Our Ref: O HO 0608

4 August 2023

Community Development and Justice Standing Committee
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

To Whom It May Concern,

RE: INQUIRY INTO THE OPTIONS AVAILABLE TO SURVIVORS OF INSTITUTIONAL CHILD SEXUAL ABUSE IN WESTERN AUSTRALIA WHO ARE SEEKING JUSTICE

Thank you for the opportunity to make this submission.

The Christian Brothers Oceania Province has been responding to the victims and survivors of abuse experienced in our facilities in Western Australia for more than three decades.

Our submission details that response and addresses relevant terms of reference.

Yours sincerely,

[redacted]

Br Gerard Brady cfc
Province Leader
Christian Brothers – Oceania Province

Enc: Christian Brothers Oceania Province Submission

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Submission to the Inquiry into the options available to survivors of institutional child sexual abuse in Western Australia who are seeking justice

Introduction

The Trustees of Christian Brothers Oceania Province (**Oceania Province**) acknowledges the shameful legacy of abuse of some children in its care in Western Australia and which was the subject of Case Study 11 of the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**). The Oceania Province has been committed for many years to properly responding to those who were harmed in our institutions including providing fair compensation, counselling and a direct apology where requested.

The findings and recommendations of the Royal Commission were endorsed by the Oceania Province and it is noted that the Civil Liability Legislation Amendment Act (Child Sexual Abuse Actions) Act 2018 (**Amendment Act**) enacted many of the recommendations made by the Royal Commission.

While the Amendment Act has brought much change in the legal landscape of Western Australia, there are also many elements that have not changed so far as the Oceania Province's response to historical abuse claims is concerned.

What Has Not Changed

In 2015, prior to the introduction of the Amendment Act, the Oceania Province voluntarily and proactively adopted Guiding Principles which obliged the Province and those acting for it to refrain from taking technical defences including a specific principle that *"Ordinarily, [the Oceania Province will] not rely on a defence that the limitation period has expired either in the proceedings or in settlement negotiations."*.

Notably, in practice, the Oceania Province did not rely upon the Ellis defence or the time bar at the time of introduction of the Amendment Act and consequentially has not had to change its response to historical abuse claims.

Further, the Oceania Province voluntarily and proactively agreed to revisit previously settled claims for many years and made an open invite during Case Study 11 of the Royal Commission *"that any settlement that is regarded by the person settled with as unjust will be revisited"*[1].

At the time of writing the Oceania Province has completed approximately 290 historical abuse revisit claims, many of which were resolved prior to the introduction of the Amendment Act. All claimants were independently legally represented.

Other examples of the Oceania Province's proactive approach include:

- Support being provided to the CBERS organisation over 25 years ago, which subsequently became Forgotten Australians Coming Together and Tuart Place. Support to these organisations has included $1.5 million in cash support as well as peppercorn rents being offered for many years.

[1] https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Case%20Study%2011%20-%20Transcript%20-%20Christian%20Brothers%20-%20Day%20WA20%20-%2007052014.pdf, WA2254

- A number of public statements of apology and invitations to bring forward historical abuse claims, beginning in 1993 in WA and consistently reiterated since that time.
- Adopting safeguarding policies.
- Publicly declaring a commitment towards early settlement, engaging in ADR in good faith and not relying on limitations of actions legislation unless there are exceptional circumstances.
- Becoming a participant in the National Redress Scheme (**NRS**) and Australian Catholic Safeguarding Ltd.
- Offering written and/or verbal apologies to individual claimants – approximately 80% of claimants have requested and accepted a personal apology.
- Having an appointed independent barrister as monitor to whom non-compliance with our Guiding Principles can be reported – to date there have been no reports to the monitor.

What Has Changed

The changes introduced in Western Australia have resulted in a number of interlinked impacts.

Increase in Court Claims And Decrease In ADR

The Oceania Province's experience has been that there is now a tendency for claimants to be advised by their lawyers to proceed directly to litigation and by-pass the ADR processes that were well established and successful in achieving resolution. This results in an increase in the legal fees being paid by both parties, increases delays for survivors in the conclusion of claims, and inhibits the Oceania Province's ability to engage in a more time efficient ADR process.

Prior to the Amendment Act, the Oceania Province resolved hundreds of claims without a single claim being commenced in Court.

Smaller Than Expected Uptake In NRS

The timing of the ability of a claimant to commence proceedings in Court via the Amendment Act on 19 April 2018 and the establishment of NRS on 1 July 2018 was unfortunate. The consequence of opening up the Courts prior to the 'alternative path' offered by Redress is a direct cause of the low uptake in the NRS. The Oceania Province has only received 195 claims relating to Western Australian institutions since 2018, of which 129 have been concluded with a payment of redress.

It is also relevant that legal advisors who are approached by a claimant for advice, would receive no legal fees if they advised their client to join the NRS.

Legal Fees

The current system of compensation appears to us to be universally rewarding to lawyers. The majority of claims are brought through the Courts which takes longer to achieve finalisation of claims, and where discovery requires the collation and production of decades worth of operational documents of marginal relevance – both of which increase legal fees.

It is also a sad reality that some people are being encouraged to bring claims against institutions in circumstances where they are aggressively pursued by 'claims farmers'. The Queensland Government has recognised this emerging trend and acted by introducing

amendments to their mandatory pre-litigation legislation (*Personal Injuries Proceedings Act 2002 (Qld))* to combat it.

We are aware of many litigated claims where the outcome to the plaintiff, once legal fees have been deducted, is no better than if the plaintiff had participated in the NRS. This suggests that the court system is being used to generate legal fees in circumstances where a better, quicker and less traumatic outcome could be achieved elsewhere.

The caps on legal costs introduced in the Amendment Act do not go far enough to prevent claimants from being preyed upon and having their traumatic experiences leveraged for financial gain.

The Oceania Province is committed to fairly compensating all those who were harmed in their care, however, the Royal Commission's recommendations included, in addition to the suite of changes introduced by the Amendment Act:

> *87. State and territory governments should expressly preserve the relevant courts' existing jurisdictions and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period.*

The NRS exists for cases that are not suitable to be litigated in court for a variety of reasons. It is important that this recommendation of the Royal Commission be preserved to ensure that survivors – not lawyers – are the beneficiaries of the Amendment Act.

It is now a reality that institutions and their insurers are struggling to respond to the influx of claims where there are uncapped damages. Catholic Church Insurances entered into run-off in 2023 and iCare in NSW has been required by the State to top up its reserves by $600m[2].

<u>Other Options to Provide Justice</u>

The interests of justice would be best served if the following adjustments were introduced:

1. Mandatory pre-litigation ADR such as that proscribed in the Personal Injuries Proceedings Act (Qld) 2002.
2. Stricter caps on legal fees to prevent solicitors being able to receive more than half the damages received by the claimant as is the case in Queensland or caps on legal fees where the claimant does not achieve an outcome better than they would in the NRS (similar to provisions in New South Wales).
3. 'Claims farming' prevention methods such as those introduced in Queensland.
4. A requirement that any civil settlement is certified by the solicitor representing the claimant attesting to having given advice on the option of seeking compensation via the NRS.

[redacted]

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4 August 2023

[2] https://www.smh.com.au/politics/nsw/embattled-nsw-insurer-needs-extra-660-million-as-work-property-claims-rise-20230616-p5dh5j.html