WESTERN AUSTRALIA

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Mr M C Hay
Assistant Commissioner (Crime Operations)
Western Australia Police
2 Adelaide Terrace
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Dear Mr Hay,

CHRISTIAN BROS INQUIRY

I regret the delay in replying to your letter of 8 December 1994 which was forwarded with the full CIB investigation into allegations against certain Christian Bros. The need for careful reflection and consideration, coupled with the pressure of other matters, has caused a longer delay than I had hoped.

The brief was examined by a Crown Prosecutor of considerable experience, reviewed by the Senior Crown Prosecutor and then submitted to me.

On a previous occasion, we were provided with [redacted] statements containing allegations against a number of Christian Bros. Advice was sought specifically in respect of Bros Lawrence, Dennis Murphy and Patrick Bruno Doyle. Our examination of those statements went beyond the two persons named. We approached each statement with a view to assessing a possible prosecution in every instance where an allegation was made. The present brief contains [redacted] and records of interview from [redacted] people alleged to have committed acts of physical, emotional or sexual abuse.

Once again, all of the material provided has been carefully examined to determine whether there are any reasonable prospects of conviction if charges are laid against the alleged offenders : see *Prosecution Policy* paras.23-28.

When advice is sought by police as to whether charges should be laid, our office follows a set pattern. The evidence is first assessed to determine whether or not there is a prima facie case. The question is whether there is evidence in respect of each element of a charge upon which a properly

instructed, reasonable, jury could be satisfied beyond reasonable doubt. That test is perhaps a little higher than the one normally employed by a police officer who might arrest and charge when there is sufficient credible evidence identifying a person as having committed that offence.

Because indictable offences are invariably prosecuted by our office, it is always appropriate, in matters of complexity or sensitivity, for police officers to submit their brief for assessment. Although the decision to charge remains for the police, they will be entitled to act on the recommendation of the Director of Public Prosecutions especially as that recommendation is in effect a forecast as to what, in the absence of significant change, view will be taken after committal.

It is because the matters will ultimately come to us that, when advising police, we do not limit our advice to consideration as to whether there is a prima facie case, but also express an opinion whether there are reasonable prospects of conviction. It is neither fair nor just to the accused or to the community to proceed with a prosecution which has no reasonable prospect of resulting in conviction.

An evaluation of prospects of conviction is matter of dispassionate judgment based on a prosecutor's experience and may on occasions be difficult. The assessment of prospects of conviction is not a usurpation of the role of the court but rather is an exercise of discretion in the public interest.

Some of the matters to be taken into account are set out in para.27 of the *Prosecution Policy*. Further, the prosecutor must have regard to the relevant law as found in statutes or in decision of the High Court, Court of Criminal Appeal, and other sources.

I advise that in our opinion the quality of the complainants' statements has not changed or become stronger since we first assessed the matters in 1993. Some of the complaints are now a little later in time, but virtually every individual allegation is completely lacking in confirmatory or corroborative evidence. Even in the odd instance, where complaints appeared to be talking about the same incident of physical abuse, there are very significant discrepancies in the narrative. Worst of all there is almost a complete lack of particularity as to when alleged offences are supposed to have occurred.

In a number of instances complainants have alleged abuse against a particular brother when the order's records would suggest that brother was at another institution.

Finally, all Christian Bros or former Christian Bros against whom an allegation is made have denied the allegations. Some of them have done so in a formal interview while others have responded to allegations with details replies. Murphy, for example, explains how particular allegations could not have occurred because he was never responsible for a certain dormitory or had a particular job or was not at the relevant institution at the time alleged. While their denials are not of course decisive, they cannot be totally ignored.

I have noted in the past that the Christian Bros Order has admitted the existence of sexual abuse in its institutions. As I said in my media release in November 1993: "In ordinary experience, a number of allegations against the same person may suggest that probably that person has committed offences."

However, when a decision is required as to whether to pursue a prosecution against a particular person, the case against each such person must be considered separately, bearing in mind the strength of the evidence against that person. Moreover the decision must take into account the rules of practice and evidence laid down by the High Court. Based on media reports over some years, it appears that certain interest groups do not understand or perhaps want to understand, the evidentiary rules which circumscribe criminal proceedings, particularly in the cases of alleged sexual abuse. I know however that police officers, and relevantly those attached to the Child Abuse Unit are generally aware of the particular rules and limitations.

The decisions of *Hoch* (1988) 165 CLR 292 and *De Jesus* (1986) 61 ALJR 1 as applied by the courts in this State generally prohibit Crown from joining allegations of different complainants against a particular person on the same indictment at the same trial. The allegations of each complainant are separate and in the normal course would proceed to trial individually. I do not consider that the recent case of *Pfennig* (1995) 127 ALR 99, though expanding the concept of similar fact evidence, and to some degree explaining the decision in *Hoch*, materially alters the position.

The decision of the High Court in *S* (1989) 168 CLR 266 demands that the crown specifically particularise each allegation charged against an accused. The lapse of years has made the task of being specific very difficult, it not impossible.

The offence of maintaining a sexual relationship which overcomes, in part, the difficulties created by *S* is of course not available, having only been acted in 1992. It is not retrospective.

The decision of the High Court in *Longman* (1989) CLR 79 puts an obligation on the trial judge to warn a jury in the strongest terms of the unreliability of memory after the lapse of many years notwithstanding *Evidence Act* s.50. That decision has been adopted and endorsed by the Court of Criminal Appeal in this State and judges regularly warn juries when the delay in complaining has been relatively brief compared with the 25 to 40 years delay applicable to some of the present matters.

Certainly in our experience juries are very reluctant to convict when a matter is stale and they are warned, as they must be, of the unreliability and frailty of human memory with the passage of time.

In any criminal trial the Crown has the task of proving each charge beyond reasonable doubt. In all the present cases, the offences are denied. The only evidence which the Crown could present is the word of the complainant in circumstances where there is a lack of specificity and a general danger of unreliability in the recall of events of childhood many years ago.

We understand how difficult it is for many complainants to come to terms with the fact of abuse and then to disclose it to others. That delay is the common experience of the police and this office. Nonetheless the fact of delay, particularly when it is such a long period, creates the real danger that a prosecution may be oppressive.

Comparison with other cases is seldom helpful because of the wide disparity in the factual matters. For example, with my knowledge and approval, our office has advised in respect of charges or continued with prosecutions in respect of a former Christian Brother and a former Catholic priest although the offences occurred a long time ago. However, in each case there were admissions as to criminal conduct subsequently confirmed by pleas of guilty.

Recently a man was convicted of offences which occurred in 1953. However, those offences were admitted and he subsequently pleaded guilty to them. In respect of other matters alleged against him he denied his guilt. He was acquitted after trial in respect of 4 counts. Other trials are pending. The judge ordered that there be separate trials in relation to each complainant. Those

indictments relate to alleged offences much later in time than the ones under consideration here.

In the result, on application of the *Prosecution Policy* and the law to the particular facts, I have reached the opinion that there are no reasonable prospects of conviction and accordingly I advise that no criminal charges ought to be laid.

It is not in the public interest to proceed with a prosecution which has no reasonable prospects of success and that remains the position despite the clamour of pressure groups or special interest groups. In the end, this is an office of public prosecutions, not an instrument of personal or particular vengeance.

The police have responded appropriately to allegations of abuse and have investigated properly on this occasion and in 1993 In my view, any criticism of them is unfounded. Our conclusion in these cases does not imply lack of diligence on the part of the police. It is simply a reflection of the lack of material which has any realistic prospect of sustaining conviction on proof beyond reasonable doubt.

Yours sincerely,

John McKechnie

JOHN McKECHNIE QC
DIRECTOR OF PUBLIC PROSECUTIONS

8 May 1995