

THE ACADEMIES BILL 2010 Analysis and Commentary for Clients

In addition to providing the detailed analyses commissioned by individual clients, it is LBM-W policy to issue a general analysis of relevant legislation as a service to all clients in the education sector. Our intention is to assist the sector in developing an understanding of legislation in process and to alert clients to any pitfalls which we judge might lie in it for them. Such a paper is not intended as a guide to the legislation (which of course may change) or as advice on process. LBMW is issuing a separate paper to advise interested clients on the current process for outstanding schools to apply for academy status.

We would of course be glad to respond to commissions to supply more detail in areas which concern any of our readers.

This commentary is based on the Bill as published and commenced in the House of Lords and on the associated **Explanatory Notes** published by the Department for Education. We have also taken note of the various letters sent out by the DfE on this subject as the Bill has been commenced, of statements made by Ministers in the wake of the Bill's launch and of the guidance for outstanding schools now available on the DfE website.

It is of course (as often) not easy to determine initially whether all effects of the legislation as we see them are in fact government policy and intention. We draw attention from time to time to areas which could be either. It is of course for clients (and in particular the existing bulk providers of schools) to determine whether there are areas they wish to press government about or so seek changes in the Bill through whatever mechanisms are at their disposal. LBM-W's professional services are naturally available as required.

In the case of the **Academies Bill 2010**, we certainly find ourselves wondering from time to time whether we have not invented subtleties or intentions foreign to the drafters of the Bill but have taken the view that we should share our worries with you, finding comfort if enquiry should show that we were being over interpretive!

While we comment from time to time on specific **sections** of the **Bill** and of the **Explanatory Notes**, this is not

intended to be a section by section commentary. Instead, we draw out what seem to us to be the major themes (and indeed some minor ones) and in particular try to point out consequences which may or may not be foreseen either by government or by the casual reader.

Much of what we shall say has particular relevance for the Church of England, the Roman Catholic Church, the Methodist Church and other (faith or non-faith) bodies that provide large numbers of schools – Voluntary Schools (VA or VC), Foundation Schools and the current model of Academies. However, this Bill of course seriously affects Local Authorities and indeed every current provider as well as those groups aspiring to provide schools.

We take the view first of all that this Bill is potentially the largest change in the provision of education in England since 1870. Our reason for this is simple. Until the 1870 Act the provision of schools in England (and Wales) was overwhelmingly that of voluntary providers – mostly (but not exclusively) the Church of England and other Christian bodies. From 1870 to the present day the balance has been swung ever more towards state provision (not of course just state finance). This Bill is capable (if schools respond as the government clearly wishes) of tilting the balance back again to voluntary provision, but not of course to voluntary provision as it was understood in the early 19th century – or even (we fear) as it has been practised in England under the Dual System in recent years. We suppose that the government would ideally wish to see the end of Local Authorities as providers of schools as distinct from commissioners of education and challengers of standards. What actually will replace them is not however the same locally determined provision as that which originated mass education from 1800 onwards. This Bill brings the Dual System to an end.

This is a huge change, especially as there must be questions (given the powers which this Bill gives the Secretary of State) about the continued role of the Local Authority even as commissioner and challenger. The LA has no role in the creation of these new academies nor any funding role towards them nor any influence on them. We

doubt that “Free Schools” (whatever they may in detail turn out to look like) will be much different. Challenge on the part of LAs remains, but it is questionable whether their strategic role remains at all robust. Their provider role is in principle torn to shreds. This Bill could in practice tear apart the roles of the big religious providers too.

We make no comment on the desirability or otherwise of these changes. We simply point out that they are in our view the direct consequence of this Bill with potential swift and cumulative impact.

This Bill certainly offers “powers” to schools to take a greater part of their present and future into their own hands and to parents, educational companies and other bodies to initiate or increase a role as school provider. However, in the light of the etiolation of the commissioning role of the LA, this is also a centralising Bill, focussing powers in the Secretary of State and his agencies. This Bill removes the establishment and maintenance of academies entirely from LAs and leaves them only with initial administrative tasks in respect of them. The consequence if (as is clearly wished) the majority of schools become academies is obvious.

This Bill is also (we suggest) in a profound muddle (or a deliberate obfuscation) about what it is to be a school provider. We say this because, while the position of trustees of existing voluntary and foundation schools and academies is safeguarded (at least up to a point) in the voluntary process of becoming an academy, it is not safeguarded in the compulsory process which will we presume be immediately and increasingly used in respect of schools with serious weaknesses. In the latter case, trustees and current providers have no role and no powers and will have their property compulsorily purchased by the state.

This would (in our view) be fair and honourable if the existing providers had the powers which Local Authorities have to intervene in their schools and to challenge poor quality provision. However, it is our considered view that existing providers actually have little or no powers of intervention other than what is achievable through the appointment or removal (but how tricky that can be!) of foundation governors. Trustees of Voluntary or Foundation schools with foundation minorities have in effect no real powers of intervention and any trustee body providing a site for a foundation school without a foundation is totally at the mercy of the governing body – as indeed are all foundations of foundation schools in the last analysis.

It cannot be right that trustees may have their school removed from them and their property compulsorily

purchased (for that is what this Bill provides) without them having had some reasonable powers themselves to intervene when a governing body is visibly not tackling major problems in the school. The LA has ample powers of intervention in Community Schools (and of course in voluntary and foundation schools too) but the voluntary trustees do not.

The Secretary State is of the view that this Bill is compatible with the European Convention on Human Rights (see **paragraphs 51-56** of the **Explanatory Notes**). In the light of the above argument, we suggest that this may not be the case. Compulsory purchase when the owner has not had a chance to rectify problems is surely not compatible with Article 1 of the First Protocol to the Convention.

This is made all the more complex by the existence of value due to the original donor in many voluntary school sites. The School Sites Acts of Queen Victoria are still in force and (subject to the Reverter of Sites Act 1987) still provide the legal framework for a significant proportion of present school sites. It is more than likely that a substantial number of voluntary school sites which could become academies will be subject to Reverter. We believe that there are mechanisms which can avoid Reverter occurring as long as the change to the academy category is voluntary and the original trust remains in place. However the replacement of a “school eligible for intervention” by a school or an academy with a different provider under **s4(1)(b)** of the **Bill** and the consequent forced purchase or transfer of the site under the provisions of **Schedule 1** would in our view normally trigger reverter and bring into the picture the rights of the original (mainly 19th century) donor and his heirs.

We cannot see that it can be right for such a donor to be forced to make available his land for use other than by the trustees (or at least the kind of trustees) to which the donation was made. We have in mind in particular trusts with an explicit religious character of course, but others could conceivably be involved.

This brings us to a further momentous consequence of this Bill – and one about which we have heard nothing and read nothing from politicians or DfE officials. The Bill (as has been well advertised) protects any designated religious character which a school may have (as long as the trustees remain the same). However, it does not (of course) protect such a character where the school is closed and replaced as envisaged under **s4(1)(b)**. This might be reasonable if the religious body providing has clearly not been up to the task (though remember our

argument above about limited powers) but carries with it further complications which we now set out.

Academies are of course Independent Schools and subject to **The Education (Independent School Standards) (England) Regulations 2003** (as amended). **S1(6)(a)** of the **Bill** requires academies now created to abide by **s78** of the **Education Act 2002** but does not impose on them **s80** – which is the current legal formulation of the Basic Curriculum. Hence, these academies are not only not required to follow the National Curriculum (as has been made very clear) but also they need not follow the Basic Curriculum. Religious (and no doubt anti-religious) bodies will have great interest in this, as, since, as there is no comparable requirement in the Independent School Standards Regulations cited above, there is so far as we can see no requirement for these academies to provide either religious education or any acts of worship. While this may be acceptable (and indeed right – at least in respect of worship) in small numbers of schools deliberately provided by secular bodies, it is clean contrary to the Dual System agreement which has prevailed in England and Wales since state funded education commenced in the mid 19th century. These academies will be the first publicly funded schools in England in quantity to which the requirements for RE and worship do not apply. This is a change (if desired by the state) worthy surely of more significant legislation and discussion than to be simply smuggled in on the back of legislation to which it appears not to be directly related.

We further take the view that this Bill seriously weakens the powers even of the proprietors of academies with a designated religious character to ensure that RE and worship continue to find a serious rather than a token place. For this Bill appears to provide for the creation of academies either without Agreements (under **s4(1)(b)**) or with Agreements which are more limited in scope than those currently in force (under **ss3 and 4(1)(a)**). However, the safeguarding of a religious character in an academy (as distinct from a maintained school) is very much a matter of what is incorporated into agreements, Memoranda and Articles and the leases under which it is expected that the existing trustees of voluntary and foundation schools make their land available to the academy company/trust.

We note too that the law for the designation of Independent Schools as having a religious character is different from that which obtains for maintained schools. The former is a voluntary designation (regardless of the religious nature of the trust and indeed potentially of the

wishes of the trustees) the latter is compulsory on the basis of certain key facts about the nature of the school trust and its governance.

Hence, we cannot see that there is anything except the provisions in agreements, M and As and leases to prevent an academy created under the provisions of this Bill from subsequently deciding to abandon its designation (or to change to the in our view meaningless “Christian” designation) in order to distance itself from the denominational body which has in fact provided it and to which its trusts will usually make explicit reference. Since denominational structures (usually but not of course solely diocesan ones) are the one area from which serious challenge to the standards set by a governing body could come, this distancing could in the long run be disastrous for the standards of the school as well as a serious betrayal of the wishes of providing trustees and original charitable donors.

The government (and we presume Departmental strategists – since this is not a change from the previous administration) seem to be taking the view that the provision of education is wholly in reality a matter for the Governing Body of the school on the one hand and for the Secretary of State on the other. This leaves out not only the Local Authority (no surprise there) but also de facto the school provider.

We have set this out mainly from the perspective of religious provider bodies, but we suggest that this significant weakness actually applies to all providers, existing and potential. Bodies and individuals seeking to provide schools and believing that this will give them long term, serious and positive influence on the nature and standards of education in their local area should pause and ponder these matters, for their actual powers as providers as very limited and their exposure to action over their heads (or under their feet) is very great.

We now set out in brief a series of points about the Bill which do not seem to us to have received much publicity.

- Not all academies appear to need academy agreements and perhaps none will have agreements of the complexity of those which are current. Yet agreements are one of the main ways in which the purposes of trustees can be safeguarded.
- The Bill legislates for two academy mechanisms, one voluntary and one compulsory. It is only the first which has had much publicity. The second seizes trustees' schools and compulsorily purchases their assets. It is not clear to us that this is in fact (as alleged by the

Secretary of State) compatible with the European Convention on Human Rights.

- The Bill says nothing about funding levels and the Explanatory Notes are very vague.
- All existing academies are deemed to have been created as per this Bill. We trust that this in no way invalidates their Funding Agreements.
- The Bill appears to leave the way open to the use of religious criteria for the admission of children, depending to some degree on what the school's "area" (vague word) comes to be determined to mean.
- It is not at all clear that the funding of and the arrangements for the closure of academies formed by the forced (as distinct from the voluntary) procedure will be the same as those under the voluntary procedure.
- VA schools that become academies will note that they lose their distinctive capital arrangements under this Bill and that religious authorities (dioceses) will have much less in the way of legal authority in respect of property and buildings.
- It is not clear that the dioceses (or other similar bodies) will always (even in the voluntary process) be able to veto the change. They will certainly have no power to do so in the compulsory process.
- What happens with voluntary schools (especially VA ones) that are part of federations?
- Schools need to be reminded of the Local Authority's "duty to maintain" and of what they get in consequence of that – which they will have to pay for as academies.
- It is not true that these academies will not be subject to Ofsted inspection or indeed also to denominational inspection where the latter is written into agreement and leases.
- The existing trust (in the voluntary change) will not be dissolved but will be expected to lease its land to the academy trust. The latter will in effect become the providing trust of the school.

- In the compulsory change either the same will happen or the trust will be forcibly bought out and in effect prevented from carrying out its purposes.
- Preservation of any religious character only obtains if the existing school is changed into an academy. The Bill also provides that a new school be created instead (which would probably be an academy with a different provider). Then of course designation falls.
- The drafters appear to have forgotten that the GB of a voluntary school is an exempt charity in its own right and cannot simply have its charitable assets seized. This is a separate issue from the trustees, who are of course also an exempt charity.
- Is it really desirable for the academy charity to be an exempt charity with a Regulator appointed by the government as distinct from having to register as at present with the Commission?
- What is the government planning about accreditation (which is in our view highly questionably legally in any application to Church of England dioceses)? This issue intertwines with this Bill, which seems to imply that all GBs of outstanding schools must automatically be appropriate accredited providers – not something that necessarily follows at all in our view.
- The drafters seem to have ignored those cases where community schools have some of their land in the ownership of trustees with actual trustee (as distinct from public) value. There are a number of these in our experience.
- No valuation method or protection for trustees' value is mentioned in the sections on compulsory purchase.

It is for others to make the "political" points that they feel to be appropriate about this Bill. We merely note its legal ramifications and consequences. We suggest that there is much in both categories which requires clarification and we look forward to the debate.

Lee Bolton Monier-Williams
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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