

HGH:VV

24 November 1993

Br. Julian McDonald cfc  
Provincial  
Christian Bros  
Private Box 144  
HABERFIELD NSW 2045

Dear Brother

**RE: SLATER AND GORDON ("SLATER & GORDON") CLAIMS AGAINST THE  
CHRISTIAN BROTHERS ("THE BROTHERS")**

We refer to recent discussions and to the arrangements made for a meeting of the Provincials and their legal representatives at 9.30 am on 6 December next at Balmain.

We summarise the current position as follows:

1. Slater & Gordon Solicitors purport to act for approximately 250 individuals who allegedly seek compensation in respect of treatment at the four Christian Brother Institutions in Western Australia during the 1940's and the 1950's. This firm of Solicitors operates throughout Australia and has very considerable litigation experience and is likely to be a key player in respect of any litigation against the Brothers, the Catholic Church and other orders.
2. Slater & Gordon have on behalf of these individuals filed in the Common Law Division of the Supreme Court of Sydney Summonses seeking extensions of time pursuant to section 58, section 60G and Clause 4(4) of

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Schedule 5 of the NSW Limitation Act 1969. We have a copy of one of the Summonses but have not as yet been able to obtain from the Court a copy of the Schedules setting out the names of the Defendants nor do we have a list as yet of the full names of the individuals involved. In addition to these Summonses for an extension of time a master Statement of Claim has been filed annexing a schedule of Plaintiffs and Defendants. It appears that the Supreme Court has seen fit to accommodate Slater and Gordon by accepting the filing of initiating process with only one filing fee being paid, on behalf of some 241 individuals.

3. Slater & Gordon have refused various requests for information as regards the identity of the individual claimants, the particular allegations etc.
4. At least one individual for whom process has been filed by Slater & Gordon has been in contact with the Western Australian Order indicating that Slater & Gordon had no authority to so act. The Brothers should keep alert to any old boys who would be prepared to swear an Affidavit confirming that Slater & Gordon did not have instructions from them to file initiating process. We have discussed in conference recently a proposed Application to the Supreme Court in Sydney challenging Slater & Gordon's retainer.
5. Slater & Gordon are not now proceeding with a previously foreshadowed Application to the Supreme Court of Victoria for suppression orders in relation to the  and  matters. However it is anticipated that actions will be pursued in the Supreme Court of Victoria on behalf of these individuals later this year. In these proceedings and the Sydney proceedings the primary Defendant would appear to be the Trustees of the Christian Brothers, the entity created by the NSW Roman Catholic Church Communities Lands Act. Slater & Gordon will argue that the NSW Body was at the relevant time the administrative entity responsible for operations in Western Australia.
6. We understand that Slater & Gordon confront great difficulty in pursuing action in Western Australia because of the limitation provisions in that State. They have a much better prospect of overcoming these time problems if actions can proceed in the east. Having a New South Wales statutory entity as a



defendant is of some convenience to the Plaintiffs from the point of view of jurisdiction.

7. As a result of amendments to the Commonwealth Service and Execution of Process Act and certain decisions of the High Court such as Stevens v Head it is now easier for a Plaintiff to pursue action in one state jurisdiction within Australia in respect of a cause of action which arose in another State. However, we anticipate that the Supreme Court in Sydney and Melbourne will listen very attentively to the arguments that will be available to the effect that Slater & Gordon should not be allowed to pursue in these States actions which arose in Western Australia unless the cases involve individuals currently resident in these states.
8. At our recent conference Mr Rippon indicated that whilst no formal decision has been taken Catholic Church Insurances Limited is at this stage inclined against granting indemnity to the NSW Trustees in respect of "Western Australian claims". A decision in relation to indemnity will be made once initiating process has been received. For a number of reasons there is unlikely to be automatic insurance cover for these claims and accordingly the Brothers will be required to make decisions in respect of the defence of these claims which will impact importantly on the future course of this emerging class of litigation. The Brothers will need to confirm a strategy to be adopted in the defence of these claims around the country which -
  - (a) protects the position of the Brothers from an insurance point of view;
  - (b) utilises in an appropriate and agreed fashion the various substantive defences which would appear to be available including:
    - (i) the Statute of Limitations
    - (ii) whether or not the corporate status conferred by the NSW legislation and similar enactments around the country creates an entity which can be technically sued
    - (iii) issues in respect of vicarious liability



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- (c) incorporates any necessary balance between legal-pastoral-ethical considerations;
- (d) pays sufficient attention to the broader objective of containing this type of litigation with its potential for considerable expense, distraction and associated criminal investigations etc.

### Legal Issues in New South Wales

At our recent conference with Mr Gross QC the following matters were touched upon:

#### 1. Statute of Limitations

In New South Wales the standard limitation period for the filing of an action in respect of a claim which arose prior to 1st September 1990 is 6 years and in respect of actions arising thereafter 3 years.

The Courts have always had jurisdiction to extend the limitation period in appropriate cases.

However Section 51 of the New South Wales Limitation Act states that a cause of action is not maintainable if brought after the expiration of a limitation period of 30 years running from the date from which the limitation period for the cause of action commenced to run - a 30 year backstop.

Section 52 then deals with the "suspension" of the limitation period during periods of "disability".

Whilst the limitation period for an infant does not, for practical purposes, commence to run until the infant turns 18 it is the common view of Section 51 that the 30 year period runs from the date on which the cause of action is complete and not from the infant's 18th birthday.

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Pursuant to Schedule 1 of the 1990 amendments to the Limitation Act Section 51 does not apply to a cause of action in relation to which an order has been made under the special discretionary extension arrangements relevant to the

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1990 amendments which required an application to be filed in Court prior to 1st September 1993.

Slater & Gordon filed their Summons pursuant to the 1990 amendments just prior to 1st September 1993.

As discussed in conference these special arrangements were understood to have been introduced for respiratory and related problems only.

However, it is to be anticipated that Plaintiffs in these cases will seek to rely on psychiatric arguments involving processes of repression or detachment or de-realisation in an effort to bring the application for an extension of time under the 1990 amendment thus escaping the 30 year bar and attaining a general extension of time to sue.

Mr Gross indicated in conference his view that there are a number of arguments which would be available to put before a Court in opposing such applications for extension of time and that these matters can for various reasons be distinguished from other types of cases in which the Courts are generally inclined to grant an extension of time.

2. **Correct Legal Identification of the Defendant**

As discussed it appears that the Christian Brothers will be named as a Defendant in the proceedings relying on the provisions of Sections 4 and 10 of the Roman Catholic Church Communities Lands Act.

There is considerable doubt as to whether this Act which was brought in to resolve certain difficulties to do with continuity for land holding purposes does create a legal entity which can be sued in this way.

Alternatively it would be necessary for a Plaintiff to sue a wide range of individuals which would give rise to obvious practical problems.

It would appear to be open to a Plaintiff to apply to the New South Wales Supreme Court for an order involving the appointment of a representative Defendant



### 3. Vicarious Liability

Generally a religious order cannot be liable for the one off criminal actions of its members. Mr Gross reviewed the bases on which a religious institute could be liable at common law in these types of claims. Certainly if there was evidence of "institutional failure" in properly dealing with a Brother who was known to have a problem then civil liability would arise.

Generally speaking, however, there is no automatic responsibility on the part of an order for one of criminal acts on behalf of its members.

### 4. Cross Vesting Legislation

Section 5(2) of the Jurisdiction of Courts (Cross Vesting) Act, Commonwealth States -

"Section 5(2) where -

(b) it appears to the first Court that -

(iii) it is otherwise in the interests of justice that the relevant proceedings be determined by the Supreme Court of another State or Territory."

The first Court shall transfer the relevant proceedings to the other Supreme Court.

In New South Wales we have similar cross vesting provisions in the Jurisdiction of Courts Cross Vesting Act 1987.

As discussed by Mr Gross it is possible that Slater & Gordon are initiating proceedings in Victoria with a view to seeking to have the same transferred for hearing in New South Wales pursuant to the cross vesting legislation thereby escaping the limitation problems.

### 5. Compensation Recoverable in New South Wales

A victim of abuse in New South Wales will be entitled to seek compensation from the offender and/or the order of two types:



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- (a) A claim for criminal injuries compensation is available through the Victims Compensation Tribunal. Time constraints will probably not be much of an issue with these claims given the relevant time extension provisions. There is a \$50,000.00 maximum payable by the Victims Compensation Tribunal and the Tribunal then has a right to seek reimbursement from the individual brother.
- (b) A claim against the Order and/or the Brother for damages at large in respect of pain and suffering, income loss, treatment expenses, costs etc. Claims will be made for punitive or exemplary damages which in the United States involve large potential amounts. Whilst Australian Courts are generally conservative in awards compared with United States Courts it must be anticipated that there will be Plaintiffs who will attract substantial damages awards from the Courts if their actions are technically successful.

## Conclusion

It is to be anticipated that Slater & Gordon will proceed with action against the Brothers and in particular the New South Wales Trustees in the not too far distant future.

Slater & Gordon would prefer to conduct this litigation in Victoria and New South Wales.

It may well be that the Courts in the east will force this litigation to Perth if prevailed upon to do so.

Apart from the Slater & Gordon claims recent publicity in respect of complaints emanating from Bathurst Island confirm that there must be an anticipation of civil claims of this nature coming forward in years to come.

Accordingly it would in our view be appropriate to give attention to the following matters on 6th December :



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(a) Administrative matters

- (i) Record keeping.
- (ii) Centralising modes of communications if problems arise including the use of a single spokesperson and ensuring that statements, admissions are not made by individuals within the Order to the media, the authorities, an investigator acting for a potential plaintiff or any old boy revisiting a Brother ( to elicit an admission).
- (iii) The use of legal professional privilege to protect communications between the Brothers and an insurer involving potentially damaging admissions.
- (iv) The approach to be taken with the Authorities in the handling of any criminal investigation.
- (v) Liaising with Centercare and similar bodies and the use of professionals as "listeners" in respect of persons coming forward and making complaints

(b) Legal matters:

- (i) The utilisation of technical defences such as the statute of limitation.
- (ii) The timing and extent of utilisation of points to be taken in respect of the capacity of a Plaintiff to proceed against the New South Wales Trustees.
- (iii) Whether the Brothers should take a "hard" legal line in respect of initial claims or softer settlement approach.

Finally it would be envisaged that the conference would provide an opportunity to resolve any outstanding questions or enquiries as regards the organisational structure of the Brothers in Australia in years gone by.

We are forwarding a copy of this letter to Mr McGowan and Mr McKenzie.

Perhaps you could forward copies to other parties.

Yours faithfully

**CARROLL & O'DEA**

Per:

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