

The Academies Bill 2010 - Guidance

The Academies Bill signals a very significant change in the structure of the English schools system. It heralds potentially one of the largest changes affecting the Church schools since the creation of the dual system.

This paper provides guidance on how this applies to Church of England primary and secondary schools. It affirms the underpinning of Church schools, establishes the principles to be applied when church schools become academies, develops key operational procedures and highlights a number of related issues.

It is intended for use at national and diocesan board level and by schools.

Introduction and Background

1. This guidance has been developed following scrutiny of the Bill, discussions with DFE officials and politicians, an Association of Anglican Diocesan Directors of Education (AADDE) and NS symposium and advice from the NS legal advisers. It develops and supersedes the interim guidance published on 14th June 2010. **This guidance is still subject to further amendment as new information becomes available.**
2. The Bill will most likely become law by the end of July 2010.
3. The Bill is regarded as permissive rather than the basis of expectation
4. The DFE web site contains guidance, application forms, initial model documentation and exemplar funding agreements.
5. The government expects to announce the first small tranche of new academies in September. Timescales for other schools are not clear. Schools deemed to be failing will be subject to direction to become academies. The criteria to be used and the process for how this will work will be published later in 2010.

Church Schools and Academies

6. Through the dual system the C of E has become the largest provider of schools in the State system. The schools are distinctively Christian in nature. In the light of the changes it is appropriate to be reminded of why the C of E is a provider of schools.
7. The main points (with acknowledgement to *'The Way Ahead – C of E Schools in the new millennium'* 2001) are:
 - Church schools are a key part of national provision and are bound together by many aspects of Christian principle and foundation
 - Church schools are inclusive and for the local community. They exist equally for those of the faith, those of no faith and those of other faiths. This was expressed by Lord Runcie, when he was Archbishop of Canterbury, as: 'nourish those of the faith, encourage those of other faiths and challenge those of no faith'
 - Church schools stand at the centre of the Church's mission to the nation, particularly for the disadvantaged. They provide a key means for the Church to reach out to young people
 - Church schools provide a balance between service and nurture
 - Church schools must be distinctively and recognizably Christian institutions. Key parts of this expression are: collective worship, servant leadership, development of koinonia and the pursuit of excellence

- Church schools are both ethos and values driven. The web site: www.christianvalues4schools.co.uk is a significant expression of this
- Church schools, by working in harmony with their diocese, their parishes, their LA, other schools, church HEIs and related organisations contribute to the lives and well being of others
- Church schools are often ecumenical in character and structure. There are strong bonds with the Methodist Church and the Catholic Church
- The C of E is the biggest national provider of academies under the original framework. These academies all serve areas of significant disadvantage and are a manifestation of the Church's mission.

Key Issues of Principle on the change to Academy Status

- Whereas the Church does not oppose the concept of academies or the transition of some schools to academy status, there are a number of guiding principles and strategic concerns which should influence decision making at all levels. The Church needs to be seen to be positive, proactive and critically constructive in response to Government initiatives in order to maintain its long term strategic future in the school system. It must be remembered that dioceses often have obligations as trustees and these must always be fulfilled
- At the heart of this is the need to ensure, through stewardship and guidance that a good decision is made for each school. **That is, one made on the basis of what is right for the school, the pupils, the community, the LA and the family of local schools.** Will the decision to become an academy tangibly improve learning, achievement and ethos?
- Schools and DBEs should be mindful of the following points when considering a change to academy status:
 - A period of pause, reflection and contemplation is better than a rushed or impatient decision. This is not a time limited process – there is no rush
 - Financial considerations should not drive the decision making process. There is no evidence yet that schools will be significantly better off by becoming academies. Consideration must be given to the financial impact and a business case must be developed to support a proposal
 - There must be added value (learning, achievement, developed ethos) for the transition to be worthwhile
 - The needs of vulnerable children in the school and wider community must be paramount
 - The Church does not wish to see a fragmentation or loss of a sense of 'family'. Diocesan structures and ways of working have, over many years, developed collegially and collaboratively and this has brought great strength to the reputation and achievements of Church schools. It is important that this is maintained and developed, not negated by the creation of new academies
 - The Church academies established so far all serve deprived areas. This is a key part of the church's mission. This raises questions:
 - Will the new wave of academies, especially those already judged outstanding, compromise this aspect of mission?
 - Will giving academy status to a school undermine equitable distribution of resources to the remaining schools?
 - Will small rural schools be able to cope with the additional burdens?
 - Will academy status directly benefit students?
 - How will the family of Church schools work together in the future?
 - In relation to these and related questions dioceses and schools are urged to think beyond the implications for just one school. It is essential to consider the role and function of the school in both its local and

wider community and the creation of an academy would be unacceptable if the key principles are compromised

- DBEs will wish to consider a possible 'backlash' effect of (say) several C of E schools becoming academies. If this leads to other schools losing resource, through reduced LA capacity, it could be seen as working against the Church mission for equity of provision.

Outstanding Schools

11. Schools currently judged to be 'outstanding' by Ofsted have been invited to apply immediately for academy status. There is no closure date on applications, despite popular myth of the need to submit an application by 1st September 2010 though schools were expected to start the process early if they wish to convert rapidly.

12. Key issues relating to this category of schools are:

- There is an expectation that outstanding schools will support a weaker school. Can this be realistically achieved and has the school got sufficient capacity to enable this?
- The snapshot Ofsted judgement of 'outstanding' will be the only criteria for fast tracking. It cannot be presumed that this judgement still holds good if the inspection was a while ago. Circumstances can change rapidly and dioceses, heads and governors must be aware of the arising implications. It is therefore essential to thoroughly check the school's current capacity to benefit from academy status and it may not be in the school's long term interest to become an academy if the judgement is insecure and additional future support may be needed

Other Schools

13. Schools in other OFSTED categories (other than failing) may now apply, but no timescales or further details are available about how and when applications will be processed. Details will be published by the Government in due course

14. Key issues relating to this category of schools are:

- It is presumed on information currently available, that no external sponsorship or provider will be required but new partners/sponsors could be engaged
- As with 'outstanding schools' the decision to apply rests with the headteacher and governors but is subject to other aspects of consent by foundation governors.

Schools deemed to be failing

15. This category of schools will be handled differently, but no substantive details are yet available.

16. Key issues relating to this category of schools are:

- There is no clear view at present on how such schools will be defined or what the trigger points will be, but the Bill identifies 'a school eligible for intervention within the meaning of the 2006 Act'
- The Secretary of State is empowered through the Bill to direct failing or weak schools ('eligible for intervention') to become academies. It is unclear about how extensively these powers will be used but the Government appear resolved to use these powers
- It appears that an accredited provider (or sponsor in previous parlance) will be appointed to 'take over' the school and re-engineer it, possibly using the advertised competition route. There are obvious implications here for Church schools and further guidance will follow

- The NS national proposals for achieving a co-ordinated and system wide accreditation approach will be re-invigorated when new DFE guidance emerges. The Church must retain stewardship of its schools.

Consideration at Diocesan Board Level

17. DBEs will need to examine each potential application for academy status with care and in relation to the principles set out in paras. 6 to 10 above. Paras. 20 to 27 below outline how this will work as a process.
18. DBEs are urged to take account of the following points as they proceed:
- The DBE should act as a neutral critical friend in the process, seeking to ensure (as in para 9) that a good decision is made by and with the school
 - Thinking at diocesan level should be driven by the bigger vision for the purposes and delivery of Church schools
 - DBEs will have an entirely different relationship with the academy after the transition. If the DBE becomes a member of the academy company, they will be able to exert considerable influence on governorship and so forth, but this has resource implications
 - DBEs will need to be mindful of the impact on both their resources and capacity if the number of academies becomes significant. DBEs may need to develop contractual arrangements for providing continuing services to academies but it must be borne in mind that academies to engage the diocese or seek their permission to undertake capital projects
 - The implication of a DBE refusing to give consent will need careful reflection. It may ultimately damage the greater concern for developing a church school family working in partnership with the diocese
 - DBEs will need to build strategies for ensuring that academies continue to regard their religious character as essential and developmental.
 - Academy Trusts (and in particular the three or more founding members) rather than LA will be responsible for standards. In order to meet this responsibility the founding members of all academies appoint the majority of governors. This is not the same as the voluntary or foundation school majority or minority models. The minority model does not exist for academies

Considerations for Schools

19. Before making an application for academy status, school governing bodies and headteachers should thoroughly consider a number of issues and be prepared to discuss these in detail with relevant stakeholders and the DBE. They are:
- The school should rapidly discuss their intentions with the DDE and DBE, thus ensuring good and effective communication and support
 - Schools must recognise the consequences on resources and capacity associated with the extra portfolio of duties they will take on. The extra administrative and managerial burden must not be underestimated. Schools should obtain a very clear statement from the LA about the extra money they will receive, the services they will forfeit and the cost of buying in services. A range of providers should be considered in order to get best value
 - The NS advises that academies should not deviate lightly from national terms and conditions for staff employment, but there could be case for properly negotiated change
 - Schools must develop and evaluate an operational and strategic business plan (covering both recurrent and capital aspects) which demonstrates continuing viability and growth

- Careful consideration must be given to future governance structures. Academy governors are appointed in the main by the founding members and the concept of foundation majority or minority does not exist. There must be at least three founding members and the NS advises that it is essential that these should be corporate members (not individuals) in order to ensure future continuity. The obvious three in most circumstances would surely be the Trustees, the DBE and either the local PCC (for small primaries) or the Deanery Synod for secondaries. If desired there can be more than three founding members, which would allow for more than one PCC if required by local circumstances. This model should ensure that the ethos of the academy is not weakened over time. Consideration should extend to the size, the balance of representation and the functionality of the new governing body
- Consultation prior to application is required but the method is not specified. Church schools will be expected to consult widely with staff, parents, students, the community and the parish and to prepare a balanced report on the outcomes. The key feature of the consultation should be the perceptions of stakeholders on a) the impact of the new status on standards and b) the impact on other schools in the area
- Schools wishing to become academies should be able to demonstrate their commitment to collaborative working, particularly with the wider school family
- Careful consideration will be needed on how the new status will impact on the development of religious character. SIAS inspections will still happen, RE to an agreed syllabus will be required and collective worship will still be expected and will be required by the funding agreement
- The application and all that ensues must not lead to the DBE incurring extra costs. Any costs in establishing the academy must be borne by the school, using its own funds and the £25k set up grant
- Governors in academies will have a more extensive and demanding role. This will require additional training and resourcing. The implications of being a trustee or director of the academy company must not be underestimated. They take on liabilities, particularly if the school fails or gets into financial trouble. They are directly accountable to the Secretary of State
- The Bill places no limits on the size of schools becoming academies. Very small schools will need to thoroughly assess their ability to manage themselves as academies.

Conditional Agreement – the process

20. This section covers the recommended process for use by schools and DBEs as they process an application for academy status.
21. This section is built on the assumption that there are foundation governors and that the 'person or persons by whom the foundation governors are appointed' includes the DBE or the DBF if it is the trustee. This ensures that either the DBE or the DBF becomes a consenting body and has a right of veto and/or the ability to set conditions. DBEs must check the position of foundation governors. It is likely that in a very small number of schools (especially VC) there will not be appropriately appointed foundation governors and hence the DBE may not be able to impose conditions or a veto as it is not a trustee. If one foundation governor or their nominating body objects to a proposed application it cannot go ahead. Clause 3(4) of the Bill refers.
22. The steps are:
 - The DBE should review the intention and application from the school. This may be by means of a checklist such as that shown in para. 31.
 - Each separate body who appoints foundation governors must provide its own letter indicating agreement, with or without conditions, or dissent. DBEs may wish to obtain legal guidance on the substance of the proposed letter
 - These letters should be lodged with the headteacher, each governor and the DFE project lead.

- The DBE should then ensure that the conditions find expression in the draft funding agreement and/or the memorandum and articles. In some cases this may extend to lease conditions.
- These key documents should not be signed off until all parties are happy
- The DBE should then seek to establish mutually agreed monitoring arrangements
- The school must pay if the diocese incurs significant extra costs to achieve this process.

The Funding Agreement and Memorandum and Articles

23. These are the pivotal 'outcome' documents and great care is needed to ensure they are appropriate and correct before signing. They are the means of expressing and ensuring that conditionality is secured and acted upon.
24. The Funding Agreement is the legal contract between the Secretary of State and the Academy Company to provide educational services in return for funding
25. The Memorandum and Articles are the constitutional devices which determine governance and management arrangements. They are normally incorporated in the Funding Agreement
26. The NS will shortly produce a set of variant exemplar Funding Agreements to support this step
27. Key aspects around conditionality are:
 - The founding members of the academy (of which there must be at least 3) should normally be the Trustees, the DBE and either PCC(s) or Deanery Synod. It is not appropriate for the founding members to be named individuals or to include a majority of secular partners.
 - The 'foundation' governors must remain as a majority and the proposals must be acceptable to the Foundation/trustees
 - The NS advises that the consultation processes must demonstrate support for the proposal
 - The religious character will be sustained and developed. This must find expression in the funding agreement through an ethos statement
 - There is an expectation of collaborative working with local schools and other Church schools
 - There must be clear expression about how the academy will add value and improve educational outcomes
 - For secondary schools, there should be a commitment to support and work in partnership with existing 14-19 partnerships
 - There must be a viable business plan
 - DBEs may wish to expect to continue with advisory rights, particularly on headteacher appointments
 - The transition must be carried out at no additional cost to the DBE
 - A due diligence exercise should be carried out and all risks arising mitigated
 - The admissions policy, present and future, is legal, appropriate, acceptable, inclusive and in accordance with diocesan and NS guidance.

Other Issues

28. Here is a list of other matters to be considered as part of the process:

- The current category of the school (VA, VC, foundation or community) has a bearing on some aspects of the change process. These will need to be carefully considered
- DBEs may wish to consider whether they can impose a top slice on the academy revenue stream to pay for engagement with the DBE and services. This may be in the form of an imposed SLA. Legal guidance on this will be needed
- DBEs may wish to consider organisational models such as single Trusts or single funding agreements or the creation of several group trusts. If this is being considered, in depth legal advice will be needed
- It is timely for DBEs to consider the impact of these changes on their modus operandi and that their work/role will be different in the future. The NS is beginning work on this in the near future
- The impact of Free Schools has not been assessed at the time of writing. Further guidance on this issue will appear once more is known
- The future position on capital is bleak. Schools and DBEs should make no presumptions. Academies which are ex VA will not have to make a 10% contribution to capital projects. LCVAP and DFC cease to exist and are replaced by arrangements given in the Funding Agreement. Only mutual agreement between DBE and Academy will enable the Academy capital allowances to be 'grossed up' in the diocese. It is unlikely that academies will be prepared to be part of such schemes as it will take away their autonomy and be seen as cross subsidy to other schools. DBEs will need to evaluate the consequences of this.
- A 'tipping point' might be reached where it is not viable for an LA to continue to provide services for schools. DBEs will need to monitor this situation carefully
- At present, regulations about competitions for new schools are still in place and will be used but further guidance on this and the situation for schools eligible for intervention will follow when more is known. It will be important through the accreditation arrangements for the Church to remain as the provider
- Further guidance on admissions related matters will be given when more is known but academies must comply with the Admissions Code and schools of religious character with existing wide catchment areas will not need to change to more local ones
- Accountability for all matters passes to the Academy (which effectively reports to the Secretary of State) and this will have impact on the DBEs role and work
- It has been decided that if one school in a federation becomes an academy the other schools may also do so
- There will be another major Education Bill later in 2010. This will provide another opportunity to tweak the existing Academies Bill in the light of experience. It must be clearly understood, however, that 'government by regulation' is a thing of the past and that all uncertain matters will be dealt with (mostly at institutional level) on a case by case basis. It is therefore essential to try to pre-empt as many issues as the start of the process.

Legal Issues

29. The NS Legal Advisers, Lee Bolton Monier-Williams, have provided a number of legal and technical briefings aimed at supporting the process. The briefings published to date are accessible on the firm's website www.lbmw.com. **It is anticipated that more detailed legal advice will follow as it becomes**

available. Also, at the time of writing, work is about to start on developing template/model documents for funding agreements, memorandum and articles and leases.

30. DBEs and schools need to be mindful of a number of headline issues some of which have been referred to above. Briefly, these are:

- **Land transfer:** The Bill suggests that the norm should be that the trustees (having previously indicated their general agreement to cooperate) then make their land available by means of a lease via the LA, thus enabling a single lease from the LA to the academy company covering all of the required land. It will be essential that suitable conditions are incorporated to ensure that the trust can still carry out its purposes and that the arrangements for the appointment of foundation governors are safeguarded. This requires negotiation to establish national model documentation
- **Trusts:** Existing trusts and their trustees (whether for voluntary schools or for foundation schools with foundations) simply remain in place. Their legal role does not change, though they will formally be one step more distant
- **Reverters:** The government has indicated that it believes that reverters will not be triggered by this conversion. It is our view that they may not be for the voluntary conversion (where the trust remains in place) , but that they are bound to be for the forced conversion of schools requiring intervention if this results in the compulsory purchase of the trustees' land as set out in the Bill
- **TUPE of staff** will apply, even in VA and Foundation schools, as the academy company becomes the new employer. The procedure will have to be gone through with care and requires its own consultation procedure with staff and their unions, quite apart from any consultation which may otherwise be required for the conversion. Subsequent to conversion, terms and conditions may be varied by agreement (or in some other circumstances) and new staff need not be appointed on the standard terms and conditions. Any academies intending to make variations (e.g. in the timing and length of the school day/week as it may effect the hours and days of work) need to take great care and ensure that they have appropriate legal advice
- **Charity implications:** The government appears determined that the academy companies should be exempt charities with the YPLA as Principal Regulator. This has been challenged at length in the Lords by those who see the Charity Commission as a better defender of the charitable nature of these bodies. There are arguments on either side. The old governing body (with its charitable status) will of course cease to exist and there will be technical issues about the transfer of assets which the GB may currently hold in its charitable capacity. The trustees remain exempt charities and there is currently no proposal that they should have a Principal Regulator, whereas it is proposed that the DFE will assume that role for voluntary and foundation schools.
- **VAT:** the position for academies is roughly comparable to that of VA schools. The funding agreement provides that VAT is fully covered in the level of funding delegated, which should therefore be greater than for a comparable community school. Discussion with government and HMRC will be required to establish details but there is no reason to suppose that these would differ greatly from the present academy position. With groups of academies there may be internal VAT issues to be addressed
- **Pensions:** There is continuity of pension entitlement and provision. Schools will have to watch out for past and future pension deficits (particularly for non-teaching staff), which will become their individual responsibility.
- **School Trustees:** School trustees (which might be the DBE or DBF) need to have regard to the trusts upon which land is held for the school, but it is anticipated that trustees will share the perspective of the school's Governing Body. However where land is held on trusts that require land to be used for the provision of 'education in accordance with the tenets and principles of the Church of England' trustees are reminded of their wider responsibilities to the Church as a whole and the recommendations of its educational advisory bodies at both Diocesan and National level. School trustees of any category of church school are obliged by the Diocesan Boards of Education Measure 1991 (as amended) to consult with DBEs over any proposed lease of the school site to the Academy Trust and must have regard to the

DBEs advice. Clearly this should be done at the start of the process, as the trustees cannot otherwise sign a letter saying that they will agree to make the land available.

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