

1. Plaintiff lawyers tell us that Marist Brothers Australia are particularly persistent applicants for permanent stays, more so than some other institutions. Why is that?

Stays are an accepted part of our legal system, are available to all parties, and have been exercised by many organisations including the Australian Broadcasting Corporation (ABC). The Marist Brothers only apply for permanent stays when it seems a fair trial is not possible. It is relevant that applications for permanent stays by the Marist Brothers represent 0.004% of the total number of settled matters over 20 years.

2. What are reasons for seeking a permanent stay and the challenges defending historical claims?

The main reason is when it is difficult to ensure a fair trial. This is best articulated by Justice Bell in the NSW Court of Appeal decision, *Moubarak by his tutor Coorey v Holt* (2019) NSWCA.

“The (non-culpable) delay that s6A of the Limitation Act retrospectively permits, carries with it the possibility that a fair trial would not be possible”

The full bench in *Williams v Spautz* (1992) 174 CLR 509 said:

“The point, no doubt, is that, although there is a public interest in bringing allegations of serious criminal conduct to trial, there is no public interest in doing so under circumstances of irreparable unfairness. It is more important to retain the integrity of our justice system than to ensure the punishment of even the vilest offender. We do not say this because the justice system is some precious preserve of the judges; it is not. We say this because the integrity of the justice system is a fundamental and essential element in the maintenance of a free society. Our society should not buy the conviction of its guilty at the cost of allowing trials which would inevitably risk convicting also the innocent.”

In his conclusions in the decision of *Fields v Trustees of the Marist Brothers* [2022] NSWSC 739, Garling J made the following comments:

*“No doubt, the conclusion which I have reached may come as a surprise to many who are untutored in the common law and who wish to see justice done by the payment of damages for the many victims of historic sexual abuse in the community. However, as Gleeson CJ made clear in *Lepore* in 2003, as extracted at [22] above, the common law does not automatically provide for damages against a third party for the consequences of criminal conduct by way of sexual assault of children such as school students. Liability for damages will only be found where, after a trial which it is possible to conduct fairly, but not necessarily perfectly, negligence or any other cause of action is found to be established.*

There are other avenues by which the victims of historic sexual abuse may seek redress. For example, the Australian Parliament has made provision by the National Redress Scheme, established pursuant to the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth), for compensation for sexual abuse which may be paid to a person such as the plaintiff in these proceedings which does not require the establishment of liability in any court according to the principles of the common law.”

3. Are stays being sought by Marist Brothers Australia due to concerns about how you will financially cover these claims?

The Marist Brothers have settled claims for decades from their own financial resources and will continue to do so. The Marist Brothers only apply for stays when an alleged offender is deceased or unable to give instructions due to incapacity, when the claim is so old that there are few or no witnesses available. Once again, it's about fairness in a trial. Cases in which applications for stays have been made represent 0.004% of the total number of settled matters over 20 years.

4. Plaintiffs tell Four Corners that having their case shut down with a stay before it has even begun is silencing and retraumatising for them, after being abused as children in Marists' care. Why not let them have their day in court, given historical cases are often so hard to prove anyway given the passage of time?

A 'day in court' for a plaintiff, especially in the context of an historical abuse claim, is potentially traumatic and an expensive process. The Marist Brothers' preference is to engage in ADR and achieve resolution early by agreeing to fair compensation as early as possible to avoid the unnecessary incursion of legal expenses and prolonged trauma via the litigation process.

Even if a permanent stay is granted by the courts – and to this date there's been only 3 granted for the Marist Brothers - the complainant has recourse to the National Redress Scheme that was recommended by the Royal Commission. It provides a non-litigated forum in which a complainant can be responded to in a survivor focused manner and includes the opportunity for a 'direct personal response' where a claimant can meet with a representative of the Marist Brothers and express their experiences in a non-litigious context. The choice to bring a civil claim is one by the complainant and this forum also provides them the opportunity to articulate their claim before the Court.

5. Do you see a conflict between the recommendations of the Royal Commission and acts of parliaments to abolish the Ellis Defence and the Statute of Limitations and the seeking of permanent stays?

The Royal Commission recommended that permanent stays be retained in the context of other recommended changes to civil law such as the removal of time limitations. The specific recommendation is:

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.

https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf

6. Why did you raise a permanent stay in negotiations with complainant Ted Kawicki, who alleges abuse at the Marist Brothers Maitland school in the 1960s?

Whilst we do not comment on the details of ongoing matters, the Marist Brothers have attempted in good faith to reach a resolution with Mr Kawicki in multiple ADR processes, both before and after the commencement of litigation. We respect that he has elected to exercise his civil rights and commence Court proceedings and, as the defendant in that matter, the Marist Brothers are required to mount a defence and in doing so, are entitled to exercise the same civil rights under the law