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## **MEMORANDUM OF ADVICE**

### **RE: THE CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF TOOWOOMBA ("THE DIOCESE")**

1. This memorandum provides confirmation of the verbal advice which I provided on 3 September, 2009 in conference with Mr Moore and Ms Yates.
2. My written advice of 17 February 2008, set out a summary of relevant matters arising out of criminal charges against Gerard Byrne, a former teacher at the primary school [redacted] in Toowoomba. I repeat and rely on that summary. I have also relied on the contents of the lengthy progress report by Thynne & Macartney dated 27 April, 2009.
3. Since my last advice, there has been a significant further development. On 22 April 2009 the Principal was charged with an offence pursuant to section 366 of the Education (General Provisions) Act 2006 ("the Act") of failing to provide a written report to police on 7 September 2007. I am instructed that the Principal intends to plead not guilty to the charge and the matter is listed for trial in the Toowoomba Magistrates Court in November 2009.

#### **Prior information received about the defendant teacher**

4. It is now apparent<sup>1</sup> that the Principal received information from two parents and a student on 6 and 7 September 2007 about the defendant teacher's conduct. The information was in relation to two female students in the

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<sup>1</sup> from the statements of Cathey Long and Megan Wagstaff

defendant teacher's grade 4 class at the primary school. Both female students are complainants in the criminal proceedings against the defendant teacher. Both appear to have experienced further abuse following the provision of the information to the Principal in September 2007.

5. The two reports provided to the Principal about the defendant teacher's conduct were as follows:

#### First report

6. On 6 September 2007 the Principal and the primary Student Protection Officer Cathey Long met with a parent and year 4 student of the school during which the parent and student made allegations against the defendant teacher of inappropriate conduct. The Student Protection Officer made contemporaneous typed notes of the information provided by the student as follows:

*Mr Byrnes put his hand in my shirt twice and he did it to KA [redacted] We were sitting on the floor for news time. He puts his hand around my shoulders and rubs my chest. It happened in 1st term and this term.*

*He kisses Claudia on the cheek when she asks for help – he doesn't kiss me. KA [redacted] is too scared to tell her Mum because of her stepdad.*

*He puts his hand up our skirts when I go up to his desk with corrections and I feel uncomfortable.*

*He sometimes says the "Sh" word and he nearly says the "F" word.*

*Parent is not making a formal complaint at this stage but felt that Terry needed to know.*

#### Second report

7. On 7 September 2007 Kellie Dickenson, a mother of a child in the defendant teacher's year four class, telephoned the school and spoke to the Assistant Principal Religious Education Megan Wagstaff. The Assistant Principal recorded the information provided by Ms Dickenson in a typed note which stated:

*07.09.07  
Kellie Dickenson – mother of Charlie, a child in 4B rang. She expressed to me her concern about a conversation that her daughter had relayed to her.*

*On the way home from school yesterday (Thursday) afternoon Charli told her mother that KA [redacted] (also in 4B) had told Charli (while at after school care) that Mr Burns had*

put his hand down KA [redacted] pants. Kellie asked Charli questions related to this conversation and determined that Charlie thought the girls may be making it up as they were laughing about the incident as they spoke. The other girl in the conversation, Kellie believed, was KH [redacted]. Kellie expressed concern that the girls were talking like this and the implications for Gerry's career as well as the implications from a child protection perspective.

*I reported this conversation to Cathey Long (student protection officer), who informed me that we cannot react to hearsay and gossip so no further action was taken with the girls.*

*I also reported the conversation via phone to Terry Hayes (Principal).*

15. The assistant Principal provided the typed note to the Principal and also reported the information to Senior Education Officer Christopher Fry of the Toowoomba Catholic Education Office.

#### **Toowoomba Catholic Education Office**

16. The Principal immediately approached Senior Education Officer, Christopher Fry from the Toowoomba Catholic Education Office for advice and assistance in responding to the information received from the parents about the defendant teacher. Ultimately two Senior Education Officers were involved in responding to the matter, Christopher fry and Ian Hunter.
17. It appears that it was decided by the Principal in consultation with the two Senior Education Officers that the information provided by the parents did not trigger the mandatory police reporting requirements of s.366 of the *Education (General Provision) Act 2006*. But rather they decided that it should be dealt with pursuant to diocesan policy for staff disciplinary procedures.
18. This involved the Principal writing to the defendant teacher particularising the behaviour complained of and the defendant teacher responding to the allegations in writing. This occurred and it appears nothing further came of the matter until the defendant teacher's arrest on 14 November 2008.
19. The two Senior Education Officers did not report the information received from the Principal to their superior officers within the Toowoomba Catholic Education Office, including their direct supervisor Margaret Hendriks, Assistant Director School and Staff Development and the Director, John Borserio.

#### **Inconsistent versions**

20. Initially the two Senior Education Officers claimed that the Principal provided them with a sanitised version of the information received by the Principal about the defendant teacher. However my instructing solicitors do not consider this to be the case and it appears that the Principal made full disclosure of the information received by him, either by phone or email at least to Senior Education Officer Christopher Fry.

### **Factual sources**

21. My instructing solicitors have taken statements from the various staff members (as detailed below<sup>2</sup>) involved in the matter and these statements are included in my brief. The Principal declined my instructing solicitors request to be interviewed to protect his interests in the court proceedings involving the failure to report.
22. In advising, I have had regard to the following observations from my instructing solicitors:
- (a) the Principal and the two Senior Education Officers are highly regarded, experienced staff. They are all long term employees of the Diocese. They have never been the subject of any disciplinary actin. Included in my brief are their employment contracts and two summative reviews of the Principal's performance;
  - (b) It appears that the information provided by the parents in September 2007 about the defendant teacher did not raise in any of the staff involved (including the Principal, the two Senior Education Officers, the Student Protection Contact and the Assistant Principal Religious Education) a suspicion of sexual abuse. There is a subjective element to s.366 of the *Education (General Provisions) Act* and my instructing solicitors expect that this will form part of the Principal's defence;
  - (c) there is nothing to suggest that the staff involved did not act in good faith in responding to the allegations. None have disclosed any particular allegiance to the defendant teacher. There was no cover-up as suggested in media reports. It appears the staff involved exercised poor judgement, with tragic consequences.

### **Systemic Failure**

23. The legislative scheme under s366 of the act places onerous obligations on non-state school staff members and principals. A staff member upon

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<sup>2</sup> statements of:  
John Borserio;  
Margaret Hendriks;  
Christopher Fry;  
Ian Hunter;  
Cathey Long;  
Megan Wagstaff;  
Bishop William Morris DD

becoming aware or reasonably suspecting that a student under 18 years has been sexually abused by a co-employee of the school is under an obligation to immediately give a written report about the abuse or suspected abuse to the school's principal.<sup>3</sup>

24. The school's principal must immediately give a copy of the report to a police officer.<sup>4</sup>
25. It appears that, for whatever reason, the Principal and the relevant officers at Toowoomba Catholic Education Office, had superimposed a further requirement, namely, that there needed to be a formal written complaint from a parent before the obligation to report to police was triggered.<sup>5</sup>
26. This is a manifest misconstruction/misunderstanding of the requirements of s366 of the Act. It goes without saying that every effort should be made to ensure that current staff members both in the Diocese office and in the schools are aware that a written and/or formal complaint from a parent is not a prerequisite to the obligations under s366.

### Disciplinary Action

27. The Principal, Terry Hayes should be provided with a show cause as to why he should not be disciplined for his role in these matters.
28. The critical question is that of timing. Specifically, whether to issue the show cause now or to await the outcome of the charge against him under s366 of the *Education (General Provisions) Act 2007*, being that he failed to provide a written report to police on 7 September, 2007.
29. In my opinion, the better course is to await the outcome of the prosecution. Although, the law distinguishes between the processes of criminal prosecution and employer discipline processes, there are, I suggest, pragmatic reasons to justify the employer having regard to the outcome of the prosecution in determining The show cause process.
30. Should the outcome of the prosecution be a guilty plea or finding by the court, the position of the Principal, as an employee, would be untenable. By this I mean that community expectations would surely be overwhelmingly against a teacher with a s366 conviction (whether recorded or not) continuing as a Principal of a church primary school.
31. Faced with a "guilty" outcome, the decision maker, dealing with the show cause, would be expected to terminate the employment of the Principal.

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<sup>3</sup> subsections 1 and 2 of the Act

<sup>4</sup> subsection 4 of the Act

<sup>5</sup> refer to paragraphs 1, 17 and 19 of the statement from Cathey Long and paragraphs 9, 10, 11, 12, 13 and 14 of the statement of Megan Wagstaff.

32. On the other hand, a not guilty verdict, would put matters in a different light. Even though the criminal standard of proof applies to the prosecution, and not to employment matters, the teacher would be expected to rely heavily on a not guilty verdict as a finding of "innocence".
33. On an unfair dismissal application in an industrial tribunal, a not guilty verdict on the prosecution, would be likely to support a submission that dismissal was unfair and that there should be a reinstatement.
34. In the circumstances of a not guilty verdict on the prosecution, there may be justification for a lesser form of discipline. For example, transfer and demotion.
35. In the meantime, the Principal should remain suspended on full pay. Although the suspension may last several more months, the employing authority has no other realistic option. To convert the suspension to a without pay basis would most likely be inconsistent with the objectives and values of the Diocese as to pastoral care of its teachers.
36. A return to duty, with the hearing of the charge pending is likely to be destabilizing and counter productive. Suspension, but with pay seems to be the appropriate holding situation.
37. APRE, Megan Wagstaff, took the complaint from Mrs Dickenson on 7 September, 2007. She provided a typed file note to the Principal. She has not been charged. There is no evidence on the brief which suggests she was involved in any "cover up". She appears to have discharged her obligations under s366 of the Act.
38. On the basis of the material before me, I can see no proper basis for issuing a show cause to her.
39. The school's Child Protection Officer, Cathey Long, has not been charged with any breach of the Act. The evidence suggests she behaved in a timely way. There is no evidence of any cover up on her part.
40. There was, it appears, erroneous advice from Cathey Long to Megan Wagstaff to the effect that there was "an inability to act on third hand information". However, this did not cause Wagstaff to withhold a report to the Principal. Indeed, Long advised Wagstaff to advise Fry as well.
41. On balance, there does not appear to be any basis for a show cause to be issued to her.
42. Senior Education Officer Christopher Fry was fully informed of the two complaints by the Principal. He was aware of the contents of the letter to Gerard Byrnes of 12 September, 2007. He has not been charged. His recollections of relevant events was found to be unreliable and inconsistent with matters which were objectively established through documents.

43. He should be issued with a show cause.
44. This could be issued forthwith, since there are no prosecutions pending against Mr Fry. However, the outcome of the show cause to him may be influenced by the outcome of the prosecution of the Principal and any consequential disciplinary action against the Principal.
45. I suggest that the issue of a show cause to Fry be held back pending the resolution of the prosecution of the Principal and show cause proceedings against the Principal. Should a show cause against Fry be issued in the near future, it may not be determined for many months. Even though the hearing of the charge against the Principal is listed for November, the decision may be reserved. It would be unfair to Fry to have show cause proceedings hanging over his head for many months, while he is performing his duty.
46. However, his job description and duty statement and if necessary the organisational structure and reporting lines should be altered immediately to ensure he has no involvement with advising Principals or other school staff on complaints as to possible misconduct by school staff in their dealings with students.
47. Ian Hunter, Senior Education Officer was fully informed of the two complaints by the Principal. He was aware of the contents of the letter to Gerard Byrnes of 12 September, 2007. He has not been charged. His recollections of relevant events was found to be unreliable and inconsistent with matters which were objectively established through documents.
48. He should be issued with a show cause.
49. This could be issued forthwith, since there are no prosecutions pending against Mr Hunter. However, the outcome of the show cause to him may be influenced by the outcome of the prosecution of the Principal and any consequential disciplinary action against the Principal.
50. I suggest that the issue of a show cause to Mr Hunter be held back pending the resolution of the prosecution of the Principal and show cause proceedings against the Principal, and reiterate the comments made in paragraph 45 above.
51. However, his job description and duty statement and if necessary the organisational structure and reporting lines should be altered immediately to ensure he has no involvement with advising Principals or other school staff on complaints as to possible misconduct by school staff in their dealings with students.

52. Director CE Toowoomba, John Borseria has not been charged. On the evidence before me, there appears to be no proper basis upon which to issue him with a show cause.

#### **Media matters**

53. Media interest in these matters has, I am instructed, been intense and ongoing. It appears the media expect an imminent announcement regarding the results of the Thynne & Macartney investigations. There are, of course, competing interests to be considered.
54. It is desirable to minimise the extent to which there is further media criticism to the effect that the church has done nothing or not enough to discipline staff members who failed to act on the initial complaints, only to have Byrne commit further offences against pupils in his care.
55. On the other hand, it is essential that publicity not prejudice the Principal in his upcoming court hearing; and that the Principal and the two SEO's not be prejudiced in their foreshadowed show cause processes.
56. It would therefore be unwise to say anything to the media beyond:-
- (a) the firm have completed their recommendation and report;
  - (b) the firm has made recommendations about possible employee disciplinary action after the conclusion of the police prosecution of the Principal under the Act;
  - (c) pending determination of the police prosecution of the Principal further public comment will not be made in order to ensure natural justice.;
  - (d) further steps have been recommended to ensure that future information as to actual or suspected sexual abuse is immediately reported to police.

#### **Administrative Reforms**

57. Hotline access to Thynne & Macartney should be made available to all Principals in the schools of the Diocese. This should be on the basis that the Principals have onerous personal obligations as to reporting under s366 of the Act. They need to be able to get advice from competent lawyers, on a direct and timely basis, when issues which may enliven their reporting obligations arise.
58. Audit of the reporting practices in the schools should be undertaken periodically by an external source. This is necessary to protect the interests of the bishop, the corporation, staff members, parents and students.

59. Kits and other instruction publications for staff should be reviewed by lawyers to ensure that they accurately deal with reporting obligations under the Act.
60. Kindly advise if I can assist further in this matter.

With compliments

J E MURDOCH SC

Chambers, 7 September 2009