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## Parker & Parker

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29 May 1997

**BY FAX TO REDACTED**

(comprises 9 page(s))

Mr Graham Sapwell  
 Director, Employee Relations  
 Salvation Army  
 Territorial Headquarters  
 5 Hamilton Street  
 MONT ALBERT VIC 3127

Dear Mr Sapwell,

### CHARLES ALLAN SMITH

We refer to previous correspondence and to the several telephone conversations between yourself and Sharron Wise of this office. We hope that these conversations have clarified the issues and that our views as expressed below are in keeping with your stated requirements.

You have asked us to provide you with a model to enable you to put into place a scheme to compensate the victims of Charles Allan Smith. We confirm that at this stage, there are only 5 identified victims, although Mr Smith has confessed to offences against approximately 20 children. We also confirm that as the offences all occurred before 1978 all of the victims are now adults.

We have prepared our model on the basis that this model will not necessarily need to be confined to the 5 cases currently before you. It is a model appropriate of course to the situation in hand, but it is also a model which we anticipate will be of use to you in the future if the other victims come forward, or if the same situation arises with respect to actions of other officers of the Army. This model will need to be modified if any of the future applicants for compensation are children.

In order to make an assessment of the damages suffered by the victims and compensate them accordingly, we suggest that the method of assessment used be that used in personal injury cases. We make this suggestion because:

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1. The measure of damages in personal injury cases closely acquaints with the measure of damages which would be awarded for breach of fiduciary duty.
2. It is the measure of damages that would be used in any negligence action that may have been brought by the victims but for the limitation period.

The assessment of the amount of damages to be awarded is not a question of law but a question of fact. There are general principles that the law has laid down and which we suggest should be applied in the model for assessment, however, each case turns upon its own peculiar facts and accordingly the final Arbiter will need to look at each individual case on its merits.

We have considered the question of whether or not the parties should be legally represented. We confirm your advice that 4 of the victims have appointed a solicitor, Mr Anthony Dale. Mr Dale is a West Australian practitioner with offices in East Perth. We understand that the fifth victim is likely to also appoint Mr Dale. In all the circumstances, we believe that it would be appropriate for legal representation to play a role in the assessment procedure.

1. **THE MODEL**

1.1 **Identification of the Victims**

We understand that Mr Smith has identified 20 victims by name but at this stage only 5 have been located by the police and have approached the Army. We presume that you are satisfied that they have been accurately identified. If any of the other victims come forward or if an alleged victim presents themselves who has not been named by Mr Smith you will need to identify them. We suggest that this be done by reference to:

- (a) the date of the offence;
- (b) the place where the offence took place; and
- (c) the identity of any other officers or any other staff on the premises at the time;

and that the above be compared as best as possible against your records.

1.2 **Assessment by Counsellors**

We understand that counselling and pastoral care is being given to those victims who wish to receive it. Obviously, those counsellors who have been given the task of counselling the victims (whether they be Salvation Army officers or independent psychologists) will be in a good position to assess the trauma caused to those people by Mr Smith. We therefore suggest that

they be asked to prepare a comprehensive report consisting of all of the relevant information that they become aware of during counselling. It may well be that your guidelines for counselling will provide a sufficient framework for the report. We would be pleased if you would send a copy of the guidelines to us to enable us to verify this.

We suggest that the counsellor's report then be given to an independent counsellor who should consider the report, conduct an assessing interview with the victim and prepare a recommendation. That recommendation should include:

- (a) the assessor's view as to whether or not the victim has suffered trauma;
- (b) the extent of that trauma;
- (c) the manifestation of that trauma; and
- (d) whether the trauma occurred as a result of Mr Smith's action.

We recommend that the same independent counsellor conduct the assessments of each of the 5 victims in order to ensure as much uniformity in the decision making process as possible.

### 1.3 **Medical Assessment**

Each victim should be asked to provide the names and addresses of all doctors who have examined and treated him for any injury (physical or psychological) inflicted by Mr Smith. The victim should be asked to sign an authority permitting the doctors to release all relevant medical records to the Army and to provide a report to the Army if requested.

Each victim should also be referred to a psychiatrist for independent assessment. We recommend that the same psychiatrist examine each of the victims to ensure uniformity in the decision making process. We suggest that either Mr Fiday Jones, Mr Mustac or Mr Walker be asked to assess the victims.

If the victim has received or is receiving psychiatric treatment the treating psychiatrist should be approached to provide a report. The questions to be put to the psychiatrist will to a certain degree depend on the individual victims and the counsellor's assessment should be considered before writing to the psychiatrist. However, some evidence should be sought from any treating psychiatrist including:

- (a) the psychiatrist's diagnosis of any psychiatric medical condition suffered by the victim;
- (b) the period for which the victim has been receiving treatment from the practitioner;
- (c) the type of treatment given ie. psycho-therapy, medication, hospitalisation etc;
- (d) the underlying cause of the victim's condition, is the condition caused the assault by Mr Smith or is there another cause and if so:
  - (i) what is that cause;
  - (ii) in what way has the underlying cause been affected by the assault; and
  - (iii) in what way has the victim's psychiatric problems caused by the assault been affected by the underlying cause of his problems;
- (e) has the victim ever been assaulted by anyone else, for example family member or foster parent etc;
- (f) if the victim had not been assaulted by Smith is it possible to assess what his psychological condition would be;
- (g) in what way has his psychiatric condition affected his life style, his marriage, his choice of career and employment and his ability to maintain employment.

Questions along the lines of questions (a) (d) (e) (f) and (g) should also be asked of the assessing psychiatrist.

The general practitioner should be asked to give a comprehensive report as to all consultations had with the victim which relate in any way to the assault or any condition the victim has developed as a result of the assault. The names and address of any specialist to whom the victim has been referred to should also be requested. If possible a report should be sought from every GP to whom the victim has revealed the circumstances of the assault.

#### 1.4 Legal Assessment

There are 3 ways in which personal injury - such as that inflicted by Mr Smith upon his victims - can cause damage:

- (a) an existing capacity, mental or physical, may be destroyed or diminished either temporarily or permanently;
- (b) a need or needs which did not previously exist may be created; and
- (c) the victim may experience pain and suffering, past, present or in the future.

Generally, these 3 elements are divided under two general headings: Pecuniary and Non-Pecuniary Loss.

Non-Pecuniary Loss includes pain and suffering, disfigurement and nervous shock (a term used to denote a psychiatric illness brought about by emotional distress and damage). These will need to be assessed by the medical assessors. Together with loss of amenities and the enjoyment of life which include the ability to play sport or to pursue hobbies or other such activities, loss of marriage prospects, loss of independence, loss of educational opportunities, loss of employment opportunities and the like. The victim will need to be interviewed to assess this loss.

Pecuniary Loss includes claims for expenses including the costs of medical treatment if it has been incurred. It also includes compensation for loss of earnings and loss of earning capacity.

The assessment of the victim's loss of amenities and enjoyment of life and pecuniary loss is probably best assessed by a solicitor in an interview situation. The solicitor should then be asked to prepare a recommendation on this aspect of the victim's loss. We accept that there may well be an overlap in some areas considered by the counsellor and the assessor. It may well be appropriate for the victim's solicitor to prepare submissions and provide evidence of the victim's losses in this regard.

### 1.5 **Assessment of Compensation**

There are a number of dispute resolution procedures that could be adapted for the purposes of arriving at a sum of money to be given to each of the victims in compensation.

These are:

- (a) Arbitration - where an independent arbitrator makes a decision that is binding on the parties to the dispute.

If the Army chooses to go this way we would suggest that a Queen's Counsel practising at the WA Bar be asked to act as the Arbitrator.

We would recommend that Mr Peter Nesbett be approached. Mr Nesbett has acted for both plaintiffs and defendants in personal injury cases, with an emphasis on plaintiff representation. Mr Nesbett is also recognised in the profession for his pro bono work and is generally regarded as an approachable and sympathetic person. Mr Nesbett would probably be acceptable to a victim's legal representative.

- (b) Mediation - Mediation is where a professional mediator attempts to facilitate agreement between the parties to a dispute. The mediator cannot make a decision that is binding on the parties or compel the parties to reach an agreement. We have not considered the possible appointment of any of the professional mediators. Again Mr Nesbett could be asked to act as a mediator rather than as an arbitrator if you so wished.
- (c) Informal Resolution - The parties to a dispute may themselves attempt to resolve the dispute whether accompanied by their legal representatives or not. This is generally done by means of a "without prejudice" meeting or series of meetings between the parties (and their legal representatives if they so wish). Without prejudice means that whatever is said by one party during the course of a meeting cannot be used by the other party if negotiations break down and the matter proceeds more formally through court proceedings.

## 2. OTHER MATTERS

### 2.1 The Position of the QC

A Queen's counsel if appointed could act on behalf of the Army in the event of:

- (a) refusal of a victim to co-operate in the Army's proposal for compensation;
- (b) breakdown of assessment process caused by:
  - (i) withdrawal from the assessment procedure by the victim; or
  - (ii) dissatisfaction with the assessment when made.

We are of the view that it would not be possible for the arbitrator/mediator Queen's counsel to act on the Army's behalf if any of the events at (a) or (b) occurred.

We believe that the Queen's counsel would experience a conflict of interest and it would be best to appoint a different counsel to represent the Salvation Army.

## 2.2 Status of Documentation

You have also sought our views as to the status of the documentation created during the assessment procedure in the event that the procedure breaks down and a victim chooses to proceed more formally through the court system. In order to be completely fair and to allow full and frank exchange of information in the assessment procedure it will be necessary for the Army to provide to the victims' solicitors copies of all the documentation created. Once created it is difficult to prevent that documentation being used in either a formal or informal manner. We would suggest that there be no restrictions placed on the use of the documentation other than confidentiality against use in the public arena. However, all documents created must avoid any reference to the Army and its alleged liability in the matters. The documents must be constrained in their scope.

## 2.3 "Without Prejudice" Assessment and Settlement

Before any procedure for assessing compensation is put into place the victims should be asked to sign an agreement acknowledging that the Salvation Army is entering into settlement negotiations without any admission whatsoever that the conduct of Charles Allan Smith in any way constituted a breach of any legal duty owed by the Salvation Army to the named victim. It must also be agreed that the Salvation Army enters into compensation negotiations on an entirely without prejudice basis to its legal rights to defend any legal proceedings brought by the named victim against it in respect to the alleged actions of Mr Smith.

When the amount of compensation has been assessed (or agreed upon) each victim should be asked to sign a formal legal release. Any release should clearly set out the following:

- (a) that it is entered into in consideration of the settlement sum paid by the Salvation Army to the victim (contemporaneously with the execution of the deed of release) the receipt of which by the victim releases and discharges the Salvation Army from any liability which might exist in connection with the actions of Charles Allan Smith.
- (b) that the release stand as a bar to any legal proceeding relating to or arising out of or in connection with the actions of Charles Allan Smith;
- (c) that the terms of the release are confidential (each party agree not to disclose the confidential information contained therein without the

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written consent of the other party) and to take all reasonable steps to preserve the confidentiality of the confidential information.

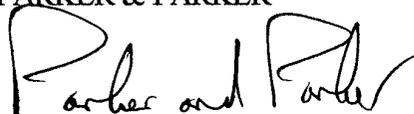
We suggest that you instruct us to prepare "without prejudice" agreements for each of the victims to sign prior to the compensation process beginning. You may wish to instruct us to prepare a standard form draft deed of release which can be annexed to the main agreement. The main agreement could contain a provision that the parties, if negotiations are successful, will enter into a deed on the terms contained in the attachment.

We have enclosed a table setting out in summary the proposed model for your convenience.

If you would like to discuss any aspects of the model please do not hesitate to telephone either Sharron Wise or Tony van Merwyk at your convenience.

We look forward to hearing from you.

Yours faithfully  
PARKER & PARKER

Handwritten signature of Tony van Merwyk in cursive script, appearing to read "Parker and Parker".

Tony van Merwyk  
Partner

**Enc**

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