**Potential Trustee Liability in Health and Safety Legislation**

1. **Summary**
2. 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.
3. The advice received was on the basis of criminal liability for health and safety breaches, as opposed to any civil remedies that might arise.
4. 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.
5. In light of this, the CES advises Trustees to:
6. Adopt and use the new ‘Occupation of Premises’ document which delegates the performance of Trustees’ health and safety duties;
7. Undertake a review of possible health and safety liabilities;
8. Consider persons to nominate as being responsible to take the steps to discharge any Trustee liability; and
9. Take steps to appropriately monitor that the performance of the health and safety duties is in fact being appropriately carried out.
10. **Details of Liability**
11. 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.
12. 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.
13. 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.
14. 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.
15. 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 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).
16. 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.
17. 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.
18. 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.
19. 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.
20. **Nature and Scope of the Duty**
21. 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.
22. 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.
23. 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.
24. 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’.
25. 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.
26. 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.
27. 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.
28. 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.[[1]](#footnote-1) Consultation does not impede upon an employer’s ability to make the final decision.
29. **Specific Legislative Requirements**
30. **Management of asbestos**
31. 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.
32. 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.
33. 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.
34. 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.
35. 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.
36. 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.
37. 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.
38. 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.
39. 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.
40. 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.
41. The CES document ‘Occupation of School Premises’ includes this explicit instruction.
42. **Construction**
43. 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.
44. 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.
45. 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.
46. 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.
47. **Health and safety at work**
48. 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.
49. The Trustees make non-domestic premises available to non-employees, as discussed above, and so therefore the duty potentially arises.
50. 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.
51. 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.
52. **Fire safety**
53. 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.
54. 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.
55. 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.
56. **Other provisions**
57. 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.
58. 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.
59. 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.
60. 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.
61. 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.
1. <http://www.hse.gov.uk/pubns/indg232.pdf> [↑](#footnote-ref-1)