

CONVERTING INTO AN ACADEMY

This guidance is of a general nature only. It cannot take account of all possible local circumstances or of the varied nature of existing trust deeds and trusteeship arrangements. It is intended to guide you as to the process you should follow but is not a substitute for the detailed legal advice and procedures that all parties (governing bodies, trustees, bodies appointing foundation governors and relevant religious authorities) will need to commission and undertake.

There are issues in the conversion process that might prove to be matters of contention between the parties. If this proves the case the parties should seek separate legal advice in such circumstances.

GENERAL POINTS

1 The Academies Act 2010 calls the change to academy category "conversion". We therefore use this term in this guidance. References below are to this Act by **section** and **subsection** unless otherwise indicated.

2 This guidance is designed to be suitable for all existing categories of school (voluntary aided, voluntary controlled, foundation and community). It also holds good for the various kinds of special school which might wish to convert into an academy. However, the level of detailed guidance required for voluntary and foundation schools is significantly greater than for community schools. The former have a much more complex existing legal context.

3 Local Authorities and religious or other bodies with oversight of various kinds for large groups of schools will no doubt be issuing their own guidance. This will relate in particular to the initial assessment that any governing body should make of the advantages and disadvantages of conversion. Hence we do not concern ourselves with that here except insofar as to stress that the factors that trustees, appointing bodies and religious authorities should take into account are not necessarily identical to those relevant to the school governing body. The last will be predominantly concerned with value to pupils (and perhaps to the wider community). The former must also take account of their duty to maintain the purposes of their trust under charity law and of their duty to ensure so far as they may the continuation into perpetuity of any religious character and ethos the school may have.

There may also be wider considerations which such bodies may have which go beyond a consideration of what is in the best long term interests of the individual school per se.

1 Now that the Academies Act has passed into law, it is open to the governing body of any existing school to seek an "academy order" from the Secretary of State enabling the school to convert into an academy. The DfE has already indicated that schools judged "outstanding" in their most recent OfSTED inspection will normally be allowed to convert with a minimal process. Other schools will be subject to more scrutiny if they seek an order, but no details of the scrutiny process or criteria have yet been published. LBMW will issue supplementary general guidance on this matter as soon as information is available.

2 This guidance does not extend to the process of the creation of "Free Schools", even though it is clear that these will in fact be academies. "Free Schools" are by their very nature additional schools and will therefore require the Secretary of State to assess the potential impact of their creation under s9 of the Act. No information is yet available about this process.

3 Nor does this guidance include those schools which may come to be created not under academy agreements but under "arrangements for academy financial assistance". This category may in fact not be much used but may include "Free Schools". No secure information is yet available about the way in which these cases will be treated. What is certain is that the assets of trustees in such cases will need the most careful consideration in order to protect both the

value and the purposes of the trust. Any voluntary or foundation schools which come to find themselves in such a situation should take immediate legal advice, as should any community school which has part or all of its site owned by trustees.

7. DfE guidance on the process whereby existing schools can convert into academies can be accessed at:

["http://www.education.gov.uk/academies/becomeanacademy"](http://www.education.gov.uk/academies/becomeanacademy)

Click on "To access further guidance follow this link" to obtain the full document. This page also contains links to the various model documents that the DfE has provided to date. It would be useful for your key personnel to familiarise themselves with all of these early in the process. LBMW is in the process of negotiating model documentation for schools with a designated religious character and these will be available (probably via your DfE Link Adviser) when needed.

8. The DfE guidance is the definitive guide and thus we do not reproduce here what it says but instead comment on various issues arising from it below.

Nor does this guidance replace our general **Guidance for the Trustees and Governing Bodies of Voluntary and Foundation Schools in Becoming an Academy** which can be accessed on the LBMW website. Some of the material from that Guidance is repeated here. However, the primary purpose of the earlier document is to give you the information you need to consider the issues relating to conversion. This new guidance takes you through the legal aspects of the process in more detail.

THE FIRST STEPS

9. It is for the governing body of your existing school (and it alone) to decide that it wants to explore the possibility of conversion into an academy. The decision to do this should be taken at a properly called meeting with this item explicitly on the agenda.

10. You should allow sufficient time before the meeting for your school trustees and any other especially interested parties (such as any religious authority you may have or indeed the Local Authority) to be made aware by you that the subject will be raised. It may be that written guidance from such parties may have been issued which should be considered. This is because as the process moves forward you will need the agreement of your trustees and others, so it is wise to brief them with care even at this very early stage. It would be sensible

also to attempt to gain the goodwill of your LA and not to exclude them.

11. If the governing body wishes to go ahead with the exploration, it should also decide at the meeting whether it wants to appoint a working group to undertake the process or appoint someone to undertake the work for them. Once a governing body has reached an in principle decision to convert to academy status, if not before, we recommend that legal advisors be appointed to advise. Provided governing body and other parties with an interest in the school agree with that decision in principle, a single firm might be appointed to advise all parties in pursuit of a common goal, but do refer to our comments in our general introduction to this guidance.

12. In the case of schools with trustees and/or religious authorities, it is essential that all parties be alert to situations in which they should take their own legal advice, as there are issues over which they could come into conflict or disagreement. Unless and until such a point is reached a single legal firm can act for all parties.

13. Note that some community schools may in fact have trustees who own part or all of the school site and who may have charitable value (not just public value) in it. The DfE does not explicitly address this situation in its guidance, but it is our view that these trustees should be treated as being in a similar position to that of voluntary or foundation school trustees in respect of this process – viz that their agreement to make their land available should be required and the conversion cannot take place without it. It is after all their land and should not simply be expropriated. There is no provision in Schedule 1 for the transfer of such land. We presume that arrangements similar to those set out for voluntary and foundation school will be adapted. Trustees must act so as to preserve their trust and its purposes.

14. Having taken a decision to explore the possibility of conversion, the governing body should discuss the matter in detail with any trustees the school may have, with those bodies that appoint any foundation governors and with any religious authority that may have responsibility for the school. The conversion may not take place without the agreement of the first two and the religious authority (even if it is not the trustee and does not appoint governors) must at least be consulted and may be in a position to challenge or block the process. LBMW has developed a separate analysis of the powers of Church of England Diocesan Boards of Education under the DBE Measure 1991 (as amended). DBEs should note its contents, the various powers it gives them and their limitations.

15. At this stage those leading the process for the school should read the DfE Guidance with care and should register the interest of the school with the Department. The DfE will then appoint an adviser to take you on through the conversion.

CONSULTATIONS

16. There are in fact three quite different consultations that need to be undertaken (and in some circumstances a fourth – see below at 37).

17. First, all schools need to conduct a general consultation. The DfE guidance tells you how at 1.1. Note that this consultation gives no one the power to prevent the change. It was added to the Bill as it passed through parliament in order that the various parties that might be consulted should have the opportunity to comment.

18. It is for the governing body to determine whom to consult. We advise that a wide consultation should be the norm and that a short “brochure” should be produced setting out the fact that the governing body wishes to convert the school into an academy and giving the reasons why. This brochure can be written so as to be suitable for all the consultations.

19. This first, general consultation may be undertaken either at once, or later (but before the Secretary of State makes an “academy order” enabling the school to convert) or even after the order has been made but before the actual conversion takes place. We advise that a sound approach would be to consult early and that the governing body should then take account of the views expressed and be ready to give reasons in response to any negative comments received – or indeed to accept them and change its mind.

20. The second consultation that should be commenced is that with the staff in respect of their prospective change of employer. The academy company will employ the staff after conversion and TUPE applies. 1.4ff and 2.8ff of the DfE Guidance gives you the outline of this important consultation. However it is one on which you should also take explicit legal advice. LBMW has an advice package should you wish us to act for you. Note that there are in effect two stages to this consultation, informal as soon as the governing body agrees to explore the conversion process and formal once the governing body has taken its actual decision to submit an application to convert. The information brochure suggested in 18 above could be made suitable to give the school staff and their unions the information they need. Staff views should of course be taken seriously, but they cannot

prevent conversion provided that the correct processes have been followed.

21. The third consultation is with any school trustees (or foundation) with all those bodies that appoint foundation governors (including the diocesan bishop where relevant) and with any relevant religious authority. Schools should note that the agreement of each of these bodies separately and independently is required. The trustees and the appointing bodies each severally have an

absolute power to prevent the school converting if they feel that it would not be right for it to do so. It is not a majority decision. However in the case of Church of England schools, the Diocesan Board of Education may sometimes not have the power to veto (as the others always do) and may just have the power to advise. LBMW has produced an analysis of the powers of the DBE Measure 1991 which sets out the position for DBEs. In connection with this power to give advice (and in respect of paragraph 23 below) it should be noted that the governing body or the trustees (as the case may be) are required to “have regard to” that advice. The meaning of this phrase is much debated but means neither “must obey” nor “may wilfully disregard”. Recent case law in the admissions field has shown that simply taking no notice of the advice given by the relevant religious authority is not legally acceptable.

22. It is important to note, however, that the trustees of any Church of England school must also separately consult their DBE if they wish (as is required) to lease or otherwise convey their land to the academy company for the purposes of the academy. The DBE must at least advise the trustees on this and on any terms they should include in the lease and may (in some circumstances) have the power to direct the trustees not to make the land available if (for example) the DBE feels that the trustees would by doing so be jeopardising the purposes of their trust. DBEs might care to consider that, if, for example, a school is intending to set up an academy in such a way that the continuance of Church of England representation on the academy company and its governing body is either immediately removed or cannot be guaranteed for the permanent future, then it should be reasonable for it to give directions to the trustees under s8 of the DBE Measure and/or to advise against the land transfer under s3(1)(e).

23. In the case of Roman Catholic schools the trustees will normally be the diocese or a religious order. Methodist schools will need to ensure that the Methodist church’s national schools body is consulted and schools with other religious characters will also need to ensure that their relevant religious authority is consulted whether or not it is the trustee.

24. In all schools with a religious character it is likely that more than one body appoints foundation governors. They must all be consulted and all must take their own independent decision whether to agree (with or without conditions) or to oppose. If even one body opposes, conversion cannot take place. It is not sufficient for the actual foundation governors of the school to give their approval. (They have their own role as part of the governing body). Each appointing body and the trustees should provide written agreement (or provisional agreement). The Secretary of State should not allow the governing body to proceed without these documents and would be breaking the law if he did.

25. We point out in particular that the bodies appointing foundation governors include those who appoint any ex-officio governors. This will normally be the diocesan bishop in the case of Catholic and Church of England schools. Their separate agreement is thus (we believe) required.

26. As pointed out in 13 above, a community school may also have trustees whose agreement (we believe) is equally required for conversion to go ahead.

27. The agreement of the trustees etc is required before a formal "application to convert" can be made. (See DfE Guidance 2.7ff.) The TUPE discussions and the general consultation can go on after the application has been made. Indeed the formal part of the TUPE consultation cannot begin until the application has been made. (See 2.10.)

VARIOUS PARTNERSHIPS

28. Academies until now have required sponsors to promote them. The Academies Act 2010 does away with this requirement and in effect replaces sponsors by the (three or more) initial members of the academy company who sign the Memorandum and Articles. We say more about this below, but point out here that there is nothing to prevent a school seeking partners of the kind that in the past might have been sponsors. Existing academy sponsors, education institutions, religious bodies, commercial educational companies or local companies of any sort might be interested and might bring important experience and expertise to bear. This is an issue that should be explored right at the beginning of the process, though additional members of the academy company may always be added (by unanimous vote of the existing members) at any point.

29. All outstanding schools that become academies are expected to offer to support a weaker school. The details of this do not have to be agreed up front, but discussion with interested other schools (which do not

have to be in the same phase as the converting academy and do not necessarily themselves become academies – though they might do so) should be undertaken confidentially early in the process. The DfE recognises that it may not always be possible to find a suitable and willing partner of this kind.

30. There is nothing to prevent whole groups of schools

becoming an academy (or academies) under one company. The DfE supposes that an existing school Federation may apply to convert as one entity. However, it may be interesting for groups of schools with a religious character (for example) to apply for conversion together, especially if some are small schools which might feel otherwise that they did not have the scale to make the change effectively. This possibility opens the way for all sorts of local groupings of schools (either in one phase or crossphase) that the providers of large numbers of schools (such as dioceses) might find attractive. If such a move is envisaged very careful legal advice should be taken about the composition of the consequent academy trust/company and about issues that could arise such as the treatment of VAT in respect of transactions between the schools under some single company models.

31. Careful advice should also be taken by the various parties when a school with trustees (and especially one with a religious character) forms part of the application of an existing school Federation to become an academy. Such a move will not usually be appropriate unless the future ethos, governance and management of the school can be guaranteed to sustain its religious character. There are existing joint trust models for foundation and voluntary schools that might be adapted for this purpose. Trustees of such schools must be careful to ensure that they are not in breach of trust if they agree to the conversion without sufficient safeguards.

SOME BIG ISSUES

Admissions

32. Becoming an academy is not supposed to have any effect on your school's admission arrangements. When the Academies Bill was under discussion in the House of Lords the government spokesman made it clear that the phrase in the Bill that the academy should admit children "wholly or mainly from the area in which the school is situated" would be interpreted in the light of local circumstances. Hence he explicitly said that boarding schools would of course admit from a wide area, as would schools with some kind of national or regional specialism, such as drama, dance or music schools. It is our understanding that the same would apply to a school with a designated religious character that in a similar way served a wide area. None of these should be required to change their existing admissions arrangements on conversion unless they wish to do so.

33. Similarly, religious criteria can still be used for admissions if they have been in the past. We presume that it is not expected that VC schools (despite their religious character for the most part) should use such criteria unless (by exception) they do so at the moment. “No change” is what the Act seems to require and the admission arrangements are incorporated into the academy funding agreement which cannot then be changed without the agreement of the Secretary of State. It will be essential that schools examine these issues with the greatest care and ensure that they, the DfE and any trustees or religious authority are all clear about and happy with the admissions position after conversion. Note that (even though academies are independent schools) those with a religious character must continue to work with their relevant religious authority on admissions, as this is required by the Admissions Code.

34. Also schools that currently have selective admissions policies may retain them and the requirement that the academy should provide education for “children of different abilities” is stricken out of the funding agreement.

35. The funding agreement also includes appendices requiring compliance with SEN provision and exclusion regulations.

36. Academies must also participate in local protocols for hard to place children or those that have been excluded from other schools and in general must comply with the Admissions Code and the Admissions Appeals Code.

Extending your Age Range on Conversion

37. There is nothing to prevent an academy company having responsibility for academies in different age ranges. Indeed there may be encouragement for this to happen. However, if an existing maintained school wishes to change its own age range on conversion to an academy, this is possible, but will require the Secretary of State to take account of the impact of such a change on other local educational provision (see s9 of the Act) and will also require the promoters of the academy to consult such “persons as they think appropriate” (see s10). This is an extra consultation in addition to those already noted above and we advise should always include the LA. Note that the LA cannot block the change of age range, merely provide reasons why it considers the Secretary of State should not approve it.

Religious Character and Practice

38. Schools may neither gain nor lose a religious character by converting to an academy. They do however move from the “maintained school” list to the “independent school” one. There is a form for this which has to be filled out in due course.

39. However, all concerned should note that the consequences of designation are not the same for independent schools as they are for maintained schools and hence some important matters have to be included in

the academy funding agreement. A suitable model agreement will be provided in due course.

40. Note that all academies (whether or not they have a designated religious character) have the requirement to teach RE and conduct daily acts of worship written into their funding agreements. Schools with a denominational religious character have their own particular version of this and schools with a general religious (eg Christian) character but without any specific denominational attachment have yet another version. Schools, trustees and religious authorities should note that a school may not change from a denominational to a general religious character in the course of conversion to an academy (eg from Church of England to Christian).

41. The religious character of the school (if any) is reflected in the Funding Agreement and in the Memorandum and Articles of the academy company. It should also be reflected in any leases that may be required. These all safeguard the position of the existing trust which may not otherwise make its land available other than under a commercial lease. We discuss land below at 4953.

Employment of Staff

42. The academy company becomes the employer of all staff, who transfer to it from the employment of the LA or the governing body as the case may be. TUPE applies and the TUPE consultation procedures must be followed as noted above.

43. Once staff are in the employment of the academy trust modified terms and conditions may be negotiated with them, as the standard school teacher (or support staff) terms and conditions do not apply to independent schools.

44. Similarly, there is no requirement that new staff be appointed on the standard terms and conditions.

45. However, any intention to make changes in these matters would be a very major matter and is one on which the most detailed legal advice should be taken.

Governing bodies must not make the conversion, indicating that they have no intention of negotiating subsequent changes in terms and conditions and then seek to make them. It is imperative to be open about aspirations and intentions and to share these with staff. It is after all likely that many changes might be in the staff's interests or so much in the interests of the pupils that staff might be minded to agree.

46. The power to use religious criteria in the employment of staff is the one major consequence of designation for an independent school. Ex VC and Foundation schools should note that academies (like all independent schools) have powers to do this under the School Standards and Framework Act 1998 (as amended). The National Society has a comprehensive guidance document on this which can be accessed on its website. These powers are identical to (though under a different section of the Act from) those of VA schools. Hence they are more substantial than those accorded to VC and Foundation schools and parties should take careful account of the details. The terms and conditions of existing VC staff will of course be protected under TUPE and the effect of this should also be carefully noted.

WHO COMES TO OWN WHAT AND HOW

Items in the Trusteeship of the Voluntary or Foundation School Governing Body

47. It is not often recognised that the governing bodies of all voluntary and foundation schools are themselves automatically charities. Prior to the Charities Act 2005 they were "Exempt Charities". As at the date of this guidance no decisions have been communicated by the DfE or the Charity Commission as to how these bodies will be handled in future. However, it is thought likely that they will now become Exempt Charities under the 1993 Act with the DfE itself as their "Principal Regulator". What is undoubted is that these governing bodies are still charities and they may therefore own property such as funds left in trust with them for school prizes. The governing bodies of foundation schools without a foundation will also be the trustees of the school site, but this matter is dealt with separately below.

48. The DfE appears to have ignored any other charitable value in the possession of these governing bodies on conversion to academies. However the governing

body of an academy is not a charity and someone must own these erstwhile governing body assets. We believe that they would most appropriately be transferred to the existing school trustees (who may also hold similar funds) but it would also be appropriate for them to be transferred to the academy company (which will be a charitable trust). In either case the Charity Commission is likely to

have to be approached for a suitable scheme, even though the sums involved may be quite small. This is a small detail but needs explicit legal attention.

Governing Body Land

49. As noted above, the governing body of a foundation school may have some or all of the school site vested in it if the school has no actual foundation. **Schedule 1** of the Academies Act 2010 empowers the Secretary of State in **s4** to make directions as to how the land is to be handled. It would normally be transferred we presume to the "person concerned with the running of the academy" (ie the academy company) under **4(3)(c)**. This is straightforward and acceptable if the value in the land is wholly public value, as is likely to be the case in a foundation school without a foundation. If, however, there is exceptionally real trustee beneficial value in the land that value must be safeguarded. Detailed legal advice should be taken in order that a solution that is fair to all parties and secures their respective future positions may be arrived at.

Local Authority Land

50. In the case of a Community school or of those portions of any school site that are in the ownership of the LA (eg playing fields) these are to be transferred by the Secretary of State on conversion to the academy company under **s1 of Schedule 1** of the Act. It is anticipated that this will normally be done by way of lease from the LA. This lease may also include those parts of the site that are in the ownership of trustees and which the trustees have agreed to lease to the LA so that the LA may in turn lease onwards to the Academy Company in one consolidated parcel. We say more about this below. However the arrangement for excommunity schools without trustees is straightforward.

Trustees' Land

51. Matters are not so straightforward when land in the ownership of voluntary or foundation school trustees is in view (or indeed in those rare cases where community schools have some or all of their site in the ownership of trustees) and the trustees have actual beneficial value (as distinct from mere public value) in the site. In all these cases extreme care must be taken to safeguard the trustee (charitable) value as well as the public value in the land. The Charities Act 1993 requires this and in principle the trustees would be wise to be able to show that they meet the requirements of s36 in order to make their land available. This is really about sustaining the purposes of the trust. While the Secretary of State may make changes to the trust deed under s349(1) of the Education Act 1996 and under the School

Standards and Framework Act (as amended) (see 55 below), this does not extend to changing the fundamental purposes of the trust. There may be circumstances in which the agreement of the Charity Commission is requirement in order that land can be made available and there may be circumstances in which the trustees may be prevented by charity law from making their land available if suitable safeguards as to maintaining the purposes and character of their trust are not possible. This will rarely perhaps be an issue in the case of voluntary conversions, but will certainly be a matter of concern in the case of forced conversions under s4(1)(b) of the Act.

52. It should be noted that there are in principle three categories of trustee land (a) land where the value is wholly public value (b) land where the value is wholly trustee value and (c) land where the trustee value has been enhanced by public expenditure. We understand that neither receipt of VA capital grant nor of BSF funding constitute public enhancement of trustee value. Hence few VA schools should have any land other than land which is clearly either (a) or (b). The DfE appears to regard VC sites as falling under (c). However, since these distinctions only really matter on the disposal of a site (or of part of it) we hope that simple procedures can be agreed on conversion to protect all parties.

53. It should be noted that transactions in respect of (a) and (c) may be carried out by direction of the Secretary of State under the various provisions of **Schedule 1** of the Act. Other authorities for conveying or transferring these sections of the site are not required provided that the relevant requirements of charity law are met.

54. For land in category (b) a direct agreement between the trustees and the Academy company is required, which may be of any kind acceptable to the parties.

55. For (a) and (c) a formal lease (or some other arrangement entered into under the authority of the Act) is needed and it is our advice that (especially when beneficial trustee value is involved) careful

consideration should be given to whether such a lease can reasonably be via the LA or whether it should be direct from the trustees to the academy company (of which the trustees may themselves be members). The direct lease may be more reasonable under Charity Commission rules since, if the existing trust is itself a member (or appoints members) of the academy company, the latter becomes a connected party. We advise that a direct lease is also likely to be the simplest and surest mechanism for category (b) land, though other direct arrangements are possible. In either case, it may be necessary to include in the lease references to the purposes of the trust making its land available and how those purposes are protected by provision in the lease, in the Memorandum and Articles of the academy

company and in its Funding Agreement. The lease might also reasonably include a requirement for the trustees agreement to capital works, thus replicating current VA agreement mechanisms. The relevant diocese could be written in to act on the trustees behalf if this is desired.

Other Property of the Trustees

56. School trustees may hold property other than the school site. This might include other (nonpublicly funded) land or premises not used as part of the school site and various charitable investments and endowments. Nothing is said in the Act as to how such property is to be treated, with the consequence (in our view) that it remains (as it should) in the ownership of the existing trustees who will continue to apply any proceeds to the purposes set out in their trust. This may require an amendment to the trust deed to make it clear that the trustees may make their income available to a nonmaintained school. If so, the Secretary of State has the power to make such a change under s349(1) of the Education Act 1996 as amended by **para 3 of Schedule 2** of the Academies Act 2010 and under s82(1) of the School Standards and Framework Act 1998 as amended by **para 9**.

Reverter of Sites

57. This technical issue must be investigated if the trustees hold land under the various School Sites Acts of Queen Victoria, as is common with Church of England schools. It is our view that Reverter will rarely if ever be triggered by voluntary conversion (provided that the land is leased to the academy company and not transferred freehold – both in VA and VC situations) – but it seems inevitable that it would be triggered by forced conversion if that results in the school being closed and a successor school being opened by a different, nonChurch of England provider.

The LAs' Duty to maintain and Buying Services in the Future

58. It is our experience that schools and Local Authorities rarely understand the wider implications of the Local Authority's "duty to maintain" all maintained schools (this is why they are so named) as set out currently in the School Standards and Framework Act 1998 S22, as amended by the Regulatory Reform (Voluntary Aided Schools Liabilities and Funding) Order 2002. Even in VA schools this duty applies to everything in connection with the school which is not explicitly the sole responsibility of the governing body as listed in Schedule 3.3 of the SSFA. For example, even though the governing body may employ the staff, the LA still has a duty to support, advise and resource the school in connection with all aspects of that employment, just as it will (and on the same terms as it does) for those schools where the LA itself is the employer. This wide range not only of services but of responsibility and accountability is transferred on conversion to the academy company and its governors together with the relevant funding. It is extremely important that schools take full account of this factor in making a decision to convert and ensure that on conversion they provide themselves with the relevant services and protections. Where schools form part of families (eg of dioceses or other religious groupings) the "parent body" may be in a position to provide services or to negotiate them in suitable packages in a cost effective way. However care must be taken to comply with EU Procurement Regulations which may well apply, as such packages may trip the various thresholds. We advise that schools should address this issue with parent bodies and/or with other potential service providers early in the process of thinking about conversion. Matters as seemingly simple as insurance need detailed advice and attention.

The Charitable Status of the Academy Company

59. An academy company formed under the Act is an Exempt Charity under the Charities Act 1993 as set out in **s12** of the Academies Act. It was made clear in debate that the government intended that the Young People's Learning Agency would in due course be appointed the Principal Regulator.

60. This does not affect in any way the charitable status of any existing trustees, nor does it replace them.

61. Note that the governors of an academy under this Act are in effect the Directors of the academy company. They are not a separate body corporate nor a separate charity as are the governors of voluntary and foundation schools under education law, but have the

duties and responsibilities of directors under company law – hence reference in the funding agreement to an academy trust obtaining directors liability insurances for its directors/governors.

62. When a voluntary or foundation school becomes an academy the previous governing body (unlike the previous trustees) clearly ceases to exist. Hence any charitable assets it may own must be transferred in some way as noted above.

The Memorandum and Articles of the Academy Company

63. Model Articles for both single and multiple academy arrangements have been published by the DfE.

64. The published models are not as they stand suitable for academies replacing schools in the ownership of trustees, especially if they have a designated religious character. We comment on detailed issues below but stress that trustees must not agree to make their property available to an academy which is set up with the standard model Memorandum and Articles unless they have very clear legal advice as to its suitability and have taken account of the issues we raise.

65. We anticipate a model document adapted for at least Roman Catholic and Church of England projects to be available shortly and this should provide a suitable basis for other religious groups.

66. Bodies already providing academies should note that this version of the Memorandum and Articles is not identical to the version under which their existing academies are set up. The principal difference is the replacement of sponsors by the three or more founding members of the company. This in turn has consequences for continued company membership and for the appointment of governors who run the academy company (and hence the academy) on behalf of the members. More is said about this below.

67. We draw attention to the single charitable object of the company in paragraphs 4, 5 and 6. It is crucial that this object be suitably modified to meet the requirements of preexisting trusts, especially (but not exclusively) in respect of religious character.

68. The matters of membership and governorship are dealt with separately below as they are of such crucial importance.

69. Paragraphs 94ff give the governors the power to run the affairs of the trust (ie of the company) and hence of the actual academy. Members need to take very careful account of this in determining the appointment of governors and in deciding whether or not to be

governors themselves. The governors are in effect the company directors and this needs to be taken into account in selecting them and in determining the arrangements for their selection. We advise that the founding members of the company should take careful advice about this in order to secure their purposes (and the purposes of any originating trust) for the academy into the future. The members must not put the purposes of the trust and the character of the institution at risk by inappropriate arrangements for immediate or future governor appointments.

70. Detailed legal advice in relation to the Memorandum and Articles is essential if any preexisting trust body is involved. Also, in cases where those involved have no previous experience of academy status, such advice would be wise in order that those concerned fully understand the step they are taking.

71. It must never be forgotten that it is the academy company that is responsible for everything to do with the academy. It is accountable to the Secretary of State for the way in which it carries out that duty. This goes substantially beyond the position of the governing body of any maintained school which (as noted above) always has undergirding it the local Authority's "duty to maintain" with all its varied consequences.

72. Academies are independent schools. "Independence" means what it says and is not to be treated lightly. You will be responsible!

The Funding Agreement between the Academy Company and the Secretary of State

73. Just as the model Memorandum and Articles is not suitable as it stands for schools with trustees, the same applies to the model funding agreement. A revised model will shortly be available. However, it is not anticipated that the differences will be great, except to make it clear that the agreement pertains to the carrying on of an academy with characteristics (for example a religious character) appropriate to the purposes and objects of the trust.

74. However, we draw attention to the fact that the Agreement is a legal contract between the signatories and the Secretary of State, carrying obligations on both sides. Both individual and corporate prospective members of the academy company (as well as the governors they come to appoint) must assure themselves of the extent of their obligations and of their capacity to meet them. This is not a contract to be entered into lightly. The penalty for failure is in effect to have the academy taken away from you either temporarily or permanently.

75. All parties concerned should take legal advice on the content of the Funding Agreement and the Memorandum and Articles and assure themselves that these documents achieve what they wish to achieve and protect what they wish (or have the duty) to see protected.

76. The annexes to the Funding Agreement are of considerable importance and require their own careful scrutiny. In particular, it is essential that schools planning to convert discuss with their DfE adviser the exact effect on their admission arrangements. Schools with trustees, bodies that appoint foundation governors and religious authorities must ensure that all these parties are happy with the planned admission arrangements. In general these are expected to reflect exactly the arrangements in the predecessor school. Similarly, selective schools must ensure that the relevant powers are correctly reflected in Annex B, as must any boarding schools that seek to convert. It was made plain in the Lords that such schools are not expected to change their existing practice on conversion.

The Members of the Academy Company

77. ss12ff of model Articles set out the normal expectations of the DfE in respect of members of the academy trust. There must be at least 3 "signatories to the Memorandum of Association"; any body (such as foundation) associated with the school may appoint members; the Secretary of State may appoint one member if he wishes to; the chair of governors is a member ex officio; these members may appoint other members but must do so unanimously.

78. For schools without any existing associated foundation, the DfE seems to expect that at least three (and even all!) of the existing governing body members of the converting school should sign the memorandum and become founding members of the academy company in their own names. We take the view that this is not very wise even for community schools and we say more about this below. However, it must surely be quite improper for any voluntary or foundation school, as it would prevent the trust having even the slightest continuing influence (either directly or through proxies) on the future character and ethos of the school. The trustees have a duty to preserve the purposes of their trust and (in our view) handing the permanent control of the school over to a group of named individuals over whose succession they have no influence must be in breach of trust, whether or not the trust has a religious character. We advise that the trustees should refuse their agreement unless either the foundation is permanently empowered to appoint

a majority of the members or (or in addition) the trust itself becomes a corporate member and is signed up as such.

79. In the case of schools with a religious character we advise that the majority (even all) of the initial members should be corporate bodies from the relevant religion and/or denomination. This could for example include some mixture of the trustees (if they are a corporate body) or the local incumbent in his corporate capacity (if they are not), the relevant Diocesan Board of Education or of Finance or similar body, the Area Dean in his corporate capacity (as the Deanery Synod is not a corporate body) and the PCC of any associated parish(es). This membership pattern reflects common existing models for appointing foundation governors and gives a strong succession plan which can be relied upon to secure the permanent character of the school.

80. It would be possible to rely on the clause empowering the associated trust (or other body) to appoint members, provided that this is a majority of the members and all parties are agreed that the trustees (or other body) can bear the weight of this responsibility. This seems sensible if the "body" is the relevant religious authority (eg the diocese) but not if it is the trustess as (in the Church of England at least), this would often result in the local Vicar and Churchwardens having to bear all this burden which in present practice is shared between them, the Diocesan Board of Education and sometimes the Deanery or other parishes.

81. Note that this provision for company members is not a direct replacement for the existing pattern of governor appointments. Because academies are independent schools the legislation surrounding them and their practice is much less comprehensive than for maintained schools. They are, as the government has made clear "more free". Hence the majority/minority patterns of governorship which were appropriate within the context of the dual system partnership of church and state are not appropriate for what now becomes in effect a private provision. The trustees must retain always a majority which ensures that the purposes of their trust may be carried out and cannot be frustrated by company members who are appointed from elsewhere and do not share the purposes of the trust.

82. Schools without an existing foundation will have little option but to have named individual initial members unless they find some local trust or other corporate body (a Community Association, a Parish Council, local companies, existing academy providers, education companies, other local educational institutions) that might like to join the company.

Involving strong, continuing local partners will reduce the problem of finding skilled and motivated successors with a long term vision for the school. This is an issue which we suggest community schools should consider with care. Ask yourselves, "What happens after us?"

83. Equally important is an understanding of how governors of these academies are appointed and of the role of the governors.

84. Para 94 of the Articles sets out the role of the governors to "manage the business of the academy trust" and to exercise all the powers of the academy trust". The governors are in effect the Directors of the company. Their appointment and composition is therefore crucial.

85. Members may also be governors and corporate members may appoint an individual to act both as governor and as the attending member on their behalf. This is useful in avoiding a situation where the officials of corporate members could not undertake to attend themselves because of the potential number of academy companies of which they might be members.

86. There must be at least three governors and may be as many as is felt reasonable. However note that the complex requirements for committees which form part of maintained school law and practice do not apply to academies. While similar tasks will have to be carried out there could in principle be much smaller numbers of governors than is now common. This is however very much a local decision.

87. Note that, if a number of schools are grouped either as one academy or as several academies under one company the same governors may function for all with either Local Advisory Bodies or Local Governing Bodies set up for the individual academies. Note however that the academy company and its Directors are always the ultimately responsible body.

88. The Local Authority may appoint a single governor if it wishes. This governor is not a member of the company. The Principal is a governor ex officio. There must be at least two parent governors elected by the parents.

89. Except for Additional and Further governors which may be appointed by the Secretary of State if things go wrong, these categories represent the totality of governors not appointed by the members or coopted.

90. Up to two staff governors (in addition to the Principal) may be appointed by the members or coopted. It is up to the members how they determine the actual names and note that there is no requirement for staff governors at all.

91. Otherwise the governors are simply appointed or coopted by the members. This role of appointing the governors is clearly a crucial one for the members and explains in part why the make up of the membership is itself so crucial. The governors will in effect run the school, but if they get it wrong it will be the members who find their school removed from them either temporarily or permanently. It is therefore crucial in all cases (and especially in schools with a religious character) that the membership is able to ensure the continued appointment of suitable governors.

92. All governors (except for the parent governors) may be removed by the "person or persons who appointed him". This includes the staff governors, who may therefore be removed by the members.

93. Note that there are no complex regulations about removal as is the case in maintained school, though no doubt fairness of purpose and process should be observed.

94. Note also that there are no exofficio governors. This is a further reason why the strong links represented by present exofficio governorships (eg with the local parish) must be replaced by equally strong and permanent links at the company member level such as are suggested above. This will in turn enable appropriate governorships to be sustained through the appointing power of the members. For example, it might be a reasonable norm for the local incumbent to be both a member and a governor.

RE and Daily Acts of Worship

95. Because academies are independent schools and are deliberately set in a light touch legislative context, there are some requirements which are in statute law for maintained schools but which are put within the

funding agreement for academies. These include the requirement for daily acts of worship and for the teaching of RE. These are imposed by the funding agreement on all academies (as they apply to all maintained schools). There are various versions depending on the precise religious character (or lack of it) of the school. Trustees must take legal advice to ensure that the correct paragraphs are used to meet their particular case and to enable the purposes of their trust to continue to be honoured and to ensure that they cannot be changed in the future.

96. While the presence of these requirements simply in the Agreement rather than in legislation may seem to weaken the force of the provision, this is (we suggest) not necessarily the case. The Agreement gives the Secretary of State the power to take action were the terms of the funding agreement in this respect being deliberately flouted by (for example) a secularminded Principal. There are teeth in this agreement which are not there in the mere commonplaces of statute! The question remains, however, as to whether the Secretary of State would use them.

AND FINALLY

97. All the documentation involved in conversion needs the most careful attention. This is perhaps the most serious step that your school is likely to take for several generations. All involved in its present life must treat both the general decisions and the detailed issues with the utmost seriousness. The government is hopeful that conversion will sustain the quality of fine schools and improve the effectiveness of weaker ones. This will only happen if great care is taken over the technical details which can make or mar the whole life of the academy into the future.

Lee Bolton MonierWilliams 1 The Sanctuary, London SW1P 3JT

Tel: +44 (0)20 7222 5381 Fax : +44 (0)20 7799 2781 academies@lbmw.com www.lbmw.com

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