

THE ACADEMIES BILL

Peter Oldham QC

Legislative timetable

1. The Government intends the Bill to be enacted before the summer recess which begins on 27th July 2010.

2. The Academies Bill had its first reading in the House of Lords on 26th May 2010. The second reading took place on 7th June. Committee stage was on 21st, 23rd and 28th June. The report stage was on 6th and 7th July 2010, and the Bill was read for the third time on 13th July.

3. First reading in the Commons was on 13th July. Second reading in the Commons took place on 19th July. The Committee stage will take place on the floor of the House on 21st, 22nd July and 26th July.

4. This fast-track legislation does not concern a matter of national crisis, such as terrorism or economic collapse. The most recent precedent for this approach to such legislation appears to be the Dangerous Dogs Act 1991, which has become something of a by-word for the perils of over-swift law making. Concerns have been raised over the lack of opportunity for affected parties to become properly aware of the proposed legislation, and for them, or indeed Parliament, to scrutinise it properly.

5. What appears to be driving the timetable is the Government's aim to have approvals for some Academies in place by 1st September 2010: see this from the DFE's FAQ page:-

"We are a primary or secondary school - when can we open as an academy?"

We expect that the process could take a minimum of three months so (subject to the successful passage of the Academies Bill) some schools could open as academies from September 2010. Schools can also choose when they would like to open to suit their needs, but for most schools this will be at the beginning of the autumn or spring term."

6. See also the DFE's "Guidance for schools becoming Academies" at http://www.education.gov.uk/academies/~/_/media/Files/lacuna/academies/convertorguidancedoconsultationV2.ashx:-

"Length of time to convert to an Academy

We expect the four steps [registration, checks, funding agreement, pre-opening] to take a minimum of three months, although this may be longer if there are complicated issues to resolve. This means that in straightforward cases outstanding schools could become Academies by September 2010. Schools will, however, be able to complete the conversion process more slowly if they wish. It is not essential for schools to open as Academies from the beginning of a term, although many will wish to do so as it will make school planning easier."

7. Last, the explanatory notes to the Bill say:-

“7. The Secretary of State expects that a significant number of Academies will open in September 2010 and for the number to continue to grow each year.”

8. The rapid timetable has very important implications for the issue of consultation, one of the most vexed issues in the Academies project. As we will see when we consider cl 5, the Government has given way, to a limited extent, on imposing a duty to consult when a school applies to be an Academy. Consultation about anything to do with schools is a risky business in any event if conducted over the summer holidays. Even putting this general problem aside, some are asking: how can there now be enough time for there to be a proper consultation process about a school becoming an Academy when the Academy is to be up and running by 1st September? And if some schools, anticipating this problem, are already consulting, can that consultation be properly informed when the legislation is still being debated in Parliament? Is it statutory consultation at all if it takes place before the Bill is enacted? (Oddly cl 16 provides that consultation by a governing body of a foundation or voluntary school with its foundation will “count” even though it took place before the commencement of the Act, but does not make equivalent provision for other consultation requirements added to the Bill by amendment.)

9. The speed with which this legislation will be passed is also, presumably, a measure of policy commitment and perceived achievability. This is what the Conservative party’s manifesto said about Academies:-

“All existing schools will have the chance to achieve Academy status, with “outstanding” schools pre-approved, and we will extend the Academies programme to primary schools

Any school that is in special measures for more than a year will be taken over by a successful Academy provider.”

The reference to “pre-approval” is striking.

The current status of governance of Academies

10. Currently Academies are created under section 482 of the Education Act 1996 (“the 1996 Act”) which, as relevant, will be repealed by the new Act. The detail about how Academies are currently run is provided by the Funding Agreement, and the DFE has a Model Funding Agreement (“the old MFA”) for this purpose.

11. The old MFA provides for Academies, broadly, to observe rules applying to maintained schools in relation to admissions, exclusions and special educational needs. Section 482(2)(a) itself makes it a required characteristic of an Academy that it has a curriculum satisfying the requirements of section 78 of the Education Act 2002 (“the 2002 Act”), albeit with an emphasis on a particular subject area or areas.

The policy behind the Academies Bill

12. The explanatory notes to the Bill explain the genesis of Academies:-

“3. Academies are all-ability state funded schools. They have sponsors from a wide range of backgrounds, including universities and colleges, educational trusts, charities, the business sector and faith communities. Academies have largely replaced city technology colleges (CTCs) and city colleges for the technology of the arts (CCTAs), set up by the Education Reform Act 1988, and all but three of which have now converted to become Academies. The first Academies opened in 2002 and there are currently 203 Academies in 83 local authorities. Of these, 6 converted from independent schools, 53 have a faith designation and 23 are all-through Academies, which include primary provision. Most Academies have replaced weak or underperforming schools, and others have been new schools in areas which needed extra school places.”

13. The aim behind the expansion of Academies is set out at the DFE’s website at

<http://www.education.gov.uk/academies/whatareacademies:->

“Academies can benefit from greater freedoms to help you innovate and raise standards. These freedoms include

*freedom from local authority control
ability to set your own pay and conditions for staff
freedom from following the National Curriculum
ability to change the lengths of terms and school days.*

We are also making plans for further freedoms for academies in the way they engage in local partnerships and deliver 14-19 education.”

14. The Government proposes that these increased freedoms will improve standards of education, as explained in the Bill’s Equalities Impact Assessment:-

“29. The aim of the Academies Bill is to enable more schools to become Academies, giving them the freedoms and flexibilities they need to continue to drive up standards.”

15. But as we will see today, it is precisely in these freedoms that some of the key legal questions have arisen in the past and arise again now e.g. on pay and staffing.

The shape of the Bill

16. The Bill is short – it currently runs to twenty sections and two schedules. By far the most involved provisions are those relating to land (mainly in Schedule 1).

17. So it is clear that a lot is “happening” outside the terms of the Bill, and will “happen” outside the terms of the Act. In particular a very close eye needs to be kept on the DFE website. For instance:-

(i) Much will depend on the terms of the new MFA. At <http://www.education.gov.uk/academies/supporting-documents> is a website giving drafts of

documents relevant to the creation of an Academy. This includes a new MFA, albeit incomplete. It is significant in providing:-

“13) The Academy will be governed by a governing body (“the Governing Body”) who are the Directors of the company constituted under the Memorandum and Articles of the Academy Trust.

14) The Governing Body shall have regard to (but for the avoidance of doubt shall not be bound by) any guidance as to the governance of academies that the Secretary of State may publish.”

(ii) Though the Bill does not provide a regulation making power for SoS save in relation to the transfer of school surpluses, nor for a power to provide guidance, the DFE is already providing non-statutory guidance for the application process, entitled “How to become an Academy”, at <http://www.education.gov.uk/academies/becomeanacademy>. Here, for instance, it sets out the type of schools from which applications are, and are not, welcome:-

“In the first instance, Governing Bodies of schools that have been rated outstanding by Ofsted in their most recent judgement can apply to become Academies.”

This rule – and it is expressed as a rule – has no basis in the Bill, though it reflects the policy that SoS will adopt in deciding whether to approve an application: see further in the discussion of cl 3 below.

The provisions of the Bill

18. The Bill provides as follows.

Cl 1: Academy arrangements

19. Cl 1 provides:-

1 Academy arrangements

(1) The Secretary of State may enter into Academy arrangements with any person (“the other party”).

(2) “Academy arrangements” are arrangements that take the form of—

(a) an Academy agreement, or

(b) arrangements for Academy financial assistance.

(3) An Academy agreement is an agreement between the Secretary of State and the other party under which—

(a) the other party gives the undertakings in subsection (5), and

(b) the Secretary of State agrees to make payments to the other party in consideration of those undertakings.

(4) Academy financial assistance is financial assistance given by the Secretary of State under section 14 of EA 2002 on terms that require the other party to give the undertakings in subsection (5).

(5) The undertakings are—

(a) to establish and maintain an independent school in England which—

(i) has characteristics that include those in subsection (6), or

(ii) is specially organised to make special educational provision for pupils with special educational needs;

(b) to carry on, or provide for the carrying on of, the school.

(6) The characteristics are that—

(a) the school has a curriculum satisfying the requirements of section 78 of EA 2002 (balanced and broadly based curriculum);

(b) if the school provides secondary education, its curriculum for the secondary education has an emphasis on a particular subject area, or particular subject areas, specified in the arrangements;

(c) the school provides education for pupils of different abilities;

(d) the school provides education for pupils who are wholly or mainly drawn from the area in which the school is situated

(7) Academy arrangements in relation to a school within subsection (5)(a)(i) must include provision imposing obligations on the proprietor of the school that are equivalent to the SEN obligations.

(8) “The SEN obligations” are the obligations imposed on governing bodies of maintained schools by—

(a) Chapter 1 of Part 4 of EA 1996 (children with special educational needs), and

(b) regulations made under any provision of that Chapter.

(9) Academy arrangements must include terms imposed for the purpose of securing that no charge is made in respect of—

(a) admission to, or attendance at, the school, or

(b) (subject to any exceptions specified in the terms) education provided at the school.

(10) A school to which Academy arrangements relate is to be known as an Academy.

20. So Academy arrangements take the form either of an agreement with SoS or financial assistance from him. Either way the “other party”, presumably the academy trust, has to give undertakings to

establish and run a school with certain characteristics, save in the case of special schools. Those characteristics are:-

- the school's curriculum satisfies the requirements of section 78 of the 2002 Act (balanced and broadly based curriculum);
- if a secondary school, its curriculum has an emphasis on a particular subject area, or particular subject areas, specified in the arrangements;
- the school provides education for pupils of different abilities;
- the school provides education for pupils who are wholly or mainly drawn from the area in which the school is situated.

21. After concern was expressed that Academies other than special schools had no clear obligations to children with special needs, cls 1(7)-(8) were added by amendment, in effect requiring Academies to deal with SEN as maintained schools are obliged to do. The fact that SEN was singled out for statutory validation in this manner raises the question of why matters currently dealt with (like SEN) by the old MFA, such as admissions and exclusions, are not to be regulated in the same way.

22. The required characteristic that "the school provides education for pupils who are wholly or mainly drawn from the area in which the school is situated" is something of a puzzle. It is taken from section 482(2)(b) of the 1996 Act. Whether this was an express limitation (intended or otherwise) on Academies' powers to set their admission criteria, or a deliberate departure from the Admissions Code (which does not apply to Academies), is not clear.

The new MFA: SEN, exclusions and admissions

23. In the new MFA, admission arrangements, SEN and exclusions are dealt with by Annexes B, C and D. Annexes C and D provide that Academies must, broadly, comply with the obligations imposed on maintained schools in respect of SEN (also required by the Bill) and exclusions. On the basis of assurances to this effect given at the Report stage on 13th July, an amendment to the Bill to apply exclusions law to Academies was withdrawn.

24. At time of writing – and the DfE website will doubtless be changing very frequently in the coming weeks – Annex B does not appear to exist (nor Annex A) though cl 12(c) of the new MFA says that "the admissions policy and arrangements for the school will be in accordance with admissions law, and the DfE Codes of Practice, as they apply to maintained schools". The FAQs say this:-

“What are the admission requirements for schools converting to become academies?”

Outstanding schools converting to become an academy will be able to retain the admission criteria they currently use. These arrangements and related processes should at all times comply with the School Admissions Code.

When a school becomes an academy, the academy trust will become the admission authority. For some schools, such as foundation and voluntary aided schools, this will mean little change, but for community schools and voluntary controlled schools the academy will need to manage its own admissions process. This will involve periodic consultation, and regularly publishing the academy's admission arrangements.”

25. It appears that the intention is that admission arrangements will have to comply with the Code (query also the Admission Appeals Code?). This is also made clear from the answer to another FAQ about changing catchment areas. Indeed admission arrangements for 2010/2011 and 2011/2012 should already have been set.

26. Again, in the light of certain assurances given at the Report stage, an amendment to the Bill to require compliance with the Admissions Code was withdrawn.

CI 2: payments

27. Payments under Academy agreements may be in respect of capital or current expenditure.

28. Subclause (5) amends the School Finance (England) Regulations 2008 to provide that expenditure in respect of services for making provision for Academy pupils with low incidence special educational needs or disabilities becomes a class of expenditure for the purposes of the non-schools education budget. The effect of this is that each local authority must appropriate an amount in respect of those services to its non- schools education budget.

29. So far as payments under an Academy agreement relate to current expenditure, the agreement must provide for them to continue either for at least 7 years, or indefinitely, but terminable by the SoS giving at least 7 years' written notice. This ties in with complex termination provisions in the new MFA.

CI 3: Application for Academy order

30. CI 3 provides:-

3 Application for Academy order

(1) The governing body of a maintained school in England may apply to the Secretary of State for an Academy order to be made in respect of the school.

(2) In the case of a foundation or voluntary school that has a foundation, this is subject to subsections (3) and (4).

(3) The governing body of a foundation or voluntary school that has a foundation must consult the foundation before making an application under this section.

(4) The governing body of a foundation or voluntary school that has a foundation may make an application under this section only with the consent of—

(a) the trustees of the school, and

(b) the person or persons by whom the foundation governors are appointed.

31. The clause gives any maintained school in England the right to apply for Academy status. Currently the DFE, as we have seen, has let it be known that only schools that have been rated outstanding their most recent OFSTED inspection are “eligible to convert”. See the following FAQs:-

“Which schools can apply to become academies?”

Only schools (primary, secondary and special schools) that have been rated outstanding overall in their most recent Ofsted inspection are eligible to convert to academies through this process. Register your interest on the online form.

We are not an outstanding school but want to become an academy - can we apply?

Not yet. All schools will eventually be eligible to apply to be considered for academy status but the applications for all other schools will open at a later date in the year. There will be a further announcement on this process. However all schools are encouraged to register their interest in becoming an academy and we will ensure they are kept informed and provided with any help that is needed.”

32. This policy appears to operate as a bar on a successful application by a school other than an “outstanding” school. That approach does not appear to be justified by the terms of the Bill, which does not provide any rank or preference to the types of school that may apply; nor, on basic public law principles, does it permit SoS to apply a rigid rule of refusing applications from particular types of school.

33. Those opposed to selective education are concerned that grammar schools will be allowed to apply to become Academies. They fear that selective Academies will be able to expand in a way that grammar schools are currently prohibited from doing (by section 100 of the School Standards and Framework Act 1998 and controls on prescribed alterations under the Education and Inspections Act 2006 (“the 2006 Act)).

34. The very limited consultation obligations in cls 3(3) and 3(4) were in the original form of the Bill. There are now more extensive (though still limited) consultation obligations, added by a new cl 5, as to which see below. The cl 3 obligations have not been swept up into the new cl 5, but have remained where they were originally put.

35. There is no provision for an application for Academy status to be withdrawn; nor is it clear whether SoS would decline to make an Academy order if a school changed its mind after making an application.

Cls 4 and 6: Academy orders and their effect

36. Cls 4 and 6 have to be read together. They describe how it is that an Academy comes into existence.

37. Cl 4 provides:-

4 Academy orders

(1) The Secretary of State may make an Academy order in respect of a maintained school in England if—

(a) the governing body of the school make an application under section 3,

(b) the school is eligible for intervention (within the meaning of Part 4 of EIA 2006).

(2) An Academy order in respect of a school is an order for the purpose of enabling the school to be converted into an Academy.

(3) A maintained school is “converted into” an Academy if Academy arrangements are entered into in relation to the school or a school that replaces it.

(4) If an Academy order is made in respect of a school, the Secretary of State must give a copy of the order to—

(a) the governing body and head teacher of the school, and

(b) the local authority.

(5) If, after an application has been made under section 3, the Secretary of State decides not to make an Academy order in respect of a school, the Secretary of State must inform the following of the decision and the reasons for it—

(a) the governing body and head teacher of the school, and

(b) the local authority.

(6) Despite section 568(1) of EA 1996 (orders to be made by statutory instrument) (as applied by section 17(4) of this Act) the power of the Secretary of State to make an Academy order is not required to be exercised by statutory instrument.

(7) An Academy order may include incidental, consequential, supplemental and transitional provision.

38. Cl 6 provides:-

6 Effect of Academy order

(1) This section applies if an Academy order has effect in respect of a school.

(2) The local authority must cease to maintain the school on the date (“the conversion date”) on which the school, or a school that replaces it, opens as an Academy (“the Academy”).

...

(5) The relevant independent school standards are to be treated as met in relation to the Academy on the conversion date.

(6) “The relevant independent school standards” are the independent school standards (as defined in section 157(2) of EA 2002) that are applicable to the Academy on the conversion date.

...

(9) Nothing in any of the following provisions applies in a case where a local authority cease to maintain a school as a result of an Academy order—

section 30 of SSFA 1998 (notice to discontinue school);

sections 15 to 17 of EIA 2006 (procedure for discontinuance of schools).

39. So when an Academy order has been made, the local authority must cease to maintain the school on the date when the Academy opens. This date is known as the “conversion date” and will be the date specified as the Academy’s opening date in the Academy arrangements.

40. One of the implications of this, made express by cl 6(9), is that the converting school is not discontinued, and there is no obligation to consult about discontinuance under 2006 Act, though cl 5 (as we will see) provides some limited obligation to consult (other than the specific duty in cl 3).

41. Other provisions, not quoted above, make it clear that schools with a religious character will keep that religious character upon conversion to Academy status and will be treated as designated, on conversion, as independent schools having a religious character. Similarly, selective schools will be able to keep their selective status upon conversion, but selective status will not be available to other converting schools, or any other Academies, which do not have existing selective arrangements (see cl 1(6)(c)).

42. Two categories of school may be the subject of an Academy order: an applying school, and a school eligible for intervention under the 2006 Act. In the latter case, the conversion may be against the will of the school.

43. SoS, in both cases, has a discretion as to whether or not to make an order. Picking up on the point that the DFE has given notice that no application from any school which is “outstanding” will currently succeed, the discretion will apparently be exercised in only one way in respect of an application by any other school. But whilst SoS is entitled to adopt a policy towards a statutory discretion, he must remain open minded towards the possibility of disapplying that policy in particular

cases, and he must therefore take account properly of all applications, notwithstanding that they are made by schools which are not “outstanding”.

44. Furthermore, he must give reasons for refusing an application (cl 4(5)), though not for allowing the application. Reasons which show no attempt to consider the merits of an application by non-outstanding schools may be unlawful.

45. Academy orders will not be made by statutory instrument but will be administrative orders (cl 4(6)).

46. Where is the maintaining local authority in all of this? The first point at which it is mentioned in the Bill is when it receives notification that one of its schools has converted by receiving a copy of SoS's order, or notification that an application has been refused.

47. Of course, many schools will have contacted their local authorities to discuss the possibility of making an application, or at least to inform them that they have made an application. But the FAQs show a frostiness towards any local authority participation in the process:-

“As an academy, will I still work with the local authority?”

Academies are independent schools and not maintained by the local authority. However, being at the centre of your community, you will want to work with other schools and local partners.”

48. This answer is not really an answer at all. Is the local authority one of the local partners with which co-operation is expected? If not, why not say so? If so, why not say so? The message appears to be that it is up to schools to decide.

49. This message is repeated in cl 5 dealing with consultation, and SoS's “Guidance for schools becoming Academies”, to which I now turn.

Cl 5: consultation

50. Cl 5 provides:-

5 Consultation on conversion

(1) Before a maintained school in England is converted into an Academy, the school's governing body must consult such persons as they think appropriate.

(2) The consultation must be on the question of whether the school should be converted into an Academy.

(3) The consultation may take place before or after an Academy order, or an application for an Academy order, has been made in respect of the school.

51. This clause was added in the course of consideration by the Lords.

52. It gives rise to two main areas of debate:-

- (i) whether it truly guarantees consultation, as understood by the common law, at all;
- (ii) who should be consulted?

(i) Consultation as understood by the common law?

53. Cl 5(3) is remarkable, and could provide scope for the playing out of a weighty constitutional issue: the cutting down of judge-made rules as to the sufficiency of consultation. This arises because cl 5(3) provides that consultation is sufficient even if it has taken place after the Academy order has been made. As the explanatory notes to the Bill say:-

“20. The consultation may take place before or after the application, or before or after the order is made, but must take place before the Academy arrangements are entered into.”

54. The reason for this highly unusual provision may be that the Government is very keen for Academies to open on 1st September but at the same time recognises that there is unlikely to be time for this to happen if consultation were to occur when public lawyers would expect it to i.e. before the school had been made to apply for Academy status.

55. The common law obligation to consult has for decades been understood to entail the need to do so at a formative stage in the decision making process. It is very hard to see how consultation in this sense can occur at a point when the school has (1) not only decided to apply for an order, and (2) applied for an order but (3) that order has been made. Indeed, the Bill provides no power for a school to withdraw an application once made. If it cannot withdraw an application, the matter becomes starker still.

56. These points were made in a motion to amend the Bill to ensure that consultation took place before the decision to apply for an order was made. However, the motion was defeated. Government peers made reference to the assumed fact that that schools would seek to take their communities with them before applying for an Academy order, and that trust had to be extended to schools to lead the process.

57. The common law (i.e. the judges) will often impose an obligation to consult when the statute either:-

- (i) says nothing about consultation, or
- (ii) provides for consultation with only certain persons, when the common law would regard others as plainly affected by the decision in question.

58. However, can or would the common law impose obligations to consult in the teeth of the statute – that is to say, when the statute indicates that there is to be no such consultation, or where (as here) it proposes as consultation something which the common law would probably not recognise as such?

59. The position is presumably as follows:-

(i) Parliament clearly has the authority to oust common law obligations, save where to do so would be incompatible with EU law. There is no EU law issue here.

(ii) A piece of legislation that is incompatible with the ECHR may lead to a declaration of incompatibility. It is unlikely that there is any such issue here (though Art 1 of Protocol 1 may be engaged by the land transfer provisions in certain cases).

(iii) The question of whether legislation ousts common law obligations is one of construction. The Court will look for clear words to establish that this was Parliament's intention.

(iv) Even if consultation at this late stage were held to be compliant with the school's obligations (i.e. if it was held that common law obligations to consult were either satisfied, or ousted), it might be argued that SoS, in determining whether to make an order under cl 4 (see above), had to take into account the sufficiency of consultation undertaken by the school. As his current "Guidance for schools becoming Academies" says:-

"The Secretary of State will ... need to ensure that such consultation has been carried out by the Governing Body of the school before he can sign a Funding Agreement."

(ii) Who are the consultees?

60. The Government's original position was set out in an earlier form of the "Guidance to schools becoming academies" which said that the Heads and governors should "explain" to "students, parents and the wider community" what the effect of becoming an Academy would be. This was not to be consultation, but merely ex post facto explanation. Moreover, this version of the Guidance stated:-

"However there is no statutory requirement for you to consult them and you do not need to consult your local authority."

61. This left open the issue, as regards "students, parents and the wider community" whether there was a non-statutory obligation to consult (as there often will be). However, it was explicit that there was no need at all to consult the local authority.

62. The Guidance has now changed, presumably because of the addition of new cl 5. Putting aside the issue of consultation with staff under TUPE (which is dealt with in some detail, though the possible

application of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is not mentioned), the Guidance now says this about consultation:-

“Consulting interested parties about becoming an Academy

Governing bodies of schools that wish to convert to academies will be required by the provisions of the current Academies Bill to carry out a consultation on the conversion process with appropriate people before entering into a Funding Agreement with Secretary of State (see Stage 3 of the conversion process). The Secretary of State will therefore need to ensure that such consultation has been carried out by the Governing Body of the school before he can sign a Funding Agreement.

- . The consultation can be carried out before or after an Academy order has been applied for, or granted.*
- . The question for the consultation ought to be: should the school convert into an Academy?*

It will be for the Governing Body of the school to determine who should be consulted, although schools should consider involving local bodies or groups who have strong links with the school. We would also expect schools with a religious designation to consult their Diocesan Board or relevant religious authority.

There is no specified length of time for the consultation.

Your school can consult in different ways. Some examples are:

- . Information on the school's website about the application for Academy status, and a link to the Department's website, together with a contact address for enquiries*
- . A letter to all parents explaining the proposals*
- . A meeting with parents, or other opportunities to discuss the proposal*
- . A newsletter for parents answering questions or concerns, and explaining the latest position on the proposal*
- . Ask for views to be sent to the school in writing.*

As well as consulting on whether the school should convert to Academy status, Governors may wish to consult on particular aspects of running the Academy such as the Governing Body's proposals for the governance arrangements of the new Academy Trust or the appropriate specialism for the secondary curriculum.”

63. A number of points may be made:-

64. First, there is now mention of consultation, as opposed to explanation.

65. Second, there is no mention of consultation with the local authority. Indeed, the explanatory notes to the Bill still say this:-

“54. The Bill will make it possible for outstanding schools to convert to Academy status very quickly (possibly by September 2010) and allow the Secretary of State to require under-performing schools to convert to Academy status (possibly by September 2011) - in both cases without the need to consult the local authority.”

And this even though the notes recognise that local authorities will be affected by an application to become an Academy:-

“56. The Academies Bill will otherwise affect local authorities in that they will be required to cease to maintain schools that are either successful in their application to become Academies, or eligible for intervention as under-performing schools. This could affect their role in relation to schools which continue as maintained schools.”

66. Third, the question of whom the school should consult is left to the school.

67. Fourth, the practical examples of how consultation could take place is very much aimed at consultation with parents alone.

68. Fifth, leaving the issue to the school reflects the wording of cl 5(1) (“such persons as they think appropriate”) which signposts to a Court that it should interfere with the governing body’s decision about which parties to consult only if unreasonable. But might it be unreasonable to fail to consult e.g. the local authority? The local authority is clearly an affected party, whether in favour or opposed.

69. Sixth, if there were a deficiency in a school’s consultation process, query whether that could be remedied if SoS himself were to consult before deciding whether to make the order. But the statute does not require him to do so (save in the quite different case where he is creating additional schools: see cls 9 and 10 below), and there is (as far as I have noticed) no suggestion in the DFE literature that this is his intention.

Cl 7 and 8: transfers of surpluses and other property

70. These clauses provide for transfers of surpluses and other property to the Academy. Cl 7 provides for surpluses to be transferred by a local authority, and gives SoS a regulation making power to determine the amount of the surplus and related matters.

71. Cl 8 provides for the transfer of property, other than surpluses and land, from a local authority to an Academy. It gives SoS the power to make a property transfer scheme for that purpose.

Cls 9 and 10: Additional schools

72. These provisions envisage that SoS may create Academies, under cl 1, otherwise than by an Academy order i.e. may create Academies as wholly new institutions and not by converting existing schools. Cls 9 and 10 say that he must consider the impact of, and consult about, the proposed creation of an additional school.

CI 11: annual reports

73. This obliges SoS to prepare a report for every academic year on Academy arrangements entered into during the year, and on the performance of Academies each year.

CI 12: charitable status

74. This provides for the Academy proprietor to be a charitable company.

CI 13 and 14 : land; amendments

75. These clauses give effect to Schedules 1 and 2, which deal respectively with land and amendments to other enactments. Much of Schedule 1 re-enacts or extends Schedule 35A to the 1996 Act.

CI 15: transitional provisions

76. This clause provides for the extent to which Academies created under the 1996 Act are to be treated as Academies under the new legislation.

CI 16: pre-commencement applications

77. This provides that an application to become an Academy is to be treated as an application under cl 3 notwithstanding that it was made before cl 3 comes into effect. It also provides that consultation with the foundation by a foundation or voluntary school, and consent from trustees, are to be treated as having taken place under cl 3 even though they took place cl 3's commencement.

78. To this extent the Bill is retrospective. Oddly it does not apply to other forms of consultation.

Cls 17-20: interpretation, extent, commencement and title

79. The Bill come into effect on dates appointed by SoS in orders made by statutory instrument, apart from cls 15-20 which come into effect when the Bill is enacted.

80. As to the geographical extent of the Bill, the DFE explains the position at <http://www.education.gov.uk/academies/bill:->

“The Bill extends to England and Wales but only has application to England. While sections of the Bill do technically extend to Wales, the effect of the provisions will only permit an Academy to be established in England, so it will have no practical impact on, or application to, the organisation of schools in Wales.”

July 2010