

### GUIDANCE FOR THE TRUSTEES AND GOVERNING BODIES OF VOLUNTARY AND FOUNDATION SCHOOLS IN BECOMING AN ACADEMY UNDER THE PROCEDURES OF THE ACADEMIES BILL 2010

#### Which schools can become academies at this stage under this process?

1. At this stage only schools judged "outstanding" in their most recent OfSTED inspection may start the process to become academies under this voluntary process.
2. Schools of all categories (Community, VA, VC, or Foundation) may apply if they meet this first criterion. Also (for the first time) primary and (we presume) middle schools may also apply with the same proviso.
3. It is the government's intention that other schools will also be able to apply to convert to academies in due course but this will not be until after the Bill becomes law, which is expected to be some time in August. We will alert clients to developments as soon as procedures and criteria are clear.
4. Once the Bill becomes law there will also be a compulsory process to convert schools "eligible for intervention" into academies. No detailed process has yet been indicated for these and we have many concerns about it.
5. If your school has buildings provided under a PFI agreement this does not prevent you becoming an academy. It may however make the process more complex and longer. The government does not intend to "buy out" the PFI contract so there will be negotiations and special legal agreements to be attended to.

#### Where is the process for outstanding schools set out?

6. A detailed description of the process can be found on the Department for Education website at:  
"<http://www.education.gov.uk/academies/becomeanacademy>"  
Click "To access further guidance follow this link" to obtain the full document
7. This DfE document is the definitive guide. We comment on various issues arising from it below.

#### How soon can we apply if we are an outstanding school?

8. Any time from now. Schools planning to become an academy by this September, had to have applied before the end of June.

9. However the change can actually be made at any time (even mid-term) so you need not rush, especially as all voluntary and foundation schools will have to consider the matter carefully with their trustees, those appointing foundation governors and any relevant diocese or other religious authority.

#### If we decide to become an academy, can we change back later to our existing category?

10. No. Not under current legislation. The process is irreversible as it stands. If you did not want to continue as an academy you would have to close the school and it would (or would not) be replaced.

#### What are the first steps we should take?

11. The Governing Body must meet to take a formal decision that it wishes to set the process in motion and appoint a working group to oversee the process. It is for the governing body (and it alone) to apply for academy status.
12. However, the governing bodies of voluntary and foundation schools may not proceed without the agreement of (a) their trustees and (b) all those who appoint foundation governors to the existing school. The government appeared to have intended that this should always include any relevant religious authority but the legislation does not actually provide for that unless the diocese (or equivalent) is either the trustee or an appointing body. It is essential therefore for GBs, trustees and diocesan bodies to discuss the pros and cons of this major step together before any formal application is made.
13. We stress that the agreement of trustees and appointing bodies is required for this process and voluntary and foundation schools cannot proceed without it.
14. While these discussions are going on you should read the DfE Guidance and notify the DfE of your interest. The DfE will then appoint an adviser to help you through the process as it affects your specific circumstances.
15. In the original form of the Bill the Local Authority was explicitly excluded from being consulted in this process. They still cannot oppose or prevent this change. However, in the course of debate in the House

of Lords the government agreed that there should be a consultation but that the GB should be able to choose the bodies or individuals to consult. Detailed advice and guidance is needed on this for the specific circumstances of each school. Note however, that the consultation has no teeth. No-one except your trustees etc as set out in 12 above has the power to prevent the GB applying to convert to become an academy if that is its wish.

16. In general this consultation process (other than with trustees and appointing bodies) should be with parents, with the Local Authority, with the Diocesan Board of Education or similar if not otherwise included under 12, with staff and with the staff's associations. The latter two must in any case be consulted formally in respect of the necessary TUPE transfer required. Again you need detailed advice on this process. None of these can prevent a decision to change, but their views will presumably weigh with governors.

### **Existing academies have external sponsors (a company, an educational institution, the church or a trust set up by someone). Do we have to find a partner like this?**

17. No. The requirement to do this has been removed. The Governing Body may set up the academy company on its own with its existing trustees. However, it is free to invite new partners to join it if it wishes to do so and the trustees and appointing bodies are in agreement.

### **Is it expected that the academy will in some way support another school?**

18. Yes. This is expected, though exactly what that will mean is not prescribed. You should probably be having some confidential conversations with other schools about this immediately if you are looking for a swift change.

### **What about specialisms?**

19. Yes, if you are a secondary school, you will be required to have one or more specialisms.

### **What about admissions?**

20. The Bill and the guidance say that your admissions arrangements will not change. This includes selective arrangements if you have them already and the use of denominational or other religious criteria if these form part of your present arrangements. The Bill says that academies should admit children "wholly or mainly from their local area". However the Minister confirmed in the House of Lords that this will be interpreted in the context of the individual school. Hence schools with wide catchment areas because they are selective,

admit on faith criteria or have a boarding element will not be required to change their present practice. It will be essential, however, that schools in these kinds of situations examine this matter in great detail with the DfE before agreeing the change and have the clear agreement of their trustees and appointing bodies to whatever the admissions consequences may turn out to be.

### **What about staff employment and terms and conditions**

21. The academy company will become the employer of the staff (ie they will transfer either from the LA or from the VA or Foundation governing body). TUPE will apply. Hence existing staff transfer on their existing terms and conditions.
22. However, the academy company will not in the future be bound by the teachers pay and conditions agreements, which only apply to maintained schools. They will therefore have in principle a wide range of discretion about pay, terms and conditions for new staff and \*by negotiation) for existing staff.. The working day, working week and school year are all open to change. Clearly, however, these are very sensitive areas and legal advice is required if there is any intention to make changes in the future.

### **What is an academy really and will the change make any difference?**

23. At the moment you are a "Maintained School", that is you are maintained by the Local Authority and are what most people would call a "state school". An academy on the other hand is an "Independent School" even though its funding still comes from the state.
24. This makes a huge legal difference, as academies are created by charity and company law, not by education law and are (in the main) subject to Independent Schools legislation, not mainstream educational law.
25. So, for example, neither the Basic Curriculum nor the National Curriculum is applicable to academies. We say more about the effects of this below.
26. Hence the government talks of the extra "freedoms" which academy status brings.
27. In addition, since the Local Authority has no role in respect of academies it will receive no funding on their behalf. Instead, the funding which would have gone to the Local Authority goes to the individual academy. The extent of this extra depends on local circumstances (ie on how much the LA currently "top slices"). It may approach 10% but could be as little as 2%. There is a calculator on the DfE website to allow you to get a rough figure but this is not always accurate. If this issue is important to you, you must check with your LA to get your local figure. Academies are free to spend

this money as they wish, but should remember that they will need to pay someone to provide the services which they now receive from their Local Authority.

### **What effect does academy status have on the Local Authority's "Duty to Maintain"?**

28. Schools considering a change to academy status should consider with care the effect on them (and on potential calls on their budget) of the fact that this will mean that the Local Authority no longer has any duty to maintain them. This duty is not just about HR or legal matters but comprises a vast range of premises, HR, legal, technical, IT, and advisory services which will either not be provided to academies or will be provided only under contract and with a charge.
29. It may be that schools which are part of some other grouping (especially Church of England or Roman Catholic schools) may be able to obtain some or all of these services from their relevant diocese or from service agreements and structures which dioceses may (jointly or severally) set up. There will also be private, commercial bodies offering services of this kind. These matters should be discussed with trustees and dioceses immediately and the issues weighed with care.

### **What effect does a change to academy status have on any designated religious character the school may have?**

30. This does not change, except that the school is transferred from the maintained school list to the independent school list. However, in order to safeguard such a character for the future it is essential that the academy agreement provided by the DfE makes this character plain and inalienable except by the closure of the academy. Such provisions should also be written into the academy Memorandum and Articles and into the land leases which will be necessary. This is extremely important. Otherwise the trustees could come to be in a position where they were breaking their charitable trust and the religious character of the academy could either become ineffective or lost.

### **What effect does a change to academy status have on the charitable status of the trustees and the governing body?**

31. The governing body ceases to be an exempt charity, as it ceases to be the governing body of a voluntary or foundation school. It may be the case that the Charity Commission will have to advise individual school existing governing bodies on any charitable assets which the governing body (as distinct from the trustees) may hold. In the case of a foundation school

without a foundation the public property held by the governing body will simply transfer.

32. The trustees are changed neither in their composition nor in their status. They simply remain in place.
33. A new academy company will have to be created (the guidance tells you all about this) and the government intends that these companies will be automatically exempt charities. At the moment academy companies must actually register with the Charity Commission and it is possible that the exempt charity provision in the Bill may not come to pass and that you will eventually have to register. The DfE will keep you up to date on this matter –as indeed will LBMW.
34. In consequence of the creation of the academy company (whatever its eventual charitable status) the existing trustees are expected by the government to make their land available to the company, as it is the company which provides the academy. This (in our view) further distances the existing trustees from the life of the school and we advise in general that either the trustees should be one of the founder members of the academy company (there must be at least 3) or that the trustees transform themselves into the academy company if this is possible for them. The former is likely to be easier and cheaper. This is again an area on which to take the most careful advice in respect of your particular trust. It will also be imperative that trustees ensure that the leases they sign stipulate any religious character that the academy must have and include mandatory requirements in respect of the trustees agreement to capital works. The lease should also provide that, should the academy company and governing body default on these terms then the lease is void and the academy must vacate the trustees' site.
35. In this connection we stress the difference between those trustees who merely have public property vested in them (this will be most but not all foundation schools) and those that have actual private charitable value in their sites (this will be most but not all voluntary schools – both VC and VA). Trustees with private charitable value in their sites (or other charitable assets) must protect these for the purposes of their trust and may not simply pass them over to the control and "quasi ownership" of some other body. The fact that most trustees' property will have been enhanced in value by public investment does not invalidate this requirement.

### **What is the effect of the change to academy status on the teaching of RE (including denominational RE)?**

36. Because independent schools are not required to follow the basic curriculum, they are not required by law to teach RE, let alone denominational RE. Both these requirements must therefore be included in the

academy agreement and this should be reinforced by the Memorandum and Articles of the Academy Company and be made an obligatory term in the leases granted by the trustees. Unless these steps are taken the future of RE in the academy cannot be guaranteed, nor can any income from diocesan Uniform Statutory Trusts be used to support the academy. The DfE model documentation includes these requirements.

37. The trustees of schools without any current religious character should also consider their wishes in respect of RE and enforce any requirements they believe to be right. The model documentation includes the requirement.

### **What about acts of collective worship?**

38. In the same way a requirement for worship in accordance with the relevant trust deed and denominational (or other faith) practices must be written into the same documentation in order to secure its presence. The trustees will normally have an obligation to ensure this because their trust deeds will require it. Again it is there in the model documentation.
39. The trustees of schools without a current religious character should also consider what requirements they might wish to impose in this respect. The model documentation includes the requirement.

### **What about sites and will reverter be triggered under this process?**

40. Sites under this process will remain in the ownership of their present trustees (the playing fields being made available also to the academy company by the LA where these are not already owned by the trustees). However, the trustees will be expected to lease their site to the academy company. We believe that this can be done without breaching most trusts (but you must check!) or (we believe) triggering reverter. The situation is more complex if the trustees follow the suggestion in the DfE Guidance and lease their land to the LA, which in turn leases it (including the playing fields) to the academy company. We advise that you only follow this route if it is clear that it will not trigger reverter and that

the leases will provide for secure and unchangeable covenants of the kind envisaged in 36 and 38 above. All of this is greatly strengthened if the Trustees are also members of the academy company. The trustees' value in sites must be protected in this process and we anticipate developing model documentation to ensure this.

41. While the remarks above hold true (we believe) for this voluntary conversion, we have continuing reservations about the land processes set out in the Bill for the compulsory process by which a school eligible for intervention is converted into an academy. We will advise further when the government's legal views become available.

### **This is rather a lot of work (and a lot of legal and other fees). How do we pay for it?**

42. The government is making a standard grant of £25,000 available to each school in this voluntary process. It has also indicated that it will look at exceptional circumstances. We do not know whether the government would consider all voluntary and foundation schools exceptional, but would argue that they should, since the legal work will be greatly in excess of that required for most community schools.

### **Other useful documents to assist your understanding of these matters**

43. Trustees, dioceses and governors may find informative the following documents on the National Society website which were drafted by LBMW colleagues.
- "<http://www.natsoc.org.uk/downloads/acedmieshavingreligiousdesignationdec08.doc>"
- "<http://www.natsoc.org.uk/downloads/equalopportunitiesdec08.doc>"

**LBMW is supplying this outline guidance as a service to clients and the sector as a whole. However, the details of schools vary. Trust deeds vary. Local circumstances in respect of land and buildings vary. All of these require detailed investigation and (as the DfE Guidance makes clear) a range of legal tasks need to be undertaken.**

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