

BLACKBURN DIOCESAN BOARD OF EDUCATION
ACADEMY FRAMEWORK VOLUNTARY AIDED SCHOOLS

This document is to be treated as a working framework for all Voluntary Aided Schools who are considering the conversion to Academy Status. It is anticipated that there will be other changes when the next Education Bill is introduced by the Coalition Government, therefore the framework will incorporate these changes when they arise.

The Academies Act, 2010

Introduction and Status

1. The Academies Act 2010 offers an opportunity for schools to convert to academies by opting out of local authority control (similar to grant maintained schools of 1998). The opportunity is currently offered to outstanding schools although the government has made it clear their intention is to offer this to all schools. These 'new phase' academies are, therefore a different type of academy from those of the previous Labour Government, which were often failing schools which needed to be turned round.
2. This guidance takes into account that issued by the National Society.
3. This guidance is still subject to alteration due to the next Education Bill expected in December 2010/January 2011
4. The Academies Bill became law at the end of July 2010.
5. The Department for Education (DfE) web site now contains the application form and further details of how to apply. Model documentation and exemplar funding agreements are also available, but these documents are not suitable, as they stand, for Church of England schools wishing to convert to academies. The National Society working with its solicitors Lee Bolton Monier-Williams are seeking to settle a suite of model documentation which is suitable for Church of England schools wishing to convert. The government hoped to announce the first tranche of new academies in September, but legal and technical complications with land transfers and trust arrangements slowed the process of all but a few. All schools are able to register an interest, although 'outstanding schools' (Ofsted deemed) will be fast tracked. **In his announcement on 17th November 2010 the Secretary of State stated that all schools ranked good with outstanding features by Ofsted will automatically be eligible for Academy status. All other schools – primary or secondary – that wish to enjoy academy freedoms will also be eligible providing they work in partnership with a high-performing school that will help drive improvement.**

In addition, for the first time, special schools will also have the opportunity to become academies, providing them the opportunity to operate with greater freedom and autonomy in order to better respond to the needs of children with special educational needs or disabilities. Special schools will be able to apply to convert in January 2011.

6. Schools deemed to be 'failing' will, as under the previous government, be directed to become an academy, the criteria for this will follow in due course.
7. Headteachers and governors must ensure they are fully familiar with the implications (e.g. financial, HR and school improvement), accountabilities and full impact of academy status before they commit to converting to an academy.

8. The Bill places no limits on the size of schools becoming an academy, however all schools (particularly small schools) need to thoroughly assess their ability to manage themselves as an academy.

Issues to be considered

1. The impact of Free Schools has not yet been assessed.
2. What will be the impact on the LA should a significant number of schools decide to become academies? Will the Church be seen to be contributing to the creation of a 2 tier system of education? What is the tipping point at which the LA no longer becomes viable, and therefore has a detrimental effect on remaining schools which would predominantly be primary schools?
3. The Ofsted judgement of 'outstanding' is made based on evidence at a particular point in time. There are many factors that can affect a school, changes in senior leadership, governance, intake etc. It is important that at the time of application the school still has the same capacity and that going forward robust structures are in place to ensure, so far as we can, that this can be sustained when the school becomes an independent school.
4. At present, regulations about competitions for new schools are still in place and will be used where relevant. However for a school to change into an academy neither requires nor triggers a competition.
5. It is anticipated there will be another major Education Bill in December 2010/January 2011. It is hoped then when this passes into law (September 2011) this will be the point that Academy Legislation will be adjusted (hopefully favourably from the Church's point of view) in the light of experience. There is no guarantee of this of course.

Conditions for becoming an Academy

All Church Schools who want to apply to convert to an Academy must first have the consent of those who appoint Foundation Governors. In the case of Blackburn Diocese, the Board appoints Foundation Governors to all its schools; thus the approval is required of the Diocesan Board of Education (DBE). Lee Bolton Monier-Williams have produced detailed guidance on this. A Church School which converts to an academy will retain its religious designation. The vehicle which will run the academy is an academy company (sometimes called an 'Academy Trust'). This is a company limited by guarantee under Company Law. The company will also be an Exempt Charity under the Charities Act 1993.

It should be noted that this does not affect in any way the charitable status of any existing trustees of the school site, nor does it replace them. The existing trustees will still have a duty to maintain the purposes of their Trust under charity law and a duty to ensure, so far as they can, the continuation into perpetuity of any religious character and ethos of the school. It is therefore essential that the academy upholds its Christian foundation. I am assured that the suite of model documentation for Church Schools **produced by the National Society and its Solicitors Lee Bolton Monier-Williams address** these issues satisfactorily and guidance will be issued in respect of these as soon as they are finalized.

Church schools who wish to obtain academy status will therefore need to fulfill the following:

- To maintain the Christian foundation of the school, the DBE must satisfy itself that converting to an academy is in the best interest of the school, its pupils and the wider context in which the school operates. Schools must present a very clear rationale for changing their status which shows how the change will benefit the student population, improve educational outcomes and be supportive of the wider community. What would be the 'added value' of becoming an Academy? Safeguarding the well-being of children must be at the forefront of any decision-making process.

- The existing governing body of the school will need to establish the Academy Trust. There is an expectation that the DBE will be represented on the Trust. The National Society advise that for all categories of Church Schools (VA, VC and Foundation) it is preferable if Church persons are in the majority at both membership and governing body level. A VA school will only gain the approval of the Board if such a model is adopted. This is the best safeguard for sustaining the Christian Foundation of the school. There is a minority members/governors model academy company constitution for the VC/Foundation school with only a minority of foundation governors for use where the governors of an existing school won't accept a Christian majority and the DBE are prepared to accept this line. The Church body majority model is the preferred one however. For VC/Foundation schools I am advised that to go down the church body majority route DfE policy may first require the school to change category to VA and then convert. We will advise further on this as information becomes available. The number of representatives will be dependant on the size of the Academy Trust and will be discussed with each school.
- Since in our case (at present) all possible converting schools would be VA, the Memorandum of Association and supporting documentation must ensure that the church appoints a majority of members of the academy company and that this is reflected in the composition of the governing body. It is expected that this membership will comprise members of the local worshipping community. The 'Foundation' governors must remain as a majority and the proposal must be acceptable to the Foundation.
- Academies are independent schools and are therefore not required to follow the National Curriculum. However, as an Academy with religious designation the institution will still have a SIAS inspection (Statutory Inspection of Anglican Schools) which will judge the Christian distinctiveness of the school, the quality of teaching and learning in RE and the impact of collective worship. The academy agreement and Memorandum and Articles of Association, must therefore make explicit reference to:
 - a) Objects for the school which are grounded in the Christian foundation of the school
 - b) The provision for denominational religious education
 - c) Worship in accordance with the relevant trust deed and Anglican practices
- The Academy trustees must ensure that any lease they sign stipulates the religious character of the academy.
- Before the Academy can open the Academy Trust will need to ensure appropriate legal documentation is in place for the use of the land and buildings as an Academy. This is usually achieved via a long term lease which sets out the terms and conditions associated with the occupation, use, repair and maintenance of the buildings and land in question. As the original church trust legally remains in place, there would be a requirement within the lease that extensions and/or alterations to the buildings cannot go ahead without written consent of the religious foundation trustees and the DBE.
- The lease should also provide that, should the Academy Company and governing body default on these terms, then the lease can be forfeited and the academy must vacate the trustees' site.
- The consultation processes must demonstrate widespread support for the proposal, including from any other body who appoints governors. There are three different consultations that need to be undertaken:

First, all schools need to conduct a general consultation. It is the governing body who will determine the exact nature of this consultation. **(The DfE have produced guidance for schools about the consultation process as has Lee Bolton Monier-Williams.)** Note, that this consultation gives no one the power to prevent the change in status. We advise that a wide consultation should be the norm and that a short 'brochure' should be produced setting out the facts that the governing body wishes to convert the school into an academy

and giving the reasons why. This or any other appropriate documentation should be copied to the DBE.

The second consultation should be commenced with the staff in respect of their prospective change of employer, as the academy company will employ the staff after conversion. However, at this point it may be advisable to take legal advice as to the appropriate way to conduct this. Consultation with staff normally consists of both an informal stage and a formal process once the governing body has decided to submit an application.

The third consultation is with any school Trustees and with all those bodies who 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. If more than one body appoints foundation governors the governing body must consult with all parties.

- The Academy Company becomes the employer of all staff, who transfer to it from the employment of the Local Authority or the governing body as the case may be. TUPE applies and the TUPE consultation procedures must be followed as noted above. It is expected that all academies will comply with the national pay and conditions for staff. Only in exceptional circumstance would any deviation be considered appropriate. The power to use religious criteria in the employment of staff is one of the major consequences of designation for an independent school. The terms and conditions of existing VC staff will of course be protected under TUPE and the effect of this should be carefully noted.
- Any school converting to an academy must continue to develop collegially and collaboratively with the wider family of Church schools. Schools should be able to demonstrate their commitment to collaborative working, particularly with the wider school family. This includes an expectation that all outstanding schools that become academies will support a weaker school. In addition, there is an expectation that schools will continue to work with the DBE, in particular with key appointments, such as Principal/Headteacher, Deputy Principal/Headteacher, Assistant Principal/Headteacher, and Head of Religious Education (in a Secondary School).
- Becoming an academy will not have any effect on a school's existing admissions arrangements. Religious criteria can therefore still be used for admissions if they have been in the past. The admissions policy, present and future, must be legal, appropriate, acceptable, inclusive of the local community and in accordance with Diocesan and National Society guidance and, where appropriate, promote Christian distinctiveness. It will be subject to the requirements of the religious authority as set out in the admissions code and will have to comply with all aspects of the Admissions Code of Practice. Please note that recent case law in the admissions field has shown that taking no notice of the advice given by the relevant religious authority is not legally acceptable. All Admissions arrangements will be incorporated into the Funding Agreement which cannot be changed without the agreement of the Secretary of State. It is essential that schools examine these issues with the greatest of care to ensure that they, the DfE and any trustees or religious authority are all clear and happy with the admissions position after conversion.
- There must be a viable business plan and a due diligence exercise should be carried out and all risks arising mitigated. (Note that the governors of an academy are in effect Directors of the academy company and have duties and responsibilities of directors under company and Charity law – hence reference in the funding agreement to an academy trust obtaining directors liability insurance for its directors/governors.) There must be due recognition given to the consequences on resources and capacity associated with the extra duties and the HR implications and best value should not be underestimated. A clear statement must be obtained from the LA as to the services they will be willing to provide and the cost of buying in such services. There will be an expectation of collaborative

working with local and other church schools. There will also need to be a clear expression about how academy status will add value and improve educational outcomes.

- The application and all that ensues must not lead to the Blackburn 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 available from DfE.

Other Key Issues

1. Land Transfers and transfers of other school property

- Under the Academies Act 2010 (“the Act”) the Secretary of State may make various property transfer schemes in relation to the property, rights or liabilities of a school wishing to become an academy, and in relation to any land used by the school which is either publicly owned or is owned by the trustees but has some public value. Such Secretary of State transfers will only be made where such property, rights or liabilities are held by the local authority or by the school’s governing body. Land owned by the existing trustees (even if it has some public value) will either be made available by private arrangement between the trustees and the academy company or (in some cases) may be leased by the trustees to the academy under a direction of the Secretary of State. Playing fields (and any other part of the site) in the current ownership of the Local Authority or the governing body will be transferred to the academy company either leasehold or freehold. Any playing fields in the ownership of the trustees will be made available by them in the same way as the main school premises. This whole issue is complex and specific legal advice must always be taken.
- In the case of Church of England schools the legal title to the land may be held by trustees or trustee bodies, for the educational purposes of the Church of England. On conversion to academy status the legal title will remain with the trustees, with an entitlement to use the land provided to the academy. **The National Society together with their Solicitors Lee Bolton Monier-Williams have produced a model lease which includes** restrictions to ensure the continuation of the Christian ethos of the schools.

2. Trusts

- The trust deed of each school and the basis on which its land is held will have to be checked to ensure that it is in a position to apply for academy status. Any restrictions contained within a school’s trust deed unless these were changed with the blessing of the Charity Commission should be reflected in the drafting of the Articles of Association (see further below) and also reflected in the drafting of any lease pursuant to which the Academy occupied the land. The purposes of each school as set out in its trust deed cannot be changed without Charity Commission consent unless there is a power of amendment within the trust deed. However, if the only change required is one to enable the land to be used for a non-maintained school (and this will be rare) then the Secretary of State has power under the Academies Act to make such a change if requested by the trustees to do so.
- “Academy Trust” is a term given to the legal entity that has the purpose of conducting either one or a group of academies.
- An Academy Trust will be a charitable company established and governed by its Memorandum and Articles of Association and will be the employer of the staff. The directors of this charitable company will be the school’s governing body and responsible for the running of the school.

3. Reverters

- Where a piece of land was donated on the basis that the land would be used for a particular purpose (which often happened in the 19th and early 20th centuries), and later the land

ceases to be used for that purpose, the original owner's heirs may be entitled to the proceeds of sale – called a reverter.

- A reverter may become relevant when a school changes hands compulsorily under powers granted to the Secretary of State for a “school eligible for intervention”. In cases of failing schools the legislation grants the Secretary of State the power to override the trusts and intervene. Concern has been expressed about this in some quarters, as it is possible that the powers will be exercised to deprive the Church of its school property in those circumstances. However, should this ever happen the Secretary of State has to compensate the trustees for their value – in effect a compulsory purchase which we would argue should be at open market value. Note however that Reverter is not triggered by the land transfer arrangements when a school converts voluntarily into an academy as long as the original trust remains in place.

4. TUPE of staff

- All existing staff will transfer over on the same terms and conditions as before, with their employment entitlements unchanged. Under the law both old and new employer are required to inform and consult employees affected directly or indirectly by the transfer.

5. Charity implications

- An Academy Trust (so-called by the Government) will be a new charity. This charity's (and the academy school's) governing document will be its Memorandum and Articles. The charity will be exempt from having to register with the Charity Commission.

6. VAT

- Schools that become academies will no longer be able to exploit the local authority's facility to reclaim VAT. Academies will therefore receive a VAT grant to cover VAT costs. The grant is based on historic spend information. The DfE intends to create special grants to academies in order to refund the extra VAT incurred on goods and services compared to maintained schools.

7. Pensions

- Teachers working in an academy fall within the scope of the Teachers' Pension Scheme, just as if they were employed in a local authority maintained school. Staff transferring from a maintained predecessor would simply continue their membership of the scheme.
- Non-teaching staff at schools fall within the Local Government Pension Scheme. As the employer, the academy would be responsible for meeting the employer contribution.
- Both schemes will have facilities in place for staff transferring on the change of employer. A check will need to be made as to any possible impact for the Academy Trust of any underfunding of such schemes to the extent that the members are on a final salary basis and if there is a deficit, consideration given to the provision of an indemnity to the Academy Trust to cover this. The DfE have produced detailed guidance on this issue on its website.

8. Capital and Funding.

- Schools need to be advised that academy status is most unlikely to produce new capital for buildings. Also, taking into account the extra duties in relation to extra income (deriving from the academy's share of LA central costs) the school is unlikely to be better off. VA schools becoming academies will not have to pay the 10% towards capital projects, and should LCVAP and DFC continue this will be subsumed into the annual revenue budget.

9. Federations.

- A federation of schools can apply together for each school to become an academy. This will need very careful thought in the case of a mixed federation. Lee Bolton Monier-Williams are already working with one such case and can advise if needed.

10. Extra Portfolio of duties and work.

- Schools must be mindful of the many extra tasks and responsibilities which academies carry. This could make it impossible for small schools to cope and a careful risk analysis must be undertaken. Small schools could consider the possibility of becoming an academy (or academies) in groups.

Considering applications for a change of status: the process

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 parties, including the DBE. (This may include a number of preliminary meetings with the Diocese.)

1. It is for the Governing Body of the 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.
2. It would be advisable to allow sufficient time before the meeting for the school Trustees and any other especially interested parties (such as the Diocese) to be made aware by the Governing Body that the subject will be raised. This is because as a process moves forward the agreement of the Trustees, and others will be needed, so it is wise to brief them with care even at a very early stage.
3. In order to ensure good and effective communication and support from Board, the school should notify the Director of their intention to consider Academy status. It is important that the DBE and school governors discuss this important step before any formal application is made. It may be appropriate for all parties to take their own independent legal advice as there may be issues which both parties will need to resolve.
4. In a school with a religious character, it may be that more than one body appoints foundation governors. All appointing bodies must be consulted and all must take their own independent decision whether to agree (with or without conditions) or oppose academy application. It is important to remember that bodies appointing the foundation governors include those who appoint any ex-officio governors. All church schools must therefore seek the consent of the DBE before submitting an application to become an academy. It is not sufficient for the actual foundation governors of the school to give their approval. The application will only be processed with the consent of the DBE and any other foundation trust bodies.
5. 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, as trustees have a responsibility to act so as to preserve their trust and its purpose. The agreement of the trustees is required before a formal 'application to convert' can be made. It is important to note that trustees of any Church of England school must also separately consult the DBE if they wish (as is required) to lease or otherwise convey their land to the academy company for the purposes of the academy.
6. Each appointing body and the trustees should provide the school with written confirmation if they agree to the academy application to convert and such confirmation needs to be clear as to the conditions to be satisfied. Please note that the Secretary of State should not allow the governing body to proceed without these documents and he would be breaking the law if he did.

7. If a school decides to progress to a formal application, the DBE will examine each potential application for academy status with care and in relation to the principles set out above.
8. The DBE will act as a neutral critical friend in the process, seeking to ensure that a good decision is made by and with the school. However, thinking at diocesan level will also be driven by the bigger vision for the purposes and delivery of Church schools
9. The Executive Committee of the DBE will meet once during each term to consider applications for academy status. Schools must submit their application to The Director, Blackburn Diocesan Board of Education, Church House, Cathedral Close, Blackburn BB1 5AA at least 14 days prior to the meeting. The DBE will notify the Chair of Governors, Headteacher and DfE project lead of the outcome within 5 working days of the meeting. The dates that the Executive will meet in 2011 are as follows

12th January, 13th April, 8th June and 14th September in exceptional circumstances it may be possible to hold additional meetings should these be required.
10. If conditional consent is granted, Diocesan Officers will work with the school to ensure that all conditions find expression in the draft Funding Agreement and/or the Memorandum and Articles and, if appropriate, lease conditions and any other relevant documentation. Key documents will only be signed by the DBE when the Board is content that all conditions have been met.
11. The Diocesan Officers will then establish mutually agreed monitoring arrangements.

Supporting Evidence

- Schools must develop and evaluate an operational and strategic business plan (covering both recurrent and capital aspects) which demonstrates continuing viability and growth. This business case must recognise the consequences on resources and capacity associated with the extra portfolio of duties they will take on. Schools should obtain a very clear statement from the Local Authority 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
- 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/parishes 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 b) the impact on other schools in the area and c) the impact on the ethos of the school. The Board would require written evidence of the outcomes of the consultations and this could be provided by suitable questionnaires being produced showing the results of the various consultations.**
- If foundation governors are appointed by any other body in addition to the DBE, each separate body who appoints foundation governors must provide its own letter indicating agreement, with or without conditions, or dissent.

The Academy Trust and Governing Body

The role of the governing body in an academy is to “manage the business of the academy trust”. The governors are therefore, in effect, the directors of the company. Paragraph 94. ff of the Academy Act gives the governors power to run the affairs of the trust and hence of the actual academy.

It must not 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 its

duties. The agreement with the Secretary of State is a legal contract between both parties and carries obligations on both sides. Both individuals and corporate prospective trustees (otherwise known as members) of the academy company 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 could have the affect of the academy being taken away from you either temporarily or permanently.

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 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.

Members may also be governors and corporate members may appoint an individual to act both as governor and as attending member on their behalf.

There must be at least three governors and may be as many as are felt reasonable. However, the complex requirements for committees which form part of maintained school law and practice do not apply to academies.

In addition:

- The LA may appoint a single governor if it wishes. This governor is not a member of the company.
- The Principal will become an ex-officio governor.
- There must be at least two elected parent governors.

The minimum number of people on the governing body is therefore seven.

These categories represent the totality of governors not appointed by the members or co-opted. Staff governors may be appointed by members or co-opted, but it is for the members to determine the names and note that there is no requirement for staff governors at all.

All governors (except parent governors) may be removed by the “person or persons who appointed him.” This includes the staff governors, who may be removed by the members. However, there are no complex regulations about removal as is the case in maintained schools, though no doubt fairness of purpose and process should be observed.

Members of the Academy Company

There must be at least three signatories for the Memorandum of Association; and the body 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. The Model Memorandum and Articles provided by Lee Bolton Monier-Williams and colleagues for the Church of England to use set out various options for membership. Specific advice should be taken in every individual case.

Fred Kershaw

Acting Director of Education
Blackburn Diocesan Board of Education

12th December 2010