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***Anglican Schools Commission
Briefing on Sexual Abuse Issues
26 May 1998***

Define "Sexual Abuse"

What do we wish to achieve?

Duties of Schools

Consequences of Breach of Duty

Hurt

Compensation

Publicity

How to Discharge the Duties

Staff

Insurance

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What is "Sexual Abuse"?

The term "sexual abuse" is used in a broad sense, and includes what may be called "sexual harassment". It covers all instances of unwanted, sexually oriented behaviour, from non-consensual sexual intercourse at the one extreme, to sexual innuendo however expressed at the other. It may or may not involve contravention of the criminal law. It may also include consensual activity, where the consent emerges from a situation where the complainant is emotionally vulnerable.

Diocese of Brisbane Protocol for use when complaints of Sexual Abuse are made against church officials
Anglican Church of Australia Year Book 1997 Diocese of Brisbane page 535

"Sexual Abuse" is defined as any sexual behaviour which is imposed on a person without that person's consent. Children are never capable of "giving consent" to adults, therefore, adult sexual behaviour with children is a misuse of power, or, abuse. Sexual abuse may be covert or "hidden", where there is no physical contact at all (such as inappropriate sexual talk, genital exposure or sexualized/seductive behaviour); or it may be overt, involving more identifiable sexual behaviours (such as inappropriate kissing, fondling, intercourse or rape).

From "A Sexual Recovery Programme for Childhood Sexual Abuse"

"Sexual Abuse" covers criminal activities and activities that are not criminal. Some sexual activities that are criminal offences are summarised below. Sexual abuse activities that are not criminal offences would include leering, innuendo and any activity which provides sexual gratification to the perpetrator.

offences			
criminal offences			regulatory offences (summary proceedings)
crimes (indictable)	misdeemeanours (indictable)	simple offences (summary proceedings)	
arrest without warrant	warrant required for arrest		

Crimes include:

(Criminal Code ref.)

- s.208 unlawful sodomy of a person under 18 years or of an intellectually impaired person
s.209 attempting the acts referred to in s.208
s.210 indecent treatment of children under 16 years
s.211 bestiality
s.213 owner etc. permitting abuse of children on householder's premises
s.215 carnal knowledge of girls under 16 years

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s.216	abuse of intellectually impaired persons
s.217	procuring a person who is not an adult or is intellectually impaired to engage in carnal knowledge
s.218	procuring sexual acts by coercion
s.219	taking child for immoral purposes
s.221	conspiring to defile
s.222	incest
s.224	attempts to procure abortion of another
s.225	attempting to procure oneself to abort
s.229B	maintaining a sexual relationship with a child
s.347	rape
s.349	attempted rape
s.351	abduction

Misdemeanours include:

(Criminal Code ref.)

s.226	supplying drugs or instruments to procure abortion
s.227	indecent acts
s.228	obscene publications and exhibitions

Simple offences include:

(vagrants, Gaming and Other Offences Act ref.)

s.12	printing, publishing etc. obscene matter
s.12A	Advertising indecent or obscene publications
s.14	indecent postcards
Part 2A	offences relating to prostitution

Commonwealth

offences	
indictable offences	offences punishable on summary conviction

Indictable offences include:

Crimes Act (1914) Part 111A	child sex tourism
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What are we trying to achieve?

We are trying to propose actions that will:-

- prevent occurrences of sexual abuse as far as is practical
- assist in resolving the issues when they arise
- demonstrate the concern of Anglican schools about the issue

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Duties

Legal duties of care

The duty of care of a teacher

"Children are in need of supervision. Their parents cannot provide this when their children are at school. The teachers must provide it."

Full Federal Court in *Introvigne -v- Commonwealth of Australia* (1980) 32 ALR 251

"The duty of a school master is to take reasonable steps to protect the pupils against injury which should have been foreseen."

Murphy J. and Aitken J. in *Geyer -v- Downes and Anor.* (1977) 17 ALR 408

Duty of School Authority

A school authority will be liable vicariously for acts of its employees carried out in the "course of employment". This means that the employer will be fully liable for tortious acts of the employee committed in the course of employment.

An employer probably will not be vicariously liable for the criminal activities and intentional wrong-doing of teacher employees even where the acts are committed during the course of their proper functions.

Non-delegable Duty

A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on the school premises during the hours when the school is open for attendance. Further, the duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It has a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated.

Commonwealth -v- Introvigne (1982) 150 ALR 269

"The immaturity and inexperience of pupils and their propensity for mischief suggests that there should be a special responsibility on a school authority to care for their safety, one that goes beyond a mere vicarious liability for the acts and omissions of its servants."

Mason J. in *Commonwealth -v- Introvigne*

The non delegable duties of care between a school authority and pupils include:-

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1. *To take all reasonable care to provide suitable and safe premises. The standard of care must take into account the well-known mischievous propensities of children, especially in relation to attractions and allures with obvious or latent hazards.*
2. *To take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury.*
3. *To take all reasonable care to see that the system is carried out.*

Murphy J. *Commonwealth -v- Introvigne*

Temporal Extent of the Duty

The relationship of school and pupil imposes duties of care upon the school to the pupil. The relationship exists from the day the pupil is enrolled to the day the pupil finishes at the school. Ordinarily the school will owe a duty to the pupil in the school grounds and not for accidents occurring in the pupil's home. This is not because the relationship ceases when the pupil leaves school for the day but because the duty does not extend to ensuring, for example, that the floor in the pupil's bathroom at home is not slippery. The relationship of teacher and pupil does not begin each day when the pupil enters the school ground and terminate when the pupil leaves the school ground. Undoubtedly, a particular duty of care arises because of the pre-existing relationship.

The extent and nature of the duty of the teacher to the pupil is dictated by the particular circumstances. Its extent is not necessarily measured or limited by the circumstance that the final bell for the day has rung and the pupil has walked out the school gate.

Summary of Majority Decision NSW Court of Appeal - *Trustees of the Roman Catholic Church for the Diocese of Bathurst -v- Koffman and Anor.* (1996) Aust Torts Reports 81-399

Pastoral and Spiritual Duties

The church has a special responsibility to ensure the welfare of members of the church community including pupils at schools run by the church and pupils at schools using an affiliation with the church.

Sexual abuse in any form is not acceptable in the life of the church. It can have been the cause of deep and long term hurt in the life of victims.

Archbishop Peter Hollingworth in foreword to Sexual Abuse Complaints Protocol

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Consequences of Breach of Duty

Hurt

Apart from all the legal implications of injury from sexual abuse, the Archbishop has recognised that victims of abuse can be hurt.

Compensation

Where a victim can establish that abuse has occurred, that the school owes the pupil a duty in the particular circumstances, that the school breached its duty and that consequential damage has been suffered, the victim will be entitled to damages.

Publicity

Adverse publicity is most likely to arise at the time of initial complaint by the student, at the stage when proceedings are commenced and at the stage of trial. The damage suffered by a school from publicity of this kind is difficult to measure. It has an indirect adverse effect by damaging the reputation of the school.

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Some people just want assistance and do not seek monetary compensation.

Never admit liability.

Arrangements can be made for counselling and other assistance. Check with the General Manager before making any commitments at all.

The protocol published in the year book is available to assist in resolving matters of sexual abuse where church officials are involved. The protocol is most likely to be of use where the complaint does not allege criminal activity.

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Compensation

Some pupils will wish to receive monetary compensation for the damage caused to them. Once breach of a legal duty is established, the pupils will have to show that they have suffered damage and that the damage they have suffered was caused by the events complained of.

Where a claim is made it may be possible to settle the matter privately through mediation. Where a private resolution is not achieved, the pupil may commence action against the authority that owns the school and others who might have been responsible. Actions for personal injuries currently take two to three years to resolve through to final judgment at first instance.

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Publicity

A draft embryonic communications protocol is set out below for consideration. There ought to be a protocol readily available for reference at short notice if these issues arise in future.

Sexual Offences - Public Relations Protocol

Purpose: To set out guidelines for responding to publicity about allegations of sexual occurrences within schools.

Basis: A school is a semi-public institution. There is a responsibility to account to the community for the manner in which we conduct a school.

Where adverse publicity looms, an appropriate response can limit the damage and may provide beneficial results.

Refusing to comment at all is likely to compound the problem.

Guidelines:

- Provide objective, general and accurate information;
- Protect the identity of the complainant. On principle, we do not provide details of any particular student without appropriate consents;
- Protect the identity of the alleged perpetrator. Everyone is innocent until proven guilty beyond reasonable doubt. The career of the alleged perpetrator is at risk;
- Do not attack the complainant. No matter how fanciful the allegations appear to be, it does not sit well for a school to attack a person who claims to be a victim;
- Set out the procedures implemented by the school to investigate the complaint and to protect the welfare of the students;
- Nominate a single spokesperson.

Approval: All press releases must be approved by the General Manager.

Responsibility: The school is responsible for preparing and implementing the public relations. Seek assistance from the General Manager, if required, and always obtain approval from the General Manager.

Timing: Timing depends on the circumstances. Sometimes it will be appropriate to issue statements before any adverse publicity appears.

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Initiatives

To assist in answering claims that the school authorities are not taking reasonable care to care for pupils' safety it is important that each school has in place a system to ensure that no child is exposed to any unnecessary risk of injury. The school authority must take all reasonable care to see that the system is carried out.

Having identified the risk (in this case sexual abuse) "... it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position. ..."

Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman (1996) Aust Torts Reports ¶81-399 (Mahoney P)

The challenge is to develop a system which is simple, practical and readily able to be implemented.

I suggest the most sensible way of analysing risks as suggested in *Koffman* is to divide the risks into criminal offences and other matters. Criminal offences are likely to do most damage. Sexual harassment policies and the protocol of the Diocese can be used to deal with other matters.

Matters that could be considered in respect of this include:-

- making sure there is nothing about the physical state of the premises that will increase the risk of abuse e.g. dark corridors, unsupervised areas, locked rooms;
- how to ensure that a system, once developed, is consistently implemented;
- advising staff members of their responsibilities at induction;
- ensuring that sex education classes inform the students of the possibility of preying adults;
- perhaps existing sexual harassment policies could be adapted to include further appropriate provisions;
- require staff to act carefully when in the presence of students alone - being wary where one student is more often alone with a staff member;
- regulate home visits by teachers to pupils and by pupils to teachers;
- encourage complaints or comments to be reported to the head of school;

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- follow up complaints or comments;
- understanding the need to act quickly to remove a likely perpetrator from any area of risk (staff, pupil, outsider);
- checking references carefully;
- checking police records where necessary;
- including this issue somehow in staff appraisals;
- monitor the whereabouts of students on campus;
- inform complainants of their rights to complain to police.

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Staff

Natural justice is necessary before termination.

Alternatives such as suspension and changing responsibilities may be possible.

The job and career of the accused are at stake.

Don't assume that the complainant or the accused is right.

Statements made to the school by the accused may be used against them in subsequent criminal or civil actions.

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Insurance

The Diocese does carry professional indemnity insurance and public risk insurance to a limited extent.

The manner in which the insurance indemnity operates and the extent to which it operates will vary depending on the circumstances of each case. It should not be assumed that each case will be covered by insurance.

Never make any statements to anybody as to whether there is or is not insurance cover.

Any actions taken by the Diocese or its officers that may affect liability in respect of claims must be approved by the insurers. It is essential that details of any prospective claim be notified to insurers as soon as the claim arises. This is done by referring the claim through the Anglican Schools Commission and the General Manager of the Diocese.

Entities which are not directly part of the Diocese but may be affiliated with it should check their own insurance arrangements.

**Robert Cunningham
Flower & Hart
21 May 1998**

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