



## **Being a Director of an Academy Trust**

### **The duties and responsibilities of the Directors of an Academy Trust**

*The Directors of academy trusts are also sometimes called trustees or governors. In this paper they are referred to as Directors throughout. They must be distinguished from the members of any Local Governing Bodies that are created in MATs. These members (while they might be called "local governors") are only sub-committee members and are wholly under the direction of the Directors of the MAT except if they have explicit delegated powers from them.*

The Directors and Members of an academy trust are not covered by the legislation that regulates the powers and activities of the governors of maintained schools. Nor are they required to comply with the Regulations and create the structures imposed by maintained school legislation.

Being the Director of an academy is to be in different legal territory.

The *Education (Independent School Standards) (England) Regulations 2010* apply, though with some exceptions, and form a brief framework with which Directors should be familiar. However, the provisions of the Academies Act 2010 and of the documents that flow from the Act modify these Regulations in significant areas. The academy Funding Agreement carries significant provisions on important aspects of the academy's life (such as employment, admissions, and the religious life and teaching expected) that are imposed contractually on the academy in return for the funding provided by the Secretary of State. These are expanded in the Academies Handbook which is re-published annually.

The Articles of the academy company also contain significant provisions and create consequences that are set out in detail below.

### **Companies Act and charity law**

The Directors are legally Directors of a company for the Companies Act 2006. The academy trust is a company with Members rather than shareholders. The Directors are legally responsible for managing the academy trust's affairs and looking after its assets.

The academy trust is as such "exempt" from registration as a charity but nevertheless guidance given by the Charity Commission outlines what the Directors ought to do to comply with their obligations under charity law and the trust is ultimately answerable to the Commission in respect of its conduct as a charity.

The Secretary of State is the "Principal Regulator" of the academy trust as an exempt educational charity. Consequently, the academy's funding agreement and the Academies Handbook contain important information and requirements in respect of the conduct of the academy trust as a charity. The Academies Handbook requirements often exceed those of the Commission and consequently require special attention.

### **The importance of Directors' meetings**

Ordinarily, the academy trust's daily affairs are managed by the trust leader and other staff members. Directors' responsibilities are discharged through decision-taking in Directors' meetings. Directors must ensure they hold regular meetings and attend unless exceptional circumstances arise. Directors are accountable to the Members of the academy trust through General Meetings of the academy trust. Members have the power to remove the Directors that they appoint, and we advise they should do so if they are not satisfied with the way in which the academy's affairs are being managed.

### **Directors must insist on information**

Directors should ensure they receive regular reports about the academy trust's finances and affairs, including budgets, cash flows and management accounts. They can be legally liable to make good the loss to creditors and at risk of being disqualified from acting as a director if they allow the academy trust to continue to incur liabilities (including by allowing staff to continue to work in expectation of their salaries being paid) at a time when there is no reasonable prospect of the academy trust avoiding going into insolvent liquidation. An academy trust is insolvent if it is unable to meet its debts and when they fall due. It would also be insolvent if its net assets were less than its liabilities (insolvency on the 'balance sheet basis').

### **Liability for pension shortfalls**

The Department for Education has published guidance from the Charity Commission on the effect of the shortfall in the Local Government Pension Scheme on the balance sheets of academy trusts which are liable to contribute to the scheme on behalf of their staff, indicating that the academy trust's obligation to contribute does not represent an immediate contingent liability, which could have the effect that the balance sheet of an academy trust is negative and hence that the academy trust is insolvent on the balance sheet basis.

### **Financial information**

Accordingly, Directors need to be careful to make sure that the information which they receive establishes that the forthcoming expenditure has been properly budgeted, prudent provision has been made for forthcoming liabilities, sensible reserves are maintained for unexpected or difficult to value liabilities and full records are kept of all income and expenditure.

## **Companies Act 2006**

The Companies Act 2006 imposes specific duties on Directors to

1. act only within their powers
2. promote the success of the academy trust
3. exercise independent judgment
4. exercise reasonable care skill and diligence
5. avoid conflicts of interest
6. not accept benefits from third parties and
7. declare an interest in a proposed transaction or arrangement

### **Directors' duties under the Companies Act**

Directors need to familiarise themselves with the Articles of Association of the academy trust and if they are in doubt as to whether any proposed action is within their powers they should take legal advice; and they must make sure that they only exercise their powers for the purposes for which they are conferred. Their duty to promote the interests of the company includes having regard to the interests of staff, the need to foster the academy trust's business relationship with suppliers and with the community, the impact of the academy trust on the environment, preserving the academy trust's reputation for high standards of business conduct and the need to act fairly if the interests of Members differ. The Directors' obligation to act with independent judgment is qualified to the extent specified in the articles of association. Directors must exercise the skill and care expected of reasonably diligent persons; and if they have special skills must exercise those. To avoid conflicts of interest, Directors must notify the academy trust at the earliest opportunity of interests which they have in other businesses and must seek advice if any transaction is proposed with any business in which a Director has an interest. Directors' obligations not to accept benefits from third parties are not limited to those which would be an offence under the Bribery Act, if receiving the benefit is likely to compromise the independence of the Director. See further in the Academies Handbook.

### **Charity law**

In addition to the duties imposed by the Companies Act, Directors must comply with responsibilities imposed by charity law. These include not being remunerated for their services as Directors. If it is proposed that a Director should supply other services to the academy trust you should seek specialist advice as this is a complex area because of the requirements of the Academies Handbook.

Additionally, the Directors are responsible for making sure that the academy trust only provides services which respond to the need for the charity to provide a public benefit. This is a highly technical question and again, Directors need to take specialist advice on any questions where there is any doubt whether goods money or services are provided to the public at large. Sometimes a trading company is required to undertake certain public service roles that would not be proper for the Academy trust itself.

### **Dealings with Members**

Directors must account to the Members of the academy trust in General Meetings. They should make sure that they report on the activities of the company and provide the Directors' reports and accounts required by the Companies Act. Members have an independent role in holding the Directors to account. The Academies Handbook contains explicit limitations on dealings with Directors (or indeed Members) or with connected parties.

### **Committees**

Other than Members' or Directors' meetings, any formal committee structure required is in the Academies Handbook. The DBE requires that all academies within Church MATs have Local Governing Bodies. These committees do not have the same responsibilities as governors in maintained schools. They have no more than delegated powers that may always be removed or modified by the Directors. The extensive Regulations that provide for a range of committees in maintained schools do not apply to academies. Nor does legislation regulating the relationships between schools (such as Collaboration or Federation Regulations) apply to academies. Both internally and externally Directors must develop for themselves structures that enable them to carry out their role effectively and efficiently and should not simply replicate without careful consideration the patterns they have inherited from their previous existence as a maintained school. Directors should regularly review any delegation of powers they provide to Local Governing Bodies in Multi-Academy Trusts.

### **Corporate compliance**

As well as its obligations to report to the Department of Education under the Funding Agreement, the Directors must make sure that the academy trust complies with its obligations under the Companies Act, for instance to file information at Companies House promptly on any changes of Directors. (Note that Companies House does not require to be notified about changes in Members – only Directors.) If the academy trust were to create any mortgage or charge, the academy trust will similarly have to file details of the obligation at Companies House. The academy trust will also have to file an annual return and audited accounts. If any change becomes necessary to the Articles of Association of the academy trust, this is a matter for the Members and Directors should take legal advice on the procedure necessary for the Members to make that change. The academy trust is not obliged to appoint a company secretary to deal with corporate compliance, but our recommendation would be that the academy trust should do so, so that one person at least has responsibility to make sure that these points are continuously dealt with. A company secretary can be one of the Directors. Note that this role is quite separate from the secretarial role described in some of the older academy articles. The Academies Handbook also makes requirements as to financial management and compliance and to the necessary staffing structures.

### **Policy matters**

The Directors ought to lay down policies in a wide range of areas, many of which will be familiar to those on the governing body of a school converting into an academy trust. These could include

- Decisions which have an impact on the religious character and ethos of the academy trust
- the appointment removal or dismissal of the head teacher and the appointment of any replacement or joint appointee
- the appointment removal or dismissal of other staff
- disciplinary and grievance procedures by members of staff
- capital expenditure
- setting an annual budget for the academy trust
- complaints by parents/carers
- appeals against any decision to exclude a child
- admissions criteria
- joint initiatives or ventures with other schools including pupil exchanges, teacher exchanges, off site premises such as nature centres
- use of school premises by outside bodies such as sports clubs
- policy with regard to the provision of services to the local authority or other schools, in relation to special needs pupils
- any decision to close an academy temporarily or permanently
- any decision to cease to be an academy trust
- any decision to move site
- any decision on the allocation of funding received from the Department under the funding agreement
- any decision on applications for special funding
- setting policy on any issues relating to legal compliance and forthcoming legislation
- any decision on compliance with Data Protection and Freedom of Information requests
- any decision on handling litigation such as staff complaints

A number of these are of such importance that the Directors may not be able to take a decision without consulting the Members. Whenever it is not immediately obvious to Directors whether a matter is one within their power or which requires it to be decided by the Members, they should take legal advice. To act knowingly ultra vires is unacceptable.

### **Unusual events**

Directors should make sure that decisions on how to handle unusual circumstances are not taken without their approval. These may include decisions referred to above, which clearly should not be taken by members of staff, except to the extent that the Directors have expressly delegated management and authority to commit the academy trust in the particular case. Decisions such as a proposal to remove the Principal or member of staff or any which may result in litigation or a dispute or in response to an obligation to disclose information should obviously not be taken without prior legal advice.

## **Potential liability of Directors**

A company's directors can be liable for their obligations in certain circumstances under the Companies Act, particularly where they have not behaved prudently or failed to look after the company's assets. As indicated above, Directors can be made personally liable if a company goes into insolvent liquidation. These points apply just as much to academy trusts. Similarly, Directors can be made jointly liable as Directors for a wrong done by the company. They could also be exposed to proceedings for causing personal injury, including for corporate manslaughter.

It is prudent for Directors to make sure that the academy trust takes out Directors & Officers insurance. Such policies normally cover the cost of successfully defending legal proceedings, but Directors must, as indicated still be careful and prudent in their actions, if they wish to avoid the risk and anxiety of proceedings or prosecution.

## **Conclusion**

We recommend all Directors brief themselves fully on their powers and responsibilities at the outset. If they do so and take professional advice wherever required, they will be able to discharge their duties effectively and without running the risk of later liability or recrimination.