

[Diocese][Religious Order]

## Occupation of School Premises

### 1. Introduction

This document sets out the basis upon which the School occupies the Trustees' premises for the purpose of conducting a Catholic school. It replaces any previous document of this type and may be unilaterally amended or replaced by the Trustees at any time.

The primary responsibility of the Governing Body of a Catholic school is to occupy and conduct the school on behalf of its Trustees and under the supervision of [the Superior and] the Bishop.<sup>1</sup> Traditionally that encompasses the threefold responsibilities of the Governing Body as occupier of the premises, proprietor of the undertaking and employer of the staff. This document sets out in more detail the parameters of the first of those three responsibilities. It sets out obligations imposed on the Governing Body, including important specific responsibilities relating to health and safety matters.

The Governing Body is to familiarise itself with the contents of this document and comply with the obligations this document imposes on it, obtaining professional advice as necessary.

### 2. Ownership

Ownership of the School Premises remains vested in the Trustees, and the School Premises are occupied by the Governing Body solely for the purpose of conducting a Catholic school on behalf of the [Diocese][Religious Order] in accordance with canon law and the Trust Deed.<sup>2</sup>

### 3. Delegation of Authority

Management of the occupation and use of the School Premises is delegated for the time being by the Trustees to the Governing Body of the School subject to any direction given by the Trustees or [Bishop][Superior] as to the use of the School Premises outside normal school hours.

**The Governing Body is to discharge the duties and responsibilities set out in this document. The Trustees will take reasonable steps to ensure the Governing Body's compliance with the terms of this occupation document and the Governing Body is to afford the Trustees every cooperation to enable the Trustees to do so.**

The Governing Body shall not, without obtaining the prior approval, in writing, of the Trustees:

---

<sup>1</sup> *Governance of a Catholic School: A Clarification of Roles and Responsibilities for England & Wales*, CES September 2014.

<sup>2</sup> The objects of the general trust on which the schools are held are: *[INSERT OBJECTS OF THE TRUSTEES]* In one or two schools or pieces of land, slightly different trusts may apply: diocesan advice should be sought on an individual basis if this applies.

- make any major structural changes or additions or alterations to any buildings which form part of the School Premises;<sup>3</sup>
- let or give up or transfer possession or control of the School Premises or any part of the School Premises;<sup>4</sup>
- use the School Premises for any purpose other than conducting a Catholic school;

The Governing Body is to notify the Trustees, in writing, if at any time the School no longer requires any part of the premises for the purposes of conducting a maintained school and, unless the Trustees determine otherwise, that part of the premises shall no longer form part of the School Premises and shall no longer be occupied by the Governing Body but by the Trustees directly.

All monies received from the lettings of the School Premises shall be payable to the Trustees (without prejudice to the right of the Trustees to donate part or all of those monies to the School).

During its occupation, the Governing Body shall ensure that:

- the School Premises are kept in good repair and condition;
- it engages a suitably qualified building professional, approved by the Trustees, to be responsible for advising the Governing Body in relation to their responsibilities for the School Premises;<sup>5</sup>
- adequate insurance cover is maintained for the School Premises in the joint names of the Governing Body and the Trustees, which can either be:
  - insurance through the Catholic Insurance Service Limited insurance scheme arranged through the diocese;
  - an insurance policy approved by the Trustees adequate to provide for full rebuilding costs of the buildings should they be totally destroyed; or
  - with the approval in writing of the Trustees, participation in the Risk Protection Arrangement established by the Department for Education.

A properly authorised officer of the Bishop [Superior] or of the Trustees shall have a right of access to the School Premises at any time.

---

<sup>3</sup> Major structural changes include the addition or removal of buildings from the premises, and any change in the footprint or envelope of any building. It also includes substantial alterations within the envelope of existing buildings which would permanently change the educational provision (e.g. converting a hall into classrooms or vice-versa or converting the hospitality suite to a staff room or vice versa) but not smaller changes within the envelope (e.g. reconfiguring toilets). If in doubt, advice should be sought from the Trustees.

<sup>4</sup> Letting or giving up possession of any part of the school premises only refers to the granting of a lease or licence which gives permanent and exclusive occupation of part of the premises to a third party. It **does not** refer to occasional or regular use of the premises by third parties on a non-permanent and non-exclusive basis (e.g. allowing a parish group to use the school hall on a weekday evening).

<sup>5</sup> DfE "Blue Book Guidance" *Capital Funding for Voluntary Aided Schools in England*, Feb 2011.

### 3.

#### 4. Specific Responsibilities relating to Health and Safety

The Trustees consider the Governing Body, whose undertaking is the day to day conduct of the School, to be the dutyholder for the purposes of any relevant health and safety legislation.

If any health and safety duties do rest or remain with the Trustees, the Trustees hereby nominate and appoint the Governing Body to take all steps necessary to discharge that duty, and the Governing Body shall do so on the Trustees behalf.

The Governing Body is to comply with the requirements set out in the Education & Skills Funding Agency document, 'Terms and Conditions of grant funding for dioceses and non-diocesan voluntary aided schools groups in receipt of school condition allocations in financial year 2020-21' which also sets out the responsibilities of Governing Bodies in relation to health and safety<sup>6</sup>.

The Governing Body is to ensure it has appointed a competent person to assist it in undertaking the measures it needs to take to comply with the requirements and prohibitions imposed by the relevant statutory provisions.<sup>7</sup>

The Governing Body shall ensure it has policies and procedures that promote compliance with all relevant health and safety obligations and ensure that the buildings support the provision of a safe environment for children, staff<sup>8</sup>, visitors and all other persons that use the School Premises. The Governing Body is to appoint a competent person to assist it in discharging its duties<sup>9</sup>.

The Governing Body is to take proper account of any Approved Code of Practice (ACOP) and other guidance, including guidance issued by HM Government, setting out how dutyholders are expected to discharge their duties in practice.

The Governing Body is to discharge all of its duties as dutyholder under any relevant health and safety provisions in their entirety.

These duties which the Trustees consider fall on the Governing Body include, but are not limited to, duties arising under section 4(1) of the Health and Safety at Work Act 1974 ("HSWA 1974"); the Control of Asbestos Regulations 2012 ("CAR 2012"); the Construction Design and Management Regulations 2015 and the Regulatory Reform (Fire Safety) Order 2005 ("FSO 2015").

Unless the Trustees have separately notified the Governing Body, they confirm they have taken all reasonable steps pursuant to section 4 HSWA 1974 to ensure the School Premises, access and plant are safe and without risks to health so far as reasonably practicable. The Governing Body should nevertheless consider

---

<sup>6</sup> See 'Terms and conditions of grant funding for dioceses and non-diocesan Voluntary aided schools groups in receipt of school Condition allocations in financial year 2020-21' In particular paras 10, 24.

<sup>7</sup> **The relevant statutory provisions are those defined in s53 Health and Safety at Work Act 1974. For 'competent person' see reg 7 Management of Health and Safety at Work Regulations 1999.**

<sup>8</sup> See 'Terms and Conditions of grant funding for dioceses and non-diocesan voluntary aided schools groups in receipt of school condition allocations in financial year 2020-21'

<sup>9</sup> See reg 7 MHSWR 1999

undertaking its own survey of the land and buildings, as appropriate, taking professional advice where necessary.

For the purposes of the FSO 2015, the Trustees expressly nominate the Governing Body as the 'responsible person' for the purposes of discharging the relevant duties under the FSO 2015.

The Trustees consider the Governing Body to be dutyholder and where applicable the main dutyholder, for the purposes of regulation 4(1) of CAR 2012 and the Approved Code of Practice, 'Managing and Working with Asbestos' ('ACOP'), and to bear the responsibilities of the dutyholder and main dutyholder<sup>10</sup>. The Governing Body is to note that the Trustees do not consider themselves to be the dutyholder or main dutyholder, and do not intend discharging any associated functions. The Trustees will co-operate with the Governing Body to the extent necessary for it to carry out its duties.

Insofar as the Trustees are considered to be a dutyholder under CAR 2012 and ACOP, they hereby nominate the Governing Body to carry out the steps necessary to discharge that duty on the Trustees' behalf pursuant to para 103 ACOP CAR 2012, and the Governing Body shall do so on the Trustees' behalf. The Governing Body is to ensure it has the competence to carry out its function as dutyholder. The Trustees will co-operate with the main dutyholder to the extent necessary for it to carry out its duties.

### Definitions

"Bishop" means the Diocesan Bishop.

"Governing Body" means the governing body of a maintained school, independent school, sixth form college and non-maintained special school and the Board of Directors of an academy trust company.

["Religious Order" means the *[insert name of religious order or relevant province, house etc.]*].

"School" includes a maintained school, an academy, an independent school, a sixth form college and a non-maintained special school.

"School Premises" means the premises in the ownership of the [diocese][religious order] and in the occupation of a governing body<sup>11</sup> for the purpose of conducting a Catholic school or otherwise as determined by the Trustees. Unless provided with a site plan delineating the extent of the site, the premises include the entirety of the site owned by the [diocese][religious order] in the occupation of the governing body,

<sup>10</sup> The responsibilities of the main dutyholder are principally set out in paras 82 ACOP

<sup>11</sup> Some Catholic schools [in diocesan trusteeship] also occupy land which is not owned by the [diocese] [religious order]. This document does not apply to such land. This may include local authority owned land (typically playing fields). In ex-grant maintained schools, the same categories of land will be owned by the governing body. In a few cases (e.g. ex-religious order schools) some land may still belong to a religious order which formerly exercised the trusteeship of the school. In these cases, the [diocese][religious order] will be able to advise on the particular arrangements on an individual basis.

5.

including all appurtenances thereon which, for the avoidance of doubt, include all trees and boundary fences.

["Superior" means the *[insert title of relevant superior].*]

"Trust Deed" includes the *[insert description of the trust deed(s) of the diocese or religious order]* and other constitutional documents of the Trustees.

"Trustees" means *[insert description of the legal entity who are the Trustees of the school]* (Charity Number: *[insert charity registration number of the Trustees]*)

*Approved by the Trustees on [DATE]*

## Potential Trustee Liability in Health and Safety Legislation

### A. Summary

1. The Catholic Insurance Service recently instructed leading counsel to produce an advice on the possibility of Trustees being liable for breaches of health and safety legislation, in particular in relation to asbestos management, construction and fire safety in schools. The purpose was to identify risks, to provide guidance on any risks, and to suggest steps to take to mitigate them.
2. The advice received was on the basis of criminal liability for health and safety breaches, as opposed to any civil remedies that might arise.
3. Counsel advised that Trustees *may* owe duties under a number of statutory provisions. As this area of law is untested, it was not possible for counsel to be definitive. However, the CES advise that the Trustees' response should be on the basis that liability may attach to them and to ensure that Trustees are mitigating the risk appropriately.
4. In light of this, the CES advises Trustees to:
  - (i) Adopt and use the new 'Occupation of Premises' document which delegates the performance of Trustees' health and safety duties;
  - (ii) Undertake a review of possible health and safety liabilities;
  - (iii) Consider persons to nominate as being responsible to take the steps to discharge any Trustee liability; and
  - (iv) Take steps to appropriately monitor that the performance of the health and safety duties is in fact being appropriately carried out.

### B. Details of Liability

5. In the school/academy context, under health and safety law, there may be more than one 'dutyholder'. This is the person(s) responsible for discharging particular duties under the law.
6. The most relevant legal provisions upon which counsel focussed in his advice are the Construction, Design and Management Regulations 2015 ("CDM 2015"), the Control of Asbestos Regulations 2012 ("CAR 2012"), the Health and Safety at Work Act 1974 ("HSWA 1974"), and the Regulatory Reform (Fire Safety) Order 2005 ("FSO 2015"). However, there are many other legislative requirements that need to be considered.
7. Counsel has confirmed that Trustees are capable of being dutyholders and prosecuted under health and safety legislation. This is regardless of what form of Trustee they are (i.e. whether they are a corporation, an unincorporated association or individuals). In general terms, there is nothing about 'Trustees' that renders them incapable of being a dutyholder or immune from prosecution.
8. Whether or not Trustees are actually dutyholders under health and safety law turns on whether they are: an employer; a self-employed person; or whether, in certain circumstances, they exercise control over an activity or state of affairs.
9. Counsel advised that if Trustees are employers of persons in the diocese, they will owe a duty to non-employees of the diocese connected with the school (whether they are staff members, pupils, visitors or contractors) even though they may not actually employ any person at the school. The fact that Trustees are employers in one area (the diocese) will be sufficient for them to owe duties

## 7.

to non-employees in other areas (the school) if those persons are adversely affected by something that forms part of the Trustees' undertaking (see para. 14 below).

10. In certain situations, it may not be necessary for a party to be an employer or self-employed person to owe a duty under health and safety legislation; rather it will be enough that the person exercises control over a place, activity or state of affairs.
11. Counsel advises that, although Trustees do not exercise control over the day to day running of the school, they still exercise a reasonably high degree of control over some activities on site. As examples of this, counsel suggests: Trustees permit the school or academy to occupy their site through a bare licence and ultimate control of the site and land and buildings rests with the Trustees; the Trustees could decide to withdraw the 'licence' if they wished to. No interest passes to the academy company or governing body of the school occupying the land and buildings. Although Trustees exercise varying degrees of 'control' in all dioceses Trustees' consent is required for capital works.
12. The precise level of control that the Trustees exercise will affect the extent of the duty they have: the more control they exercise, the more extensive will be the duty to ensure that risk is controlled.
13. Counsel acknowledges that the position of the Trustees within schools and academies is an unusual situation and has hitherto been untested in the courts. Given this, Trustees are advised to consider that they are or may be dutyholders in particular situations and act accordingly.

### C. Nature and Scope of the Duty

14. Counsel suggests that the Trustees' *undertaking* (the business activity or operation) is probably limited to one of oversight but must be conducted in a way that does not, so far as is reasonably practicable, create risk to health and safety.
15. The school governors undoubtedly have a far broader undertaking than the Trustees, as they are in charge of the school on a day to day basis and are obliged to make the necessary arrangements for health and safety management.
16. Counsel also advises that the Trustees' undertaking is also different from, and probably lesser than, the undertaking conducted by Local Authorities in relation to Voluntary Aided schools and the Secretary of State in relation to academies.
17. As a matter of general principle, if the Trustees have a health and safety duty, they cannot delegate or transfer the duty to another party, thereby freeing themselves from the need to comply with it. Most, if not all, of the relevant duties are 'non-delegable'.
18. However, it is open to a dutyholder to reach an agreement with another party for that other party to take the steps necessary for the dutyholder to discharge its duty. What is important is that the party who delegates the performance of the duty takes steps to ensure the other person is competent to discharge it and takes steps to ensure that he has in fact discharged it.
19. Merely telling another party they are expected to carry out the activities that form part of the Trustees' duty and leaving them to get on with it, without any form of oversight, is unlikely to be sufficient. The party delegating the performance of the duty must take certain steps to ensure it is done. This should be done through clear instructions between the Trustees and the school. It is

essential that there is clarity between the Trustees and the academy company or governing body of the school about precisely what it is that one party is expected to do and not do.

20. Trustees may consider appointing a competent person to assist them with identifying and discharging their duties. A competent person must have sufficient training and experience or knowledge and necessary qualities to enable them to discharge those duties. The level of competence required will depend on the complexity of the situation and the help needed.
21. Employers must consult with employees or their health and safety representatives about various health and safety matters including the appointment of a competent person. Consultation is not just about giving information to employees but also listening to them and considering their views before making a decision.<sup>1</sup> Consultation does not impede upon an employer's ability to make the final decision.

#### D. Specific Legislative Requirements

##### (a) Management of asbestos

22. Regulation 4 of CAR 2012 sets out the duty to manage asbestos in non-domestic premises. Dutyholders must identify the location and condition of asbestos and manage the risk to prevent harm to anyone who works on the building or to building occupants. In a school or academy, this could include pupils, teachers, visitors and any contractors carrying out work on school premises.
23. CAR 2012 define the dutyholder, which includes every person with an obligation *to any extent* in relation to the maintenance or repair of non-domestic premises, or every person who has to any extent control of the premises.
24. An Approved Code of Practice (ACOP) gives further guidance about identifying who is the dutyholder. Paragraphs 93 – 95 of ACOP address the duty to manage asbestos.
25. The Health and Safety Executive (HSE) on its website, provides guidance entitled 'managing asbestos in schools – frequently asked questions'. Although this guidance deals with situations involving the employer being the dutyholder, it does not address the 'control' provisions of Regulation 4. As earlier discussed, Trustees plainly have a degree of control over school premises.
26. Counsel's advice is that, while it is most likely that a court would consider the school governors to be the dutyholder or the main dutyholder under Regulation 4, there is a risk that the school's Trustees may also be considered to be a dutyholder, and out of abundance of caution they should proceed on the basis that they are or may be.
27. Section 82 of the ACOP requires that the *main dutyholder* ensures a written plan is prepared that shows the location of asbestos and how it will be managed to prevent its exposure. The plan needs to be put into action and communicated to those affected. The dutyholder needs to review the plan regularly, consult with those affected, and update it as circumstances change.
28. If the Trustees do not themselves wish to carry out the risk assessment and written plan, counsel advises that they should take deliberate steps and make explicit arrangements to nominate the academy company or the governing body of the school to carry out the full duties imposed by Regulation 4.

---

<sup>1</sup> <http://www.hse.gov.uk/pubns/indg232.pdf>



29. While the Trustees' legal responsibilities cannot be delegated, they can nominate others to do all or part of the work to assist in complying with the duties. The persons nominated to do the work must be competent to do so.
30. The Trustees would have to make the terms of the nomination clear and specify exactly what the school is expected to do to comply. If, through any lack of clarity, a situation arose where a contractor or some other party was exposed to risk through the presence of asbestos, the Trustees may well be held to be in breach of duty.
31. The Trustees would also have to satisfy themselves that those whom they nominate are competent to discharge their function. The regulations also make clear that those who are not the main dutyholder (or are seeking to delegate the function of main dutyholder) also have the duty to ensure that they co-operate with the party to which they delegate responsibility.
32. The CES document 'Occupation of School Premises' includes this explicit instruction.

**(b) Construction**

33. It is possible that Trustees may sometimes act as the client on behalf of a governing body in relation to the delivery of a building project. It is possible that there will be some cases where the Trustees are properly considered to be clients for the purpose of the CDM 2015 and so will be subject to the client's duties. Even if they are not the sole client, they may be a joint client.
34. The associated guidance considers that, in some circumstances, there may be doubt about who the client or clients are, Counsel stresses the importance of ensuring that parties identify and agree who it is.
35. What a client must do is set out in regulation 4 of CDM 2015. If the Trustees acknowledge they are or may be clients, but do not wish themselves to carry out the steps mandated, they should ensure that they appoint a party to act in their place. They will still have a duty, but they will have assigned responsibility for the steps necessary to carry out the duty.
36. The Trustees may appoint a competent person or organisation to assist them with their duties as client. Assuming that the party nominated is competent, experienced and well resourced, and the Trustees keep its performance under review, if there was an incident that gave rise to an allegation of breach of duty, it is likely that the Trustees would be able to claim that they had discharged their duty by appointing a competent organisation to act on their behalf.

**(c) Health and safety at work**

37. Section 4 of the HSWA 1974 creates a qualified duty to ensure that non-domestic premises which are made available for use by non-employees are safe. The duty is owed by all those who have a degree of control over the relevant premises or of the relevant plant or substance.
38. The Trustees make non-domestic premises available to non-employees, as discussed above, and so therefore the duty potentially arises.
39. Counsel advises that Trustees should at the very least give some consideration to whether there is anything about the land which may potentially give rise to risk or harm, and whether it would be reasonable for them, or conversely unreasonable for the school governors, to take steps to actively control.

40. Counsel suggests that the Trustees develop a form of simple declaration to the effect that there is nothing about the condition of the premises that they consider is likely to create a risk to non-employees, but that school governors should consider making their own surveys if appropriate.

**(d) Fire safety**

41. FSO 2015 covers general fire safety in England and Wales. The key figure is the 'responsible person'. It is highly likely that the academy company or governing body, as employer, is the responsible person, but it is conceivable that the Trustees may be the responsible person, especially given the level of control they exercise over the premises.
42. Counsel, therefore, advises that it is prudent for the Trustees to make explicit arrangements with the party they consider to be the responsible person, to nominate them as the responsible person and not the Trustees.
43. However, if it should come to pass that the academy company or governing body, as the responsible person under FSO 2015, have not carried out those duties and the Trustees are aware that this has not occurred but ought to have been, then they may be said to be in breach of their duties under the HSWA 1974.

**(e) Other provisions**

44. There are other health and safety provisions where control is a basis for liability such as the Work at Height Regulations 2005, the Provision and Use of Work Equipment Regulations 1988 and the Lifting Operations and Lifting Equipment Regulations 1998.
45. In light of the repairing and maintaining obligations imposed on academy companies and governing bodies it is perhaps unlikely that Trustees will have an active involvement in works covered by these regulations, but they may as a result of, for example, involvement in the selection of contractors.
46. If Trustees were, for example, to engage contractors to carry out work to clean roofs at school premises, they may be held by a court to have a degree of control over the work, even if independent contractors were in fact carrying out the work. Should Trustees engage contractors to carry out work on school premises, they should take some steps to satisfy themselves that the contractors they engage are working safely.
47. If Trustees engage roofing contractors, or similar, on an irregular basis, they should take some steps to ensure that they have satisfied themselves that the contractor has experience and/or some qualification and has conducted a risk assessment for the work being carried out.
48. Similarly, if the Trustees themselves engage a lifting company to do work on school premises, they should take some steps to ensure that the lifting company works safely. They should do this themselves or make explicit arrangements for another to do so.

## Statement of Facts: Occupation of Church Owned Land by Catholic Schools

### A. Introduction

1. This Statement of Facts sets out the current basis upon which Catholic schools occupy Church owned land and buildings. Throughout this document the term 'school' means all Catholic schools and colleges, including schools in the trusteeship of a religious order. This includes maintained schools, academies in England, independent schools, sixth form colleges and non-maintained special schools.
2. In this paper, as in the education system more widely, the various Church bodies which own the land and buildings are generically and legally referred to as a school's Trustees (in the plural) despite the fact that some are incorporated and some are not: see for example *Academies Act 2010*, s.4(1A) – this terminology goes back in statute to the *Education Act 1944* and beyond. For Catholic schools the Trustees will generally be the Catholic diocese within which the school is situated or, in a small number of cases, a Catholic religious order.
3. Approximately one-third of schools in England are voluntary in origin and have Trustees (the other two-thirds are statutory in origin, and do not have Trustees). Most of these voluntary schools are Catholic or Anglican, although there are a few others. More detail about the range of these Trustee bodies and their structures is given in **Appendix 1**.

### B. The Origins of these Arrangements

4. The Churches were the first providers of education in this country and have been providing schools of many different types since mediaeval times. State funding for voluntary schools first became available in 1832 and has been available in various forms ever since. Since the mid-nineteenth century most church schools have been in receipt of some form of public funding, although the Churches have always had a smaller number of schools that are not publicly funded.
5. The partnership between the churches and the State in the provision of schools has gone through a number of chapters since 1833, the most significant being:
  - the introduction of the first non-voluntary (statutory) schools alongside the church schools in 1870, followed by compulsory elementary education;
  - the introduction of local education authorities and the beginnings of modern school governance in 1903;
  - the equal maintenance of county (statutory) and voluntary schools under local education authorities and universal secondary education from 1944; and
  - the introduction of the current academy system, alongside maintained schools, from 2010.
6. Throughout that time, and up to the present day, the way in which the Churches provide schools has been fairly uniform. This paper describes the way in which the Catholic Church has provided most of its schools over the past two hundred or more years. There are a small number of Catholic schools, and individual parts of school sites, which are not provided on this basis. This paper does not attempt to deal with these schools or parts of sites.
7. In the arrangements described in this paper, the Trustees own the freehold (or equivalent<sup>1</sup>) interest in what is to become a school site. This may be newly acquired with the intention of establishing a

---

<sup>1</sup> Occasionally the Trustees' interest in the land may fall short of a freehold interest, e.g. a long lease, such as those where the Trustees own a 999 year lease on certain estates in central London. However, since we do not

school or be land which has long been in Church ownership: this makes no difference. The Trustees have made a voluntary decision to establish a Catholic school as part of the fulfilment of their mission (or, put in more modern legal terms, to fulfil their charitable objects). In order to do so, they establish an entity to conduct a Catholic school on their behalf, and they permit that entity to occupy their site in order (and only in order) to do so. This arrangement allows the Trustees actively to fulfil their charitable objects on an on-going basis, so long as they wish their objects to be fulfilled in this way.

8. The entity occupying the site and conducting the school on behalf of the Trustees has varied over time and in different sectors. It is usually some form of 'governing body', with members appointed by the Church, sometimes an unincorporated body, and sometimes some form of corporate body. A fuller explanation of the different types of 'governing bodies' is given in **Appendix 2**.

### C. The Factual and Legal Basis of Occupation

9. Catholic schools are provided by their Trustees for the purposes set out in the Trustees' governing documents, known collectively in education law as their "Trust Deed"<sup>2</sup>, which will set out the Trustees' charitable objects and other parameters within which they may allow their property to be used. The Trustees will have established the school in furtherance of their charitable objects, and the governing documents of the school will also contain parameters within which the Church school is to be conducted: these will be compatible with the Trust Deed of the Trustees.
10. The governing body of the school or the academy trust company occupy and conduct the school on behalf of the Trustees as the occupier of the premises, the proprietor of the undertaking and the employer of the staff. Occupation of the premises is subject to the Trustees' objects, Trust Deed and any other parameters laid down by the Trustees. Whilst the Trustees permit the school to occupy their site for the time being, they do not give the school any right to occupy and ultimate control of the site and any decisions relating to the land and buildings rest with the Trustees.
11. The Trustees own the freehold (or equivalent) title to the site. The school occupies the site under a mere licence (sometimes also called a bare licence). A mere licence passes no interest in the site and is always revocable. It therefore passes no *rights* to the governing body of the school or the academy trust company to occupy the site. Unlike a lease, it does not create an estate in the land. Unlike a licence *agreement*, it does not create any contractual rights. The licensee is simply given permission by the owner to use the site for the authorised purpose, thereby preventing that use being a trespass. This is in recognition of the "trustee – beneficiary" relationship which exists between the Trustees and their school. These licences are not normally in written form, and are terminable by the Trustees at any time, at will and without cause: see *The Governing Body of the Henrietta Barnett School v The Hampstead Garden Suburb*, set out briefly in **Appendix 3**.
12. The documentation required for Church academies and agreed between the DfE and the national bodies representing the Churches (the CES and the National Society), includes a *Church Supplemental Agreement*. In this document, the Trustees undertake to the Secretary of State (but not to the academy) to make the land available for use by the academy trust company, which use may be terminated by the Trustees by their giving not less than 2 years notice. This two-year notice period reflects the position set out in statute for maintained schools<sup>3</sup> and for academies<sup>4</sup> that the Trustees must give reasonable notice (defined as not less than two years) in circumstances where termination of the occupation would have the result that it is not reasonably practicable for the school to continue

---

believe this makes any material difference to the issues discussed in this paper, they will be treated as equivalent.

<sup>2</sup> See Education Act 1996, s.597(1).

<sup>3</sup> School Standards and Framework Act 1998, s.30(11).

<sup>4</sup> Academies Act 2010, Schedule 1 para. 16

to be conducted in the existing site.

13. This legal framework established by the Trustees does not give the school enforceable rights that would reflect any diminution of rights that the Trustees have over their property. The Trustees assert their control over the property by permitting it to be used for precisely the purposes for which they have established the school. The Trustees' objectives about how the site is used are the same as those of the school, with both of their objectives being met. However, it is the Trustees that must first decide that their site is to be used for these purposes within their charitable objects, and who continue to have the rights to the resources in the site. In practice the continued agreement to permit the school as an entity to use the site means that the Trustees are perpetually reasserting this control, and this has not been passed to the school.
14. This control is a substantive control, since the Trustees could, at any time, exercise the decision to take the property out of the education sector, subject only to the undertaking given to the Secretary of State in the case of an academy. They would be entitled to do this if they considered that the continued licence was no longer the best way to fulfil their charitable objects and would be obliged to do so if they considered that the continued use by the academy was no longer fulfilling their objects.
15. The Trustees are entitled to set out parameters governing the use of the land. This can include, but is not limited to, ensuring that the use is compatible with the charitable trusts, for example, restricting the use of the premises preventing certain activities which they consider to be incompatible with their charitable trust, or where such activities would not be in keeping with the teachings of the church.
16. In addition, the Trustees control any dealings with the land and buildings. For example, in relation to the collection of any information relating to matters of ownership, such as in connection with the Land and Building Collection Tool and the Condition Data Collection, the Trustees would control its completion and require sign-off before any information was uploaded by an academy trust company to the Land and Building Collection Tool. In relation to the surveys conducted to complete the Condition Data Collection, surveying firms require Trustees' consent before the surveys might be conducted. The Trustees' consent is required for any works, including capital works. Most Trustees will not even permit the submission of any capital grant application without the Trustees' consent having been provided.
17. In summary, the following are the characteristics of the standard occupation arrangements in Catholic schools.
  - Legal ownership remains with the Trustees.
  - The schools do not have enforceable rights but permission to use the site which is continually renewed until such time that the Trustees decide otherwise.
  - Both the Trustees and the schools have access to the resource represented by the site. The school cannot deny or restrict others from access to the resource, but the Trustees can deny or restrict others from access to the resource (including its redevelopment), including, ultimately, the school.
  - Decisions on the use of the site need to be agreed by the Trustees within parameters set by them. The school has no power to deal with the site except as delegated to them from time to time by the Trustees.
  - The Trustees are able to take action to ensure that the site is used to achieve their objectives including the ability to withdraw the site at will.

#### **D. Understanding the Basis of Control**

18. This note focuses on the important level of control which Trustees need to exercise in relation to the land and buildings occupied by schools. Ownership of the land and buildings by the Church, and through this the ability to exercise control over Catholic schools, is one of the fundamental reasons

why the Church has been able to continue to retain the protections of the Catholic character of the schools enshrined in legislation and in the governing documents applying to Catholic schools.

19. However, the control herein described should be exercised at a high level. Trustees should exercise the correct degree of control, which is essentially one of step in where the occupier is not conducting the school in accordance with the objects of the Trust Deed or is not fulfilling the parameters laid out by the Trustees in their current 'Occupation of Premises' document.
20. This level of control is different to the day-to-day 'control' (i.e. 'management' of the premises) which is delegated to, and being exercised by, the occupier, i.e. the school. The legal responsibility for maintenance and upkeep of the premises lies with the occupier which is directly funded by government to undertake these legal responsibilities.
21. Any oversight exercised by, or on behalf of, the Trustees should not step over into the day-to-day management and conduct of the school. Ultimately, the Trustees should be exercising oversight of the occupation of the school premises.

## Appendix 1

### Church Trustee Bodies

There are a wide variety of Church bodies that are the Trustees of Church schools, and they have a variety of legal forms. In the Catholic Church, the Trustees will usually be the diocese within which the school is situated, but in about 100 cases, they are a religious order. All of these dioceses and religious orders are established as charities in English law, although there is a variety of legal structures. Some are charitable trusts with an unincorporated body of Trustees. In others, there is a corporate Trustee, sometimes incorporated under the Charitable Trustees Incorporation Act 1872 or the successor provisions in the Charities Act 1993, and sometimes under the Companies Acts as a company limited by guarantee. Sometimes the charity itself is incorporated either as a company limited by guarantee or, increasingly, as a charitable incorporated organisation. In most cases the charitable trusts mentioned have objects wider than just providing schools, and most will have many schools as well as many other activities. However, there will be a wide variation in the size of the various charities represented by the different Trustees.

In the Church of England, there is an even wider range of Trustees. As well as a variety of diocesan bodies (incorporate or unincorporated), they also include local representatives of the clergy, or such bodies as the local Rector and Churchwardens or Vicar and Churchwardens. These last two examples are quasi-corporations in English law, to add to the variety of possible legal forms already set out above. In the case of these more local bodies, it is more likely that the Trustees will only be the Trustee of a single school.

There are also some other Church Trustees, such as those specially set up to be the Trustees of a joint school. The legal forms these may take are also varied, but, once again, it is likely that such Trustees will only be the Trustees of one or two schools.

## Appendix 2

### Governing Bodies and Equivalent

Trustees usually entrusted the conduct of each of their schools to a group of governors or managers. (Until the 1980s, primary schools generally had 'managers', with the term 'governors' until then reserved mainly for secondary schools.) In most cases these bodies of managers or governors were originally unincorporated. The text below summarises the various changes that have occurred in recent decades, but in almost all cases the various governing bodies or equivalent described will occupy sites on the basis described in this paper.

Under the 1944 Education Acts, the governing bodies of maintained schools were constituted under an instrument and articles of government, but remained unincorporated. The Education Reform Act 1988 introduced grant-maintained schools, whose governing body was a statutory corporation. The governing bodies of local authority maintained schools became statutory corporations from 1<sup>st</sup> January 1994 under the Education Act 1993.

Voluntary sixth form colleges had ceased to be maintained schools when they became part of the Further Education sector on 1<sup>st</sup> April 1993 and did not become statutory corporations until they were incorporated by The Education (Designated Sixth Form Colleges) (Incorporation) (England) Order 2001. They subsequently became sixth form college corporations under the Apprenticeships, Skills, Children and Learning Act 2009.

Non-maintained special schools are all charitable voluntary schools and retain unincorporated governing bodies established by their Trustees that conform to the Non-Maintained Special Schools (England) Regulations 2015.

Independent schools conducted on behalf of Church Trustees have a variety of legal forms, with governing bodies incorporated in various ways or unincorporated, but many also occupy sites on the basis described in this paper. For example, the oldest Catholic school in the country was founded in 1568 and is conducted by an unincorporated governing body established by its Trustees (the local diocese) under an instrument and articles of government. Since 1793 it has occupied its present site on the basis described in this paper.

All academies are conducted by charitable companies limited by guarantee, governed by a board of directors. In a multi-academy trust company there is a single company responsible for conducting a number of academy schools. It is therefore the academy company that, in legal terms, occupies the site on behalf of the Trustees, as the successor to the maintained school governing body which was its predecessor.



**Appendix 3****The Henrietta Barnet Case**

In the case of *The Governing Body of the Henrietta Barnett School v The Hampstead Garden Suburb Institute* (1995) 93 LRG 470, the Institute (the school's Trustees) had permitted the school to occupy part of its land as a school site for many decades. It had purported to terminate the licence under which the Henrietta Barnett School was occupying the site on 9 months' notice. It was accepted by the Court that the Institute had the right to terminate at will the licence under which the school occupied the site.

The decision in the case was not about the right of the Institute to terminate the licence, which was accepted, but whether a notice period of 9 months was reasonable at common law. It was decided in the circumstances of this case that the notice period was inadequate. The fact that the peremptory termination of the licence would have an adverse impact on the public was a relevant consideration. The court found that in the absence of an express provision as to notice, a requirement must be implied to give sufficient time to allow the school to make alternative arrangements and to safeguard the public service.

The case identified a gap in the statutory scheme applying at that time. It was as a result of this case that the School Standards and Frameworks Act 1998 ("the SSFA") includes provision in Section 30 (11) that the period of notice given by the trustees must be reasonable, and in any event not less than 2 years in circumstances where termination of occupation would have the result that it is not reasonably practicable for the school to continue to be conducted on its existing site.

## Occupation of Church Owned Land by Catholic Schools: Licence or Lease?

### A. Introduction

1. During the course of discussions about potential Trustee liability for breaches of health and safety legislation in schools, questions have been raised about whether it would be beneficial to change the current basis upon which Catholic schools occupy Church owned land and buildings for the purpose of conducting a Catholic school. It has been suggested that the grant of a lease to schools would be beneficial, including providing protection to the Trustees in relation to potential liability for health and safety breaches.
2. The CES settled position is that the existing arrangements under which Catholic schools occupy school sites should be retained and that Trustees should resist any move away from this and that they should not be persuaded that the grant of a lease is a preferable option. This purpose of this paper is to set out the reasoning for that position.
3. Throughout this document the term 'school' means all Catholic schools and colleges, including schools in the Trusteeship of a religious order. This includes maintained schools, academies in England, independent schools, sixth form colleges and non-maintained special schools.

### B. Current Basis of Occupation – Mere Licence

4. The current arrangements are set out in detail in the attached paper *Statement of Facts: Occupation of Church Owned Land by Catholic Schools*. As can be seen, the Trustees own the freehold or equivalent interest in the school site. The governing body or academy trust company occupies and conducts the school on behalf of the Trustees as the occupier of the premises, the proprietor of the undertaking and the employer of the staff. Their occupation is subject to the Trustees' objects, Trust Deed and any other parameters properly laid down by the Trustees.
5. The school occupies the site under a mere licence. Such licences are not normally in written form. A mere licence passes no interest in the site and is always revocable. It therefore passes *no rights* to the governing body of the school or the academy trust company. Unlike a lease, it does not create an estate in the land and unlike a licence *agreement*, it does not create any contractual rights. As a licensee, the school is simply given permission to use the site for the authorised purposes, without which it would be a trespasser.
6. A mere licence allows for maximum retention of control by the Trustees over the property. It does not give the school enforceable rights that would reflect any diminution of the rights of the Trustees. The terms of a mere licence can be varied by the Trustees at will and, potentially without notice.

### C. Disadvantages of Granting a Lease

7. A lease is a commercial transaction in which temporary and conditional use and occupation of land and premises is granted usually for a fee (rent). Leases can be fixed term or periodic tenancies. Unlike a mere licence, the occupier, i.e. the tenant, is granted an interest in the land and enjoys rights as against the landlord, i.e. the person or body granting the lease.

8. A lease would create a proprietary interest in the land for the school in occupation. Proprietary interests are profits, rights, ownership shares or advantages held by the full or partial owner of a tangible or intangible asset or property. In this case, the school would enjoy rights of ownership for the term for which the lease has been granted to it.
9. It would not be possible to revoke or change the terms of the lease once this has been granted. The terms of the lease cannot be unilaterally changed without due process and usually only with the agreement of the tenant. This would provide rights in favour of the occupier and allow for a greater degree of control on the part of the school. It would limit the ability of the Trustees to direct the use of the premises and control the use by the school, provided that such use was not subject to a restriction in the lease. It would mean that the Trustees would not be able to retain possession of parts of the site of the school which the school may no longer need the use of, without the agreement of the school.
10. Additional restrictions would apply to the manner in which the Trustees would be able to deal with the land. For example, should the Trustees decide that it was no longer in their best interests for the school to continue to occupy the premises under the lease, they may be prevented from requiring the school to surrender it. That is because both schools and academy trust companies are charities, which are required to protect assets and the value in them. The governing body of the school or the academy trust company may conclude that it is not in their best interests to give up an asset. There is a further complication for academy trust companies in that the Secretary of State's consent would be required to any surrender of a leasehold interest held by an academy trust company.
11. One of the key principles of a lease is that the tenant is granted exclusive possession of the premises and the right to quiet enjoyment. The right to quiet enjoyment may well impinge on the Trustees' ability to deal freely with their site and any adjoining property owned by them. For example, if the site of the school adjoins a diocesan building and the Trustees' wish to carry out work to the adjoining building the existence of the lease may require consent of the tenant for the Trustees' to enter onto the site for the purpose of the works. The Trustees would need to consider how the carrying out of any building works would interfere with the tenant's right to quiet enjoyment and may need to consult with the school and or offer compensation if appropriate.
12. Since both maintained schools and academy trust companies are public bodies, if legal rights are given to them through the grant of a lease, this effectively means that legal rights are signed over to a public authority. The lease, as an asset of the school, would be subject to valuation and would be accounted for in local authority or central Government accounts.
13. There are other practical issues that arise. Since every lease is a separate bipartite contract this means drawing up, negotiating and executing over 2,000 leases, which will obviously require legal and other professional fees to be paid. It would not be possible for the CES to provide a model lease because of the disparate range of needs. Each transaction would need to be considered individually having considered the title deeds under which the Trustees own each property. Additional obligations will arise, including a requirement to register the lease, depending on its duration. The registration process will also incur a fee.

14. Having separate and individual leases for each school will necessitate accurate and thorough record keeping. In all dealings relating to the school it will be necessary to consult the property records as no assumptions can be made about the basis of occupation.
15. It should be noted that a landlord retains tortious liability unless the lease contains a valid exculpatory clause. An exculpatory clause is a clause which limits the liability of the landlord under the lease. It would not be valid if it is unconscionable or unreasonable. Additionally, such clauses cannot excuse liability from harm which is caused unintentionally or recklessly. Having had sight of the opinion of leading counsel on the possibility of Trustees being fixed with liability under health and safety legislation, the CES is not satisfied that the provision of a clause in the lease limiting liability in this area would be effective.

#### **D. Conclusion**

16. A Catholic school is one which is recognised as such by the Diocesan Bishop. Essentially the definition of a Catholic school in canon law requires that it is controlled by the Catholic Church.<sup>1</sup> That control is normally established where the diocese or a religious order owns the school and appoints those governing it.
17. Successive Governments have recognised the responsibilities of the Trustees and the rights of the Catholic community as a whole to ensure the long-term future of Catholic education is secure. The law enshrines a number of guarantees from the State to ensure the Catholic character and ethos of the schools is maintained. These guarantees include considerable legislative provision which protects the Trustees ownership and value in the land.
18. The legislative and contractual basis on which maintained schools and academies are enacted and drafted reflect the current arrangements under which Catholic schools occupy Trustee land, i.e. on the basis of a mere licence. The current arrangements apply to around a third of all schools. Any change would entail a substantial overhaul of the system which would have a large financial and administrative burden.
19. Ownership of the land and buildings by the Church, and through this the ability to exercise control over Catholic schools, is one of the fundamental reasons why the Church has been able to continue to retain the protections enshrined in legislation and in the governing documents applying to Catholic schools.
20. Whilst a lease has the benefit of being well understood by professionals such as solicitors, surveyors and accountants, unlike a mere licence, it is the view of the CES that a lease would impact substantially, and detrimentally, to limit the control currently exercised by Trustees and is unlikely to provide the Trustees with any greater degree of protection than they have under the existing arrangements.

---

<sup>1</sup> Canon 803§1

[Diocese][Religious Order]

### Compliance Checklist for Governing Bodies of School Premises

#### Overview

The Trustees of [Diocese][Religious Order] require the School's nominated or competent person(s) to complete this checklist to assist the [Diocese][Religious Order] in assessing the School's compliance with its Health and Safety duties, as identified within the Occupation of Premises document.

The Governing Body, whose undertaking is the day to day running of the School, is the dutyholder for the purposes of health and safety legislation and must discharge all of its duties as dutyholder under all relevant health and safety provisions in their entirety.

The matters addressed in this checklist are directly relevant to the Trustees' interests as owners of the School buildings only and so the checklist is not an exhaustive list of the areas which the School must address.

Item	Detail	Y/N	Comments
<b>Building/premises Integrity</b>	<ol style="list-style-type: none"> <li>1. Please confirm the date of the last structural survey of the premises.</li> <li>2. Has any structural work been undertaken in the last 12 months?</li> <li>3. Was that work authorised by trustees before it commenced?</li> <li>4. Is a process in place for checking contractors' competence and insurance before they are appointed?</li> <li>5. Are the premises in a good state of repair?</li> <li>6. Is a tree survey in place and is work undertaken at appropriate stages?</li> <li>7. Is a glazing assessment in place?</li> <li>8. Is there a system of regular checks of the premises for slip/trip hazards and safe access/egress?</li> </ol>		
<b>Fire Safety</b>	<ol style="list-style-type: none"> <li>1. Is a Fire Risk assessment in place and has it been complied with?</li> <li>2. Are there regular inspections and maintenance of all fire protection systems and equipment and are records kept?</li> <li>3. Are fire drills, evacuation procedures and fire marshals in place?</li> </ol>		

<b>Statutory Inspections</b>	<ol style="list-style-type: none"> <li>1. Are gas safety inspections undertaken on an annual basis?</li> <li>2. Is an up to date electrical safety certificate in place?</li> <li>3. Has PAT testing been undertaken in the last 12 months?</li> <li>4. Have water systems been checked and legionella risk assessments been put in place?</li> <li>5. Is an asbestos survey in place?</li> </ol>		
<b>Use of Building</b>	<ul style="list-style-type: none"> <li>• Are the premises being used for the authorised purposes namely to conduct a Catholic school?</li> </ul>		
<b>Disabled Persons</b>	<ul style="list-style-type: none"> <li>• Are reasonable adjustments made to facilitate the inclusion of disabled and temporarily disabled persons?</li> </ul>		

Signed .....  
by the School's nominated/competent person

Print Name .....

Enter job title .....

Date .....

Signed .....  
by a member of the School's Governing Body

Print Name .....

Enter role (e.g. Chair of Governors) .....

Date .....