintiff so that it could be satisfied that the insurer was making a reasonable offer to settle.

54. Thirdly, meeting with the insurer well in advance of the mediations to resolve with the insurer any issues between insurer and insured. Again, this was a matter that turned out to be very important in the final outcome. It was during the course of these meetings, some of which involved fairly forthright discussions, that issues that would have been apt to stand in the way of a settlement were resolved.

55. In particular, difficult issues such as what contribution Brisbane would make to represent exemplary damages and how that contribution would be made in a particular case so that its negotiating position was not unduly compromised were discussed. Further, the approach in relation to time limitation was also discussed at this meeting. This was an important issue because it was always appreciated that the plaintiffs would turn to the Church and suggest that it was not a defence that it should in good conscience run. By meeting with the insurer first, it was possible to agree on an approach that avoided or ameliorated these sorts of issues and prevented the insurer using them by surprise for tactical purposes at the mediation to extract a greater monetary contribution from Brisbane.

56. It also left the insurer in no doubt that the manner in which it was conducting the litigation was the subject of careful examination by Brisbane. That said, matters proceeded at all times on very co-operative basis.

57. Fourthly, at the mediations, in addition to the legal representatives for the insurer and Brisbane, there was present the Brisbane Registrar and the current Chairman of School Council and Headmistress of the school. Those persons were there to offer an apology on behalf of Brisbane and the school for what had happened. The importance of this in achieving satisfactory settlements cannot be overstated. The mediator told me privately that he saw the sincere manner in which this was done as central to the success of the mediation process.

58. Again it was a matter where preparation was repaid. In advance of the mediations a meeting was held with those persons who were to be present on

behalf of Brisbane. Matters such as what form of apology would be offered were carefully discussed and canvassed. There is no doubt that the impact of the apology was much greater for it having been carefully thought out and refined in advance of being offered.

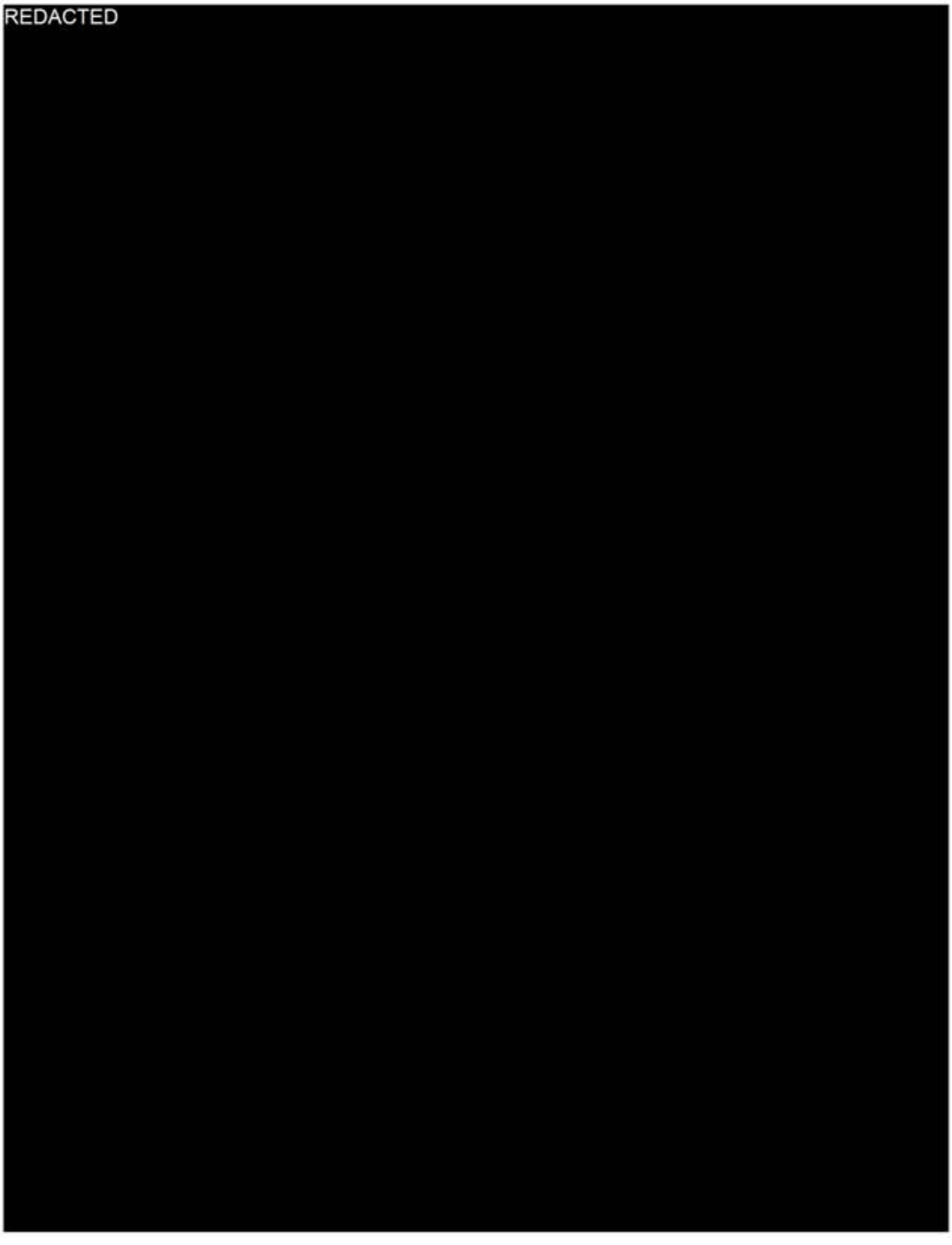
59. Fifthly, the experience was that in the course of a mediation it is important to keep the issue of apology and compensation as separate and discrete topics. The only the case that did not settle during the week long period of mediations was the first one where the apology was offered and then the insurer's solicitors moved directly into explaining why, from a monetary point of view, the plaintiff's case was not a particularly strong one. Fortunately that case ultimately settled within weeks of the mediation.

60. By the end of the week a much more successful pattern had become firmly entrenched. It involved dealing with the issue of the apology up front and in the total absence of any discussion in relation to the value of the claim. Consequently, the representatives of the school and the Registrar would meet with the former student and usually at least one other member of his family, offer the apology and discus generally what was being done for the future. It was only after that process had been fully talked out that there was then a quite separate discussion of what was acceptable monetary compensation.

61. Sixthly, successful resolution of such claims turned out not always to be purely about the dollar sum. The apologies loomed large as a feature in resolving these cases. Also important was the demonstration that the school, and the Church more broadly, was seriously addressing the problem.

62. Finally, significant in the settlements was the provision of counselling. Indeed in a good many cases a component of the monetary compensation was in fact an agreement to pay a certain sum of money over a period of time for the provision of counselling services. On the whole, when the parents of these former students, who were in their twenties, were involved they were highly desirous that any part of the settlement for counselling be by way of the

Church paying the counselling service directly, rather than simply paying over a money sum to the plaintiff to represent it.



PETER DUNNING

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