

HGH:VV

STRICTLY CONFIDENTIAL
Brother Julian McDonald, cfc
Provincial
St Mary's Provincial Administration
Christian Brothers
Private Box 154
BALMAIN NSW 2041

19 June 1995

Dear Brother

RE: SLATER & GORDON PROCEEDINGS - SYDNEY

We refer to previous discussions herein and report as follows:-

1. **Document Inspection**

Additional records were recently inspected with the assistance of Brother Ben Scanlon. These documents are now in safe keeping with Brother Ben's solicitors.

As previously discussed, Mr Peter Johnson will be in Rome in early July and we have asked him to make contact with Brother Fogarty inter alia to confirm that all relevant records have now been inspected. At this stage we would make the following comments:

- (i) The Christian Brothers have retained quite considerable documentation and it would seem probable that all such materials relevant to the Institutes in Western Australia have now been accessed.

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- (ii) It is recognised that these written materials are one aspect only of the potential litigation problem. In anticipating the way litigation will be conducted (if cases proceed to a hearing on their merits) it is known that plaintiffs and witnesses will give oral testimony of alleged occurrences and complaints which testimony will potentially constitute a significant aspect of the overall material before a court.
- (iii) However, from the point of view of the materials examined, the Trustees would appear generally to be in an eminently defensible position as regards the Western Australian claims and the general handling of complaints of sexual abuse -
 - (a) It would appear that not surprisingly any complaint of sexual abuse was acted upon and investigated. The final administrative response would depend upon a number of factors including -
 - the seriousness of the behaviour alleged;
 - whether or not there was any corroboration or admission from the Brother in question;
 - the Brother's circumstances e.g. period with the Order; prospects of rehabilitation;
 - whether or not there had been any suggestion of prior difficulty involving the Brother in question.
 - (b) The alleged 1990's standard "first strike and you're out" was not, of course, applied. The correspondence indicates the pre-occupation throughout the 40s and the 50s with the need to maintain an adequate level of manpower so as to enable Catholic boys in Australia the opportunity of a Catholic education. Frequently responding to a complaint of sexual abuse involved the weighing up of a number of heavy considerations. Dismissing a Brother was a most serious

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matter and involved a process of investigation and warning that had to be conducted in accordance with Canon law.

- (c) The system in place appears to have worked in most instances and involved -
 - (i) the Visitation system
 - (ii) the use of warnings and probation period
 - (iii) the use of Canonical warnings
 - (iv) inviting the Brother in question to resign
 - (v) in some cases, dismissal.
- (d) Some of the insights in the correspondence relevant to particular cases of reported abuse are quite progressive and the arguments considered and the action taken impressive (from a layman's point of view at least), given the level of psycho-sexual awareness at that time. There is evidence in the Visitation reports and correspondence of careful balancing between the need for firm action in relation to such matters as against the fundamental necessity to maintain a maximum teaching capacity for spiritual reasons, a belief that boys usually recovered completely from such interferences and, certainly in cases of complaint involving a Brother without any prior known difficulty in the area, a belief that in many cases rehabilitation of the offender was definitely achievable.
- (e) A number of Brother Coldrey's assertions do not stack up against a reading of all of the documents. However, it is to be acknowledged that the documents constitute one part of the picture only and clearly Brother Coldrey has been affected by his contact with "survivors". An assessment of the prospects of successfully defending cases on their merits must incorporate allowance for the probability of numbers of ex-students coming forward to give evidence in support of Plaintiffs on the issue of injury or complaint to superiors.

- (iv) There will be a number of cases of abuse involving particular Brothers which will be difficult to defend and which should be settled in any event assuming that Slater & Gordon overcome their procedural difficulties.

There does appear to have been a generally more difficult position with the institutes in the West. Parents-priests did not act as conduits for the ventilation of complaints as tended to happen in the East. There were some strong personalities involved in the administration of these institutes and a culture which made for greater difficulty in the reporting processing of such complaints as compared with the position with institutes elsewhere in the country.

2. **Brother Barry Coldrey**

We await instructions in relation to Brother Coldrey's future role. The prospect of being required to defend numbers of claims based on generalised allegations of systematic administrative deficiency does reinforce our desire to have Brother Coldrey undertake additional work.

We would suggest that there be a conference with Mr Gross QC concerning this issue and the available options.

3. **Sydney Proceedings - Court of Appeal**

The appeal has been listed for hearing on 28 & 29 day of September 1995. Mr Justice Levine is currently on leave. As Mr Justice Levine has had these cases assigned to him it appears unlikely that any application for extension of time or other hearing will come on until early 1996. Clearly Slater & Gordon's agenda will be to seek to run one or two of the worst cases before His Honour as test cases at the earliest possible time.

4. **Mr Richard Buckland**

Unfortunately we have located copies of judgments in relation to Mr Buckland which will be discussed in due course. It would seem unwise to involve him in any way in these proceedings on behalf of the Brothers. The Slater & Gordon correspondence to Mr Buckland is however very useful. The timing of

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introducing this documentation will need to be carefully considered in order to achieve maximum impact in the litigation.

5. CCI - Special Issues Cover

As previously discussed this cover will not be offered after 30 June 1995. Accordingly it is imperative that any circumstances of which there is now knowledge which could give rise to a future claim be now notified to CCI thus providing a basis for seeking indemnity under the current Special Issues policy if a claim does materialise in the future.

We enclose copy of letter forwarded today to CCI by way of general notification.

6. Archbishop Hickey

We confirm that CCI have indicated that they are not indemnifying the Archbishop in respect of the current claims. We appear to now have a more workable relationship with the representatives for CCI. Any settlement approach will be made in close conjunction with CCI's solicitors.

7. Legal Aid for Slater & Gordon

We confirm that Slater & Gordon's capacity to continue on with the current proceedings would appear to depend to some extent on whether or not they are able to obtain a grant of Legal Aid to enable them to run lengthy test cases. They were able to secure Legal Aid in respect of the asbestosis cases against CSR. At this stage our enquiries indicate that Legal Aid has not been granted and that, notwithstanding the recent Federal initiative, Legal Aid is unlikely to be provided to Slater & Gordon in respect of this litigation.

8. Settlement

Mr MacKenzie and our Mr Harrison recently attended a meeting with CCI and Mr Paul Gamble from Dunhill Madden Butler Solicitors in Melbourne.

It transpires that there have been discussions between Slater & Gordon and the representatives of Archbishop Hickey of a general type. It would seem that CCI would be prepared to contribute towards a settlement of these proceedings.

(a) Timing of Settlement

The consensus seems to dictate preparations now with a view to putting a realistic proposition to Slater & Gordon following the outcome of the hearing in the Court of Appeal.

(b) Terms of Settlements

CCI does not see itself as having any long term exposure to this type of liability. The Brothers do. Accordingly settlement of these very old and defensible claims must involve a balance between the need to bring the proceedings to a conclusion as against the desirability of achieving an outcome which does not encourage the use of the Court for this type of problem.

(c) Pragmatics of Settlement

To have some prospect of achieving settlement on terms that would satisfy the above concern there can be no intimation to Slater & Gordon that the Brothers are considering seriously any option in relation to the current plaintiffs other than a vigorous and rigorous defence involving, inter alia, the enforcement of cost orders. Accordingly we will need instructions to enforce at least for the moment the cost orders obtained in the and matters.

We must also be prepared to assiduously attend to the defence of all current legal matters on a proactive basis.

It is imperative that any discussions in relation to settlement are conducted in strict confidentiality.

(d) What if these cases cannot be settled?

Not every case filed in court can be settled. If the cases cannot be settled

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on terms acceptable to the Brothers the litigation would continue at least for some of the plaintiffs.

Compared with other cases that could be brought these claims are at least from the documentary point of view largely defensible. Slater & Gordon would seek to run two or three test cases involving appalling factual allegations. These particular cases might have to be settled rather than being permitted to establish the precedent that Slater & Gordon would be looking for.

We remain very confident the plaintiffs suing on the basis of brutality will have minimal prospects of ultimate success and will probably give up the fight.

It is also to be noted that no writs have been filed against the Christian Brothers to date in New South Wales other than in relation to these Western Australian cases. New South Wales is the most litigious state in Australia and more litigious by reference to most criteria than California.

The current defensive strategy is working in terms of the outcome of the particular cases before Levine J and in terms of the secondary objective of creating an impression of a defendant that will vigorously resist the use of the courts in these types of matters. The major savings to the Brothers relates to the cases that could be brought but which are not brought.

To best manage the current and serious litigation problem the Brothers need to seek a careful balance between the pastoral and financial considerations dictating settlement and the necessity to be seen to adopt an appropriately tough legal stance in relation to these old matters.

9. Legal Costs and Disbursements

If settlement cannot be achieved we would expect the costs and disbursements for the Trustees in the foreseeable future to involve the following:-

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- (a) Court of Appeal hearing and preparation assuming a two day hearing - \$35,000.00.
- (b) Hearing and preparation of argument on the issue of whether the law of New South Wales or Western Australia is to apply to the Western Australian claims - \$35,000.00.
- (c) Hearing of two actions on the merits, including retaining additional sociological expert re the system in place in the 1950s assuming a two week hearing - \$150,000.00.

We will be in contact with you further in due course.

Yours faithfully
CARROLL & O'DEA
Per:

cc. Mr McKenzie
Brother B Brandon
Mr McGowan
Brother Faulkner