

Director of Children's Services.

3 November 2011

### **PFI Academies**

We have recently tabled an amendment to the Academies Act which we hope will reassure banks and PFI contractors that local authorities can legally make payments in relation to PFI Academies. I know that some local authorities have raised concerns about this issue and am therefore writing to you to explain our approach.

It may help if I provide some background. The debate has been about the effect of section 6(2) of the Academies Act 2010 which states that a local authority must 'cease to maintain' a school which converts to Academy status. It has been argued that this means that local authorities cannot make PFI payments on Academies' behalf since that would amount to "maintaining" the school. We do not accept this interpretation and believe that local authorities do have, and have always had, the power (or *vires*) to make contractual payments on Academies' behalf as this in no way amounts to "maintaining" the school.

Ministers decided that in order resolve this *vires* issue and provide the necessary certainty to stakeholders they would amend the Academies Act to put the position beyond doubt. An amendment was tabled on Wednesday 19 October. The amendment has clarified that local authorities can make payments in relation to PFI Academies and we hope that given this clarification, local authorities and banks will now work with the Department to progress those Academy projects which are financed by PFI.

The amendment will take effect from the date of Royal Assent of the Education Bill which, subject to Parliamentary approval, we expect to take place in the next month. It does not need to be retrospective since it is a clarificatory amendment. It is not intended to change the law, which already allowed local authorities to make the PFI payments, but rather to clarify and put beyond doubt, that local authorities can make those payments.

The amendment was debated in the House of Lords on 1 November where Lord Hill stated;

*“The Government believe that local authorities do currently have the power to assist academies financially or otherwise. However, we recognise the demand for this point to be put beyond doubt, which is what Amendment 84C seeks to do. The amendment clarifies local authorities’ existing powers in relation to academies; it does not place any new requirements or duties on local authorities. In order to provide clarity as early as possible, the amendment to Clause 78 provides for this new clause to come into force on Royal Assent.”*

There will, therefore, be no question of any future payments made by local authorities under PFI and other contracts being ultra vires, even where those contracts or arrangements were entered into before the coming into force of the provision. If there is any remaining question as to the vires of a local authority in relation to payments it made before the coming into force of the provision, because it is clarificatory and not intended to change the law, this amendment, and the statements made in Parliament in relation to it, would similarly assist a court in concluding that the local authorities did have the necessary vires.

I hope this is helpful and that all concerned can work together to ensure that those PFI schools affected by the vires issue can continue with their plans for conversion to Academy status. If you have any questions about this matter please do not hesitate to contact Alison Powell who can be contacted by email at [alison.powell@education.gsi.gov.uk](mailto:alison.powell@education.gsi.gov.uk) or by telephone on 01325 735429.

Your sincerely  
AJ McCully

Andrew McCully  
Director General (Acting)  
Infrastructure and Funding Directorate