Browne Jacobson

Getting to grips with the direction of travel - the New Model Articles

Why academy trusts must seriously consider how the new Model Articles may impact their operations.

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For the first time in five years, on 30 June 2021 the Department for Education (**DfE**) updated the Model Articles for mainstream academies, special academies, 16 to 19 academies, alternative provision academies, free schools and studio schools (known as the **Model Articles**).

Whilst you may not be planning on changing your Articles, we recommend that you go beyond the headline technical changes and reflect on what is driving the changes and how the underlying issues and direction of travel may impact on how your trust operates in practice. It is also likely that the DfE will use trust expansions to help drive the adoption of the latest model so, if you are planning on growing over the next year, it would be sensible to know in advance what has changed. It is likely that those trusts on older Articles than the 2016 model are likely to be under a greater expectation to update their Articles.

The latest Model Articles helpfully include a summary at the beginning of the main changes. This briefing therefore seeks to help you draw out the key things you should take away.

What you will notice, when reading the changes, is that many of the themes have been trailed in previous editions of the Academies Financial Handbook and, perhaps unsurprisingly, complement developments in this year's handbook, which has been renamed the 'Academy Trust Handbook' (**Handbook**), which will be effective from 1 September 2021 (you can find our separate briefing on the new handbook here).

The changes can be grouped together into three overarching themes:

1. focus on independent and effective governance oversight;
2. ensuring Members' engagement; and
3. other enhancements and tidy up.

1. Independence and oversight

To promote greater independence within the governance layers of trusts, the new Model Articles now require:

- that a majority of Members must be independent of the Board — whilst this has been a strong policy preference for a while it has now become mandated for those trusts that adopt the new Model Articles;
- the Board to appoint a Governance Professional — this should be read in conjunction with the latest requirements in the Handbook regarding the role and importance of governance.

There is also a growing focus on the suitability of Members and Trustees. The list of Member disqualifications has been significantly expanded. The Trustee disqualification provisions have also been expanded. You should ensure that you are familiar with the full list, but importantly for both Members and Trustees, they can be disqualified where they are found to be unsuitable by the Secretary of State. These new provisions clearly supplement the provision of the Funding Agreements in this respect but mark, perhaps, half a 'step back' to when the Secretary of State could make appointments to the Membership and Board in early versions of the Model Articles.

The technical changes to disqualifications are important and you will want to digest them. More broadly, you may want to reflect on the practices and procedures you have in place for identifying and bringing on new Members and Trustees, inducting them, and what you provide in terms of ongoing support and development to ensure that you are satisfied that they are not only eligible, but also possess the competence, commitment and character to effectively serve on your Membership or Board.

It is also worth noting that the new Model Articles includes a footnote that, amongst other things, explains that Members should carefully consider the benefits and risks of appointing the CEO as a Trustee, seeking evidence to support their decisions. It is therefore very possible that your trust may be asked by the DfE, in the future, to provide a rationale and explanation of the evidence used. This is something that would be particularly relevant to consider when appointing a new CEO. We are able to provide guidance on the various benefits and risks of appointing the CEO as a Trustee if you wish.

2. Members' engagement

The DfE's focus on the role of Members continues. There are three areas where the DfE is looking to ensure effective engagement with Members.

Firstly, in this update, the requirement for the trust to hold an AGM (Annual General Meeting) is hardwired into the Articles and mandatory (until now this was always an option for the trust).

Secondly, the quorum for general meetings has been increased to a majority of Members (if you adopt the DfE's preference of five members, this raises quorum requirement from two to three).

Thirdly, the DfE has sought to provide clarity as to the duties of Members. Last year the Supreme Court gave a landmark judgment confirming that members of charities are fiduciaries (someone who owes a single-minded duty of loyalty to their beneficiary). You can access our briefing from the time here. In the latest model the DfE has extended Article 16A, which required Members not to take steps that cause the trust to breach its charitable objects, and extended it to place a duty on Members to "*act in a way which they decide, in good faith, will be most likely to further the purposes*" of the trust. This wording is taken from the model constitution for Charitable Incorporated Organisations (a relatively new form of charity), and embeds in the Articles the nature of the fiduciary relationship for the first time.

Beyond these headlines, we recommend that trusts take the opportunity to:

1. clarify both the role and responsibilities of Members in their trust to help aid the effective governance of the trust — one way of doing this, which we have already supported some of our clients with, is through putting in place a 'members' handbook', providing a practical reference guide to support your members in carrying out the role effectively; and
2. reflect on the approach to general meetings and how they could be used to support broader engagement between the trust and its Members and, perhaps, depending on your perspective, more broadly with the communities served.

It is worth noting that the new Model Articles include provisions for virtual Members' meetings too. Whilst there is a clear need for virtual Board meetings, the 'governance world' is far more divided on whether virtual Members' meetings are a good thing, having regard to the role of Members and the nature of Members' meetings but the options is there if you wish to adopt it in future.

3. Enhancements and tidy up

Increasingly, we were being asked by clients, when updating their Articles, to make them gender neutral. The DfE has taken the opportunity in this update to make the model gender neutral.

With the pandemic leading to the move to online Board and committee meetings, the DfE has incorporated improvements to the rules on virtual meetings. The old Model Articles wording (at Article 126) was written when different technology was available, and is drafted on the basis of Trustees electing to join by virtual means by giving notice in advance. The new Model now includes clearer rules that work with the growth of video call platforms.

Other changes include:

- new definitions: for example, for 'Chair', 'Vice-Chair', 'Co-opted Trustee' and 'parent';
- ensuring that subsidiary companies are within the rules on Members and Trustee benefits in Article 6;
- clarifying that Board appointments can be made for shorter than the usual four-year term (does not apply to parent trustees);
- more topic headings throughout, to help with navigating the document; and

- simplified provisions on setting rules.

Please do get in touch if you want to discuss any of the issues above, or are interested in discussing the ways we can support the Board and executive leaders with their strategic functions.

Contact

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