

GENERAL SYNOD

LEGISLATIVE COMMITTEE

Diocesan Boards of Education Measure

Comments and Explanations

The Diocesan Boards of Education Measure updates and replaces the Diocesan Boards of Education Measure 1991 (the 1991 Measure), which provides the legal framework within which the Church of England's dioceses engage and work with Church schools.

The Measure confers updated functions and powers on Diocesan Boards Education, in particular by making suitable provision in relation to academies and multi-academy trusts.

The Measure enables DBEs to be a statutory committee of their Diocesan Board of Finance and provides clarification of the existing two options for the constitutional form of DBEs (i.e. either incorporated or unincorporated).

Introduction

1. The Legislative Committee of the General Synod, to which the Measure entitled the Diocesan Boards of Education Measure (**the Measure**) has been referred, has the honour to submit the Measure to the Ecclesiastical Committee with these Comments and Explanations.

Summary of the Measure

2. The Measure reflects and provides for the current (and anticipated future) educational environment in which Diocesan Boards Education (**DBEs**) are operating, in particular by making suitable provision in relation to academies and multi-academy trusts.
3. The key change in the Measure is the introduction of the option for DBEs to be constituted as a statutory committee of their Diocesan Board of Finance (**Board of Finance**) and clarification as to how the two options for the constitutional form of DBEs in the 1991 Measure (i.e. being either incorporated or unincorporated) should operate. This is because the 1991 Measure simply requires DBEs to be incorporated or unincorporated. As a result, whilst a significant number of DBEs are incorporated as companies limited by guarantee and are registered with the Charity Commission, many unincorporated DBEs interpreted the option to be unincorporated more widely than had been anticipated and so are operating, in practice, as a committee of their Board of Finance. The Measure provides for such DBEs to become committees of their Board of Finance where they wish to continue operating in this way.
4. Another key change is that each diocesan synod will make a scheme for its DBE without any involvement from the Department for Education. The Measure provides more flexibility as to the composition of a DBE, whilst requiring core governance provision to be made. Therefore, the Measure provides more local choice for DBEs, so they can reflect what is suitable in that diocese.
5. The Department for Education and the Charity Commission were consulted on the Measure and on the amendments to it and any points raised have been addressed.

The provisions of the Measure

Section 1: Continuation

6. This section provides for there to continue to be a DBE for each diocese.

Section 2: General Functions

7. The 1991 Measure sets out the functions of the DBE in section 2. The Measure separates the objects from the functions, to improve clarity. The objects of DBEs are now set out in section 2(1) and the functions are referred to in section 2(2), as being those functions set out in sections 7 to 15. Section 2(3) defines “functions” as a power or a duty.
8. At present, whilst the objects of a DBE and any provisions in its constitution must reflect the provisions of the 1991 Measure, the wording used in the objects clauses of the various DBE charities registered with the Charity Commission varies. In order to avoid those DBEs that are already registered charities from having to amend their objects etc, section 2(1) is drafted so that those DBEs which are already registered charities should not need to adopt revised charitable objects.

Section 3: Single DBE

9. Subsection (1) provides that each diocesan synod must make a Scheme designating a body (which must be registered with the Charity Commission) as the DBE for the diocese. The three options for how DBEs may be structured are:
 - a) an incorporated registered charity (either a company limited by guarantee (**CLG**), or a Charitable Incorporated Organisation (**CIO**));
 - b) an unincorporated registered charity; or
 - c) the Board of Finance for the diocese.
10. Subsections (2) and (3) provide that:
 - a) the first Scheme, and any subsequent scheme where the current DBE is either an incorporated or unincorporated registered charity, must implement a proposal made by the diocesan bishop with the consent of the existing DBE; and
 - b) subsequent schemes where the existing DBE is a committee of the Board of Finance must implement a proposal made by the diocesan bishop after consulting the existing DBE and with the consent of the Board of Finance.
11. Subsections (4) and (5) confer power on the Archbishop of the Province to make a subsequent scheme in circumstances where the Archbishop considers the DBE is unreasonably withholding or delaying consent. To ensure that any Scheme complies with charity law the Archbishop is required to consult the Charity Commission on the terms of any such proposed Scheme.
12. Subsection (6) is an enabling power so that where the existing DBE is to be designated as the DBE for the diocese, it can make pre-emptive changes to its governing document so that it will comply with the Scheme’s requirements once it comes into force.
13. Subsections (7) and (8) provide that, where a Board of Finance is designated as the DBE for the diocese, a committee of the Board of Finance is established in order to exercise those functions conferred on the Board of Finance in its capacity as the DBE. Therefore, if a diocese designates the Board of Finance as the DBE, wherever the Measure refers to the DBE it is a reference to the DBE committee established under subsection (4), rather than a reference to the Board of Finance itself.
14. Subsections (9) and (10) provide that a Scheme made to designate an entity as the DBE must reflect the requirements set out in Schedules 1 and 2.

Section 4: Joint DBE

15. This section enables diocesan synods to designate an entity as a joint DBE for two or more dioceses (subsection (3)). Subsection (1) provides that the joint entity must be an incorporated or an unincorporated separately registered charity and subsection (2) confirms that a DBE that is a statutory committee of a Board of Finance cannot be a joint DBE.
16. Subsection (4) provides that a scheme appointing an entity as a joint DBE must implement a proposal made by the diocesan bishops acting jointly which has the consent of all the DBEs concerned. Where an existing DBE is a committee of the Board of Finance, the existing DBE committee is consulted and the Board of Finance must consent to the Scheme.

17. Subsections (5) and (6) confer power on the Archbishop of the Province to make a joint Scheme in circumstances where the Archbishop considers a DBE is unreasonably withholding or delaying consent. To ensure that any Scheme complies with charity law the Archbishop is required to consult the Charity Commission on the terms of any such proposed Scheme.
18. Subsections (7) and (8) provide that, where a diocesan synod makes a Scheme under section 4, it is considered to have complied with the requirement to make a Scheme under section 3(1) and the requirements of Schedule 1 apply to a section 4 Scheme. Subsection (9) provides that, where a joint DBE has been appointed, all references to a DBE for a diocese in the Measure are treated as a reference to such joint DBE.
19. Subsection (10) adds DBEs to the list of bodies in section 19(1) of the Dioceses, Pastoral and Mission Measure 2007, so that the provisions of sections 19 and 20 of that Measure cannot be used to set up a joint DBE and so circumvent the requirements of the Measure in this regard.

Section 5: Incorporation

20. This section supports and simplifies the process of incorporating for those unincorporated DBEs which are to be transferred to an incorporated charity (being either a CIO or a CLG).
21. Subsection (1) requires an unincorporated DBE to have the consent of the diocesan bishop and diocesan synod before taking steps to incorporate and subsection (6) provides that where an unincorporated joint DBE wishes to incorporate, it requires the consent of all the diocesan bishops and all the diocesan synods. Subsection (2) requires a DBE, which is a statutory committee of the Board of Finance, to have the consent of the Board of Finance too.
22. Subsection (3) confirms that the power to incorporate may be exercised by DBEs before the first Scheme under the new Measure is made and at any point subsequently, should the decision to incorporate be taken.
23. Subsection (4) enables DBEs to resolve to incorporate without needing an Order from the Charity Commission to authorise the otherwise unresolvable conflict of interest, provided the assets to be transferred exceed the liabilities to be transferred. This is because incorporation will provide the DBE members making the decision with personal protection from unlimited liability following incorporation, which is considered to be a trustee benefit by the Charity Commission and so would not be permitted unless it is either authorised by the Measure or by an order of the Charity Commission.
24. Subsection (5) confers trust corporation status on all incorporated DBEs (whether CIOs or CLGs) enabling DBEs to act as the sole corporate trustee of land.

Section 6: Director of education

25. The provisions of the 1991 Measure for a Diocesan Director of Education (**DDE**) appear in revised form here. Subsection (1) requires there to be a DDE for each diocese and subsection (5) provides that there will be a joint DDE where there is a joint DBE.
26. Subsection (2) provides that the DDE is appointed by the bishop in consultation with the DBE (as per the 1991 Measure) and subsection (3) provides that the DDE in post immediately before the DBE Measure comes into force continues in that role.
27. Subsection (4) provides that the DDE serves as the Secretary to the DBE but is not a member of the DBE and is not a charity trustee. Subsection (6) provides that the DDE may speak at a DBE meeting but may not vote.

Sections 7 to 10: Advice, Consent, Consultation and Directions

28. These functions and responsibilities reflect and update the equivalent provisions in the 1991 Measure, including specific provision for the role of DBEs in respect of academies.
29. Section 7: Advice
 - a) Subsection (1) confers power on the DBE to provide advice on matters affecting church schools in the diocese to the governors or Multi Academy Trust (**MAT**) proprietors of those schools, the trustees of church educational endowments and to other bodies the DBE considers appropriate.

- b) Subsections (2) and (4) to (6) list the situations in which the governing body of a voluntary or foundation church school, the proprietor of an academy which is a church school, and the trustees of a church educational endowment must obtain the DBE's advice. Subsection (3) provides that this requirement does not apply in relation to subsection (2) where the DBE's consent is required under section 8(1) or (2). Subsection (7) requires the DBE to provide the advice sought under these subsections.
- c) Subsections (8) to (10) enable certain people to attend and to make oral submissions and answer questions at the part of a DBE meeting considering the matter on which they have sought advice under this section.
- d) Subsection (11) requires those to whom the DBE gives advice to have "due regard" to that advice. This means that they would need to have cogent reasons for not following it.

30. Section 8: Consent

- a) Subsections (1) to (4) sets out the circumstances in which a governing body of a voluntary school, a foundation school and the proprietor of an Academy must obtain the prior written consent of the DBE. Where the consent requirement relates to an alteration or repair of property, subsection (5) provides that the DBE's consent is not needed if the cost of that repair falls below a threshold set by the DBE from time to time.
- b) Subsections (6) to (8) enable certain people to attend and to make oral submissions and answer questions at the part of a DBE meeting considering the matter on which they have sought consent under this section.

31. Section 9: Consultation

This section requires local authorities to consult with DBEs before appointing a person to represent the Church of England on a Standing Advisory Council for Religious Education.

32. Section 10: Directions

- a) Subsections (1), (2) and (4) set out when and how the DBE may give directions to the governing body of a church school, the proprietor of an academy or the trustees of a church educational endowment. Subsection (5) requires those receiving a direction to comply with it.
- b) Subsection (3) confers power on a DBE to direct a church school to permit an inspection of the religious education or collective worship in that school, should it have concerns as to its quality or content.
- c) Subsections (6) to (8) enable certain people to attend and to make oral submissions and answer questions at the part of a DBE meeting considering the matter on which the DBE is considering making directions under this section.
- d) If a DBE gives a direction under this section, subsection (9) requires the DBE to lay a report before the diocesan synod (and where the DBE is a joint DBE, the report must be laid before the diocesan synod for the diocese to which the direction relates).

Section 11: Engagement

- 33. This section is designed to support and facilitate cross-diocesan activity, provided in all cases that the DBE in the other diocese has provided its consent to the proposed engagement.
- 34. Subsection (1) enables DBEs to work with those involved in education in other dioceses on matters of common interest. Subsection (2) permits cross-diocesan engagement in relation to a DBE's work with children and young people where a DBE's diocesan synod has conferred such functions on that DBE pursuant to section 15(2).

Section 12: Information

- 35. Section 12 confers a new power on DBEs to ensure that church schools can be required to provide information to assist the DBE in carrying out its functions. In particular, it will enable DBEs to request information from schools which is routinely sent to local authorities and for which DBEs often have to wait some months until it becomes publicly available.

36. As subsection (1) confers broad powers on the DBE, subsections (2) to (4) provide a mechanism for resolving a dispute as to whether specific information sought by a DBE under this power must be provided by the school. Therefore, the Measure confers power on the consistory court of the diocese to determine whether a DBE's request for information is lawful. However, to make it simpler and less costly for a school to seek such a determination, any decision taken by the consistory court will be on the basis of written representations only, rather than at an oral hearing.

Section 13: Safeguarding

37. This section requires the DBE (where it is incorporated), or the members of the DBE (where it is unincorporated or a committee of the Board of Finance) to have "due regard" to House of Bishops' safeguarding guidance. Should the draft Safeguarding (Code of Practice) Measure complete its passage through the Synodical and Parliamentary processes, the duty to have "due regard" to safeguarding guidance will be replaced with a duty to comply with the requirements in a safeguarding code of practice.

Section 14: Government contributions to capital works in church schools

38. The government has agreed to pay their annual contribution towards capital works in Voluntary Aided (VA) schools directly to dioceses for their VA schools across the diocese from 2020/21. However, the government will only do this on the same basis that they make annual capital contributions to academies, so a direct payment will not be made to a unit with fewer than 5 eligible schools or fewer than 3000 children.
39. A number of dioceses already fall below this threshold and so will need to enter into arrangements with neighbouring dioceses. It is anticipated that, as more VA schools become academies, the need for DBEs to enter into such arrangements will increase and so this power has been included to facilitate such arrangements.

Section 15: Other responsibilities

40. Section 15 includes and expands on the provisions from the 1991 Measure that allow diocesan synods to confer additional functions on DBEs.
41. Subsection (1) provides that the DBE has such other functions as may be conferred on it by other legislation, including where the DBE is referred to as "the appropriate diocesan authority" or "the appropriate religious body".
42. Subsections (2) and (5) enable the diocesan synod(s) to confer functions on the DBE "in relation to children and young people", provided that the functions so conferred on a DBE reflect the limitations set out in subsection (3) and (4).
43. Subsection (6) is a general power to enable DBEs to do anything not specifically set out in the Measure in order to exercise their functions properly.

Section 16: Consequential amendments

44. Subsections (1), (2) and (7) enable the Archbishops' Council to amend the Measure by Order, provided that such changes are made only in consequence of any future legislation relating to education made by or under an Act of Parliament. This will enable the face of the Measure to remain up to date with future changes to the law. As any changes made under this section would relate to changes in the law already passed by Parliament and so which would already be binding on DBEs, it is a very limited power.
45. The synodical process which must be followed before the Archbishops' Council can seal such an Order, and the procedure for the Order to be sealed is set out in subsections (3) and (5) to (7). Subsection (4) requires the Archbishops' Council to consult the Secretary of State before a draft Order is laid before Synod.

Section 17: Review

46. Subsection (1) requires the diocesan synod to keep the way in which the DBE exercises its functions under review.
47. Subsection (2) provides for the continuance of the obligation on the DBE to report annually to the diocesan synod.

Section 18: Guidance

48. In order to support the operation of the Measure, subsection (1) requires the DBE, Board of Finance, diocesan synod and diocesan bishop to have “due regard” to any guidance the Archbishops’ Council may issue. This does not amount to making the observance of the guidance mandatory, but does mean that where any of the bodies reasonably wishes to depart from such guidance they must have cogent reasons for doing so and must minute their decision accordingly.
49. Subsection (2) requires the Archbishops’ Council to carry out such consultation as it considers appropriate, before issuing any such guidance.

Section 19: Meaning of “church school”

50. This section sets out a revised and expanded definition of “church school”, which sets out all the circumstances in which a school (including an academy) acquires a designation by the Secretary of State as a school with a Church of England religious character. Subsection (8) confers power on the Archbishops’ Council to amend this definition of “church school” in consequence of a future Act of Parliament, using the process set out in section 16.

Section 20: Other interpretation

51. A number of expressions and acronyms used in the Measure are defined in subsection (1). The remaining subsections assist in the interpretation of certain concepts referred to in the Measure more generally.

Section 21: Repeal of the 1991 Measure

52. Section 21 provides for the repeal of the 1991 Measure and for consequential repeals. Subsection (4) refers to the transitional and saving provisions in section 23(8) to ensure continuity for the status of each DBE.

Section 22: Preparatory steps

53. This section enables DBEs, Boards of Finance, diocesan synods and diocesan bishops to take such steps as they consider necessary to facilitate the implementation of provisions of the Measure. As some dioceses may wish to take steps such as incorporation of the DBE, or the setting up of a joint DBE, this section supports these activities.

Section 23: Steps for making first scheme

54. Subsection (1) provides for the Archbishops’ Council to certify when a diocesan synod has made a Scheme under the Measure and the certificate will certify the date on which the Scheme and Schedule 2 to the Measure will come into force in relation to that diocese. This process was designed to facilitate those dioceses which would like to be able to make their first Scheme sooner, so that it comes into effect earlier than 1 January 2023.
55. Subsections (2) to (5) confer power on the Archbishop of the relevant Province to make the first Scheme for a diocese where a Scheme has not been agreed by 1 November 2022. The Archbishop must consult the Charity Commission on the terms of the proposed first Scheme. This power has been provided to avoid a perpetual deadlock situation where a first Scheme cannot be agreed in a diocese.
56. Subsection (6) provides that the DBE continues to be constituted as it is before the Measure comes into force, until the first Scheme comes into force for that DBE.
57. Subsection (7) is a transitional provision to enable the current DBE members to continue in office until 1 January 2023 (or such date after their term ends from 1 January 2022 and before 1 January 2023 when the new DBE scheme is made for that diocese).

Section 24: Short title, commencement and extent

58. Subsections (2), (3) and (4) provide that section 22 and section 24 itself come into force on the day the Measure is passed. The rest of the Measure’s provisions (other than section 3(10) and Schedule 2, which come into force for each diocese on the day certified for that diocese under section 23(1)) come into force two months after the Measure is passed. The reason for this is to enable DBEs and dioceses to take such steps as may be necessary before the Measure comes into force.

Schedule 1: DBE: Scheme for Designation

59. Paragraphs 1 to 3 set out what a Scheme made by a diocesan synod under section 3 (or, where a scheme was made under section 4 for a joint DBE, paragraphs 1 and 2 only) must, may and must not include. The requirements for Schemes differ depending on whether the DBE is an incorporated charity (paragraph 1), an unincorporated charity (paragraph 2), or a statutory committee of the Board of Finance (paragraph 3).

Paragraph 1: Company or CIO

60. Sub-paragraphs (3) to (5) enable (but do not require) the Scheme to transfer property held on trust in connection with the provision of church schools in the diocese by the Board of Finance or by another body to an incorporated DBE, which the incorporated DBE must hold on the same trusts.
61. Sub-paragraphs (6) to (9) enable (but do not require) the Scheme to substitute the incorporated DBE as a member of a “relevant company” in place of the Board of Finance and to substitute the DBE for the Board of Finance where it has a power of appointment of members or directors of a “relevant company”.

Paragraph 2: Unincorporated body

62. Sub-paragraphs (3) to (5) enable (but do not require) the Scheme to transfer property held on trust in connection with the provision of church schools in the diocese by another body to the Board of Finance, which the Board of Finance must hold on the same trusts but with the members of the DBE being responsible for administering the funds.

Paragraph 3: Diocesan Board of Finance

63. Sub-paragraph (3) requires the Scheme to provide for the Board of Finance to delegate the functions conferred on it as the DBE to the DBE statutory committee. Sub-paragraph (4) then prevents the Board of Finance from exercising any of these delegated functions other than through the DBE Committee unless the DBE Committee fails to act in accordance with the Measure or Scheme in a significant way.
64. Sub-paragraph (5) provides that the Scheme must set out provision for the procedure of the DBE Committee, or authorise the Board of Finance to do so, as the DBE Committee will not have a separate constitution.
65. Sub-paragraphs (6) to (8) enable (but do not require) the Scheme to transfer property held on trust in connection with the provision of church schools in the diocese by another body to the Board of Finance, which the Board of Finance must hold on the same trusts but with the members of the DBE statutory committee being responsible for administering the funds.

Paragraphs 4 to 8: General provisions

66. Paragraph 4 confirms that the exercise by the Board of Finance of functions for the purposes of the DBE Measure are included in the meaning of the furtherance of the work of the Church of England in section 1(2)(b) of the Diocesan Boards of Finance Measure 1925. This provision does not widen or alter the current position but provides comfort to Boards of Finance that being appointed as a DBE by Scheme made under the Measure is within the scope of its statutory purposes under the 1925 Measure.
67. Paragraphs 5 to 7 set out what provisions must and may be included in a Scheme. In particular, where a new entity has been designated as the DBE (for example a newly incorporated DBE) paragraphs 6 and 7 enable the Scheme to effect any appropriate transfers of property, rights and liabilities, and of rights and liabilities under employment contracts from the unincorporated entity to the new incorporated DBE.
68. Paragraph 8 provides that the DBE signifies its consent to a Scheme by providing a certificate signed by the diocesan bishop and the director of education.

Paragraph 9: Amendment of a Scheme

69. Sub-paragraphs (2) and (4) provide that the diocesan synod (or all the relevant diocesan synods, where there is a joint DBE) may not amend a scheme unless the DBE consents to the proposed amendment.
70. Sub-paragraph (3) enables a supplementary Scheme to be made.

Paragraph 10: Revocation

71. Sub-paragraphs (1), (2) and (7) provide that, where a Scheme is revoked, a new Scheme must come into operation immediately after the revocations, so there is no period when a diocese does not have a Scheme in place. Sub-paragraphs (3) to (6) and (8) set out the process for revoking a Scheme where there is a joint DBE.

Paragraph 11: Copy for Secretary of State

72. A copy of the Scheme and any subsequent schemes amending, supplementing or revoking a Scheme must be sent to the Secretary of State within 90 days of it being made.

Paragraph 12: Vesting of property

73. Sub-paragraph (1) provides that the Scheme may transfer the legal title to property, without a separate document being required. Sub-paragraph (2) ensures that such a transfer will not be a breach of covenant or give rise to forfeiture.

Paragraph 13: Meaning of “reverter”

74. Paragraph 13 defines the term “right of reverter”, which is the term commonly used to describe the nature of a trust arising under section 1 of the Reverter of Sites Act 1987.

Schedule 2: DBE Governance

75. Schedule 2 provides for the composition and proceedings of DBEs, including the minimum size of a DBE, how members of the DBE are to be appointed, the Chair of the DBE, committees and delegation as well as enabling DBEs to regulate their own proceedings.

Paragraphs 1 and 2: Composition and Chair

76. Paragraph 1 provides for the composition of DBEs, including joint DBEs.
77. Sub-paragraph (3) confirms that each member of a DBE which is incorporated or unincorporated is a charity trustee and sub-paragraph (5) provides that a person who is a member of a DBE which is a statutory committee of a Board of Finance must not be disqualified from acting as a charity trustee. Sub-paragraph (4) confirms that the trustees of an incorporated DBE are its only company law or CIO members.
78. Sub-paragraphs (6) to (9) provide for the election, appointment and co-option of members to a DBE and sub-paragraph (10) requires the Scheme to make provision about the terms of office for DBE members, including how they leave or are removed from office.
79. Sub-paragraphs (11) and (12) authorise conflicts of loyalty (but not conflicts of interest) where a person sits on the DBE Board and is also either a director (and charity trustee) of the Board of Finance, a member of the diocesan synod, or both. This conflict is authorised to avoid the need for DBE trustees to apply to the Charity Commission for an Order to authorise the otherwise unresolvable conflict of loyalty.
80. Paragraph 2 provides for the bishop to be the chair of the DBE, or the DBE can appoint another member of the DBE as chair, following consultation with the bishop.

Paragraph 3: Committees and delegation

81. Sub-paragraphs (1) and (2) enable the DBE to delegate to a sub-committee or an officer or staff member. Sub-paragraph (3) enables persons who are not members of the DBE to be members of a sub-committee.
82. Sub-paragraph (4) clarifies that the director of education may not be a member of a committee or sub-committee of the DBE but may attend any of their meetings at which he or she may speak but not vote.
83. Sub-paragraph (5) requires DBEs to set terms of reference in relation to the delegation of any functions and sub-paragraph (6) requires the Scheme to include a requirement for a committee or sub-committee to report its proceedings to the DBE.

Paragraphs 4 and 5: Proceedings

84. These paragraphs provide for the DBE to regulate its own proceedings and includes a saving provision at paragraph 5 so that the validity of a DBE's proceedings are not affected by a vacancy among its members or a defect in the appointment, election or co-option of a member.

Paragraph 6: Application of charity law

85. This paragraph provides that nothing in the Measure relating to membership of the DBE for a diocese affects the application of any enactment providing for the disqualification of a person from being a charity trustee.

Proceedings in the General Synod

First Consideration

86. The Measure was introduced into the Synod for First Consideration in July 2019. A number of points about particular aspects of the Measure were raised but it was generally favourably received and was committed to a Revision Committee.

Revision Committee

87. Seven members of the General Synod submitted proposals for amendment of the draft Measure within the time allowed by the Standing Orders. The Revision Committee exercised its discretion to consider one further proposal that was submitted by the Church of England Education Office. It also considered proposals for amendment to the draft Measure made by the Steering Committee and the Chair of the Revision Committee.
88. The Revision Committee made a number of amendments to the draft Measure, including the following.

Constitution options for DBEs

89. The Committee considered a proposal to amend the draft Measure to remove two of the options for how DBEs can be constituted, so all DBEs would have to be incorporated charities (i.e. either CIOs or companies). The reasons for this proposal were:
- a) The structure of an unincorporated charity was considered unsuitable for a DBE and so it should not continue to be an option for DBEs going forward; and
 - b) It was considered to be wrong in principle for the DBE to be a committee of the Board of Finance, which would create a number of conflicts of interest. Although a significant number of DBEs wish to operate in this way, it was suggested that this should not override the proper legal separation of powers and the need to avoid the risk of the Board of Finance's financial interests preventing the DBE from exercising its own powers and duties properly.
90. The Committee noted that the choice of structures to be provided to DBEs in the draft Measure supports those DBEs which wish to incorporate to do so. However, the draft Measure also:
- a) enables those DBEs which are currently unincorporated and do not wish to incorporate to remain unincorporated; and
 - b) provides those DBEs which currently are operating more like a committee of their Board of Finance to adopt a legal structure to do so formally in the future.
91. Although the Committee shared the concerns raised, the Committee also considered the responses to the consultation in summer/autumn 2018, which made it clear that a significant number of DBEs and Boards of Finance felt that the most appropriate structure for their diocese was either an unincorporated DBE or the DBE being a committee of the Board of Finance. Strong feelings were expressed that, in those

dioceses where unincorporated / committee DBEs were working well to further mission, incorporation and re-structure should not be imposed on them.

92. The chair of the Steering Committee, who was at the time also the chair of the National Society Council¹, informed the Committee that the proposal to require all DBEs to incorporate was considered at the outset. However, following careful consideration of the responses to the consultation, the Measure was drafted so as not to be prescriptive where it did not need to be, with supporting guidance to be produced to encourage best practice, including making clear the benefits of incorporation. The chair of the Steering Committee noted that, if the proposed amendments were accepted by the Revision Committee, there was a significant risk that the draft Measure could face significant opposition and might not pass at Synod.
93. Therefore, in its Report to Synod, the Committee suggested that, if a member of the Synod felt that the issues raised on incorporation and conflicts of interest should be considered by the General Synod, an amendment could be put forward for consideration by Synod at the Revision Stage in February 2020².

Section 3(2) and (3) and new section 4(4) and paragraph 9(2) of Schedule 1.

94. The Committee amended sections 3(2) and 4(4) and added a new section 3(3) to require the consent of all DBEs for the first scheme to be made under the Measure. However, for subsequent schemes, the consent of the DBE should only be required where the DBE is an incorporated or unincorporated charity. Where the DBE is a committee of the Board of Finance, the requirement should be for the bishop to consult the DBE and to obtain the consent of the Board of Finance.
95. The Committee also amended paragraph 9(2) of Schedule 1 to provide that the diocesan synod may only approve an amendment to a scheme where the DBE consents to it.

New sections 3(4) and (5) and 4(5) and (6), new section 23, omission of paragraph 4 of Schedule 1³ and new paragraph 8 of Schedule 1

96. The Committee considered what would happen if the DBE refused to consent to a proposed diocesan scheme without good reason. As originally drafted, paragraph 4 of Schedule 1 conferred power on the Secretary of State⁴ to make a scheme where the consent of the DBE cannot be obtained, but this power was limited to the first scheme only. If the DBE did not consent to a future scheme, there would be no mechanism to break the deadlock.
97. The Committee considered it would be preferable for the Church to resolve the situation itself and that a mechanism to break the deadlock should be provided for future schemes too. Therefore, the Committee amended the draft Measure to add new sections 3(4) and (5), 4(5) and (6) and 23 which confer the power on the Archbishop of the Province to make the first or a subsequent scheme in circumstances where there was deadlock between the bishop and the DBE. In order to protect DBEs from a scheme that did not comply with charity law, the Archbishop is first be required to consult the Charity Commission on the terms of any such proposed scheme. Paragraph 4 of Schedule 1 was therefore omitted.
98. The Committee decided not to amend paragraph 9 of Schedule 1 to the draft Measure to make provision for an Archbishop to authorise a bishop to propose an amendment to a scheme to the diocesan synod where the DBE does not consent to it. This is because an Archbishop conferring authority on a diocesan bishop to propose a scheme to the diocesan synod without a DBE's consent is expected to be a rare occurrence and so opportunities to do so have been kept to the minimum. Should an amendment be of such importance that a bishop considers it must be made, he or she can always seek to make the amendment in a new scheme, for which the bishop can request the Archbishop's authority.
99. The Committee also decided that the draft Measure should be amended to provide that a DBE provides a certificate of consent signed by the DDE and the diocesan bishop to consent to a proposed scheme under sections 3 or 4, as conclusive evidence that the DBE consents to the proposed scheme. This will

¹ The National Society is the National Church Institution which oversees the work of the Education Office.

² A member of Synod did propose an amendment to this provision. For more information see paragraph 120 below.

³ In the First Consideration version of the draft Measure.

⁴ This power was to have been conferred on the Secretary of State because he or she has a role in making DBE schemes under the 1991 Measure.

confirm the DBE's consent for the first scheme, as well as subsequently where a DBE is unincorporated. This amendment was made by inserting new paragraph 8 in Schedule 1.

Sections 7(8), 8(6) and 10(6) – right to attend and speak at a DBE meeting considering the exercise of its powers to give Advice, Consent, and Directions

100. The Committee considered a submission questioning the justification for the restrictions imposed on the attendance and right to speak by governors/trustees etc at the relevant part of a DBE meeting considering the matter on which a school had sought advice or consent from the DBE, or where the DBE is considering providing directions to the school. It was noted that these restrictions were not included in the equivalent sections of the 1991 Measure.
101. The Committee considered that the draft Measure should be amended, by omitting sections 7(8), 8(6) and 10(6) as originally drafted and replacing each of them with three new subsections⁵ to permit:
- a) the following people to attend the DBE meeting:
 - i. the head teacher⁶;
 - ii. the chair of the governing body or board of directors or trustees (as the case may be); and
 - iii. one or two other people (or more if the DBE so permits) who have been nominated by the governing body or board of directors, or trustees.
 - b) a head teacher, chair of governors, board of directors or trustees may nominate a person to attend the DBE meeting in their place where they are unable to do so;
 - c) the attending representatives should be able to present or make a submission to the meeting and also to respond to questions put to them by the DBE.
102. The Committee were of the view that the amendments should confer an entitlement to attend a DBE meeting, rather than requiring the nominated attendees to attend the meeting, to avoid a situation where a decision made at a DBE meeting could be challenged if, for example, a head teacher or chair of governors or board of trustees refused to attend the meeting.

Section 10(9): Laying a report before the diocesan synod

103. When a DBE gives a direction to a school section 10(9) requires the DBE to lay a report before the diocesan synod. The Committee received a submission to amend the draft Measure to include how and by when such a report should be laid before the diocesan synod, as well as what the diocesan synod may do with the report. The submission noted that the equivalent section of the 1991 Measure (section 8(2)) states that a report must be laid before the diocesan synod "*as soon as practicable*,". The Committee rejected the proposed amendments on the basis that the "laying" of a report in this context would need to be in accordance with the Standing Orders of each diocesan synod and so this was not a matter for inclusion in the draft Measure.

Section 12

104. The Committee received a couple of submissions on how a request to a school to provide information to a DBE could be enforced and requesting the inclusion of a mechanism to resolve any dispute as to whether specific information sought by a DBE under this power must be provided by the school.
105. The Committee rejected proposals to include enforcement provisions, on the basis that there were no useful or practical sanctions that could be imposed in relation to non-compliance. However, in light of the submissions it heard, the Committee decided to insert new provisions into the draft Measure which provide a mechanism for resolving a dispute as to whether specific information sought by a DBE under this power must be provided by the school. The new subsections confer power on the consistory court of the diocese to determine whether a DBE's request for information is lawful but any decision taken by the consistory court is to be on the basis of written representations only, rather than at an oral hearing.

⁵ new sections 7(8), (9) and (10), new sections 8(6), (7) and (8) and new sections 10(6), (7) and (8).

⁶ A new definition of "head teacher" was also added at section 20(4).

106. The Committee also considered that, now section 12 was to be amended to provide a mechanism for determining whether any request for information was lawful, subsection (2) of the original draft should be omitted.

New section 14: Government contributions to capital works in church schools

107. The Church of England's Education Office asked the Committee to consider the insertion of a new section to enable DBEs to address a situation that had recently arisen relating to government contributions towards capital works in church schools. The Committee accepted the insertion of the new section to enable DBEs to enter into arrangements with one or more other DBEs in this regard.

Section 16: Consequential amendments

108. The Committee received submissions raising the concern that this power is too widely drafted and requesting that the Committee circumscribe this power more clearly. The Committee accepted the insertion of a new subsection which will provide an additional check on the Archbishop's Council's use of this power, which was supported by the Department for Education. The new subsection requires the Secretary of State to be consulted on any Statutory Instrument made in exercise of this power, with the proviso that if the Secretary of State does not respond to the consultation request within 3 months of being consulted, the Secretary of State will be considered to have no comments on the Statutory Instrument and it can proceed to approval by the General Synod.

Section 17: Review

109. The Committee received two submissions to amend this section to include requirements for the report to the diocesan synod to be 'in writing' or 'written' and to set out the minimum content for the report. In addition, it was proposed that the draft Measure should require the DBE to send its annual report and accounts to the Board of Finance, the diocesan synod and the National Society at the same time as the DBE submits them to the Charity Commission and to require the DBE to place its annual report and accounts on the Board of Finance's website.
110. The Committee rejected all the proposed amendments on the basis that:
- a) imposing a requirement for a report to be "in writing", or setting the minimum content of the annual report, was too prescriptive and that these matters should be left to individual diocesan synods;
 - b) imposing a statutory obligation on DBEs to report directly to the National Society risked altering the relationship between the DBEs and the National Society; and
 - c) it was unclear what the benefit would be of imposing statutory requirements on a DBE to send its accounts and annual reports to the Board of Finance and the diocesan synod and to place them on the Board of Finance's website, when such documents would be publicly available.

Section 18: Guidance

111. The Committee received two submissions on whether the Archbishops' Council is the appropriate body to issue guidance for these purposes and in relation to how such guidance is consulted on and approved.
112. The Committee rejected the first proposed amendment as the Archbishops' Council is the appropriate entity to issue formally such guidance under the Measure because the guidance produced is to be binding on DBEs, Boards of Finance, diocesan synods and bishops and not just DBEs. However, any guidance issued by the Archbishops' Council would be produced by the Church of England's Education Office and the National Society.
113. The Committee also rejected the proposed amendment to require any such guidance to be laid before the General Synod as it would mean tying the issuing (and updating) of such guidance to reflect changes in education law and practice to the General Synod's timetable. However, the Committee accepted the amendment to include a requirement for the Archbishops' Council to consult on any such guidance before it is issued.

Paragraph 1 of Schedule 2

114. The Committee received a submission to amend the draft Measure to include a requirement for a minimum number of DBE members who must be elected by the diocesan synod and a limit on the

number of DBE members who may be co-opted. The Committee rejected this amendment because, given the difficulties such prescription had caused in the 1991 Measure, it should be kept to an absolute minimum in the draft Measure so as to enable each DBE to structure its membership in the most appropriate way that reflects its local needs and circumstances.

New Paragraph 1(10) of Schedule 2

115. The Committee received a submission to amend the draft Measure to require the diocesan scheme to set out how a person appointed, elected or co-opted could be removed from office prior to the end of their term by the body which appointed or elected them, for good cause and term limits for elected, appointed and co-opted DBE members. The Committee accepted this amendment.

New Paragraph 3(4) of Schedule 2

116. The Committee received a submission from the Steering Committee to amend the draft Measure to provide that DDEs are able to attend and speak at all committee and sub-committee meetings of their DBE but are not permitted to be voting members of any committee or sub-committee of their DBE. The Committee accepted this amendment.

New Paragraph 3(6) of Schedule 2

117. The Committee received a submission to amend the draft Measure to limit the number of members on a DBE committee who are not also members of the DBE and to require a majority of the members of any committee to be members of the DBE too. The Committee rejected these amendments because, whilst it is good governance to require at least one member of each committee to be a member of the DBE, requiring a majority of committee members to be DBE members would mean a very significant time commitment was being asked of DBE members. As some DBEs already find it a challenge to find people to serve who have the necessary skills and experience and sufficient time available, imposing such a requirement could aggravate an already difficult situation in some dioceses.
118. As an alternative to the rejected proposal, the Committee considered whether the draft Measure should be amended to require the chair of each committee or sub-committee to be a DBE member, but also concluded that this may not always be practical. However, to ensure appropriate reporting arrangements would be put in place, the Committee amended the draft Measure by inserting new paragraph 3(6) to require the diocesan scheme to include provision to require reporting arrangements to the DBE board to be put in place for all committees and sub-committees of the DBE.

Revision stage at General Synod

119. The Revision Committee reported to the Synod in February 2020 and the Measure was then considered at the Revision Stage in full Synod. Although Synod members did propose amendments to Synod, all of which had already been rejected by the Revision Committee, Synod did not make any further amendments to the draft Measure.
120. A member of Synod put forward an amendment for Synod to consider which would remove the option for DBEs to be unincorporated only. This would mean that DBEs had the option of being incorporated (CIOs or companies) or a committee of the Board of Finance. In its response to the amendment, the Steering Committee noted that, although it supported the policy position that changes should not be imposed on DBEs where local arrangements are operating successfully and therefore it did not support the amendment, if sufficient members indicated their willingness for such a debate to take place it would be an appropriate matter for Synod to consider and debate. However, Synod chose not to debate this matter, as 40 members did not stand⁷ and so the amendment lapsed.

Final Drafting

121. The Final Drafting Stage and Final Approval Stage were taken in November 2020. At Final Drafting, the Synod took note of the Steering Committee's report, which noted a number of drafting amendments

⁷ The Standing Orders of the General Synod provide that an amendment that is not supported by the Steering Committee is only debated if 40 members indicate that they wish to do so.

which had been made to the Measure.

122. The Steering Committee also proposed a small number of special amendments, all of which were accepted by the Synod. These special amendments are explained below.

Special Amendments to section 23 to alter the longstop date

123. Four Special Amendments to section 23 were approved by Synod to change the longstop date for the making of a new scheme under the draft Measure from 1 January 2022 to 1 January 2023. These changes were considered necessary to provide dioceses with sufficient time to make a scheme as required under the draft Measure since Final Approval and the Parliamentary stages have been delayed due to COVID-19.
124. One of the four Special Amendments inserted a new section 23(7), which is a transitional provision to enable the current DBE members to continue in office until 1 January 2023 (or such date after their term ends from 1 January 2022 and before 1 January 2023 when the new DBE scheme is made for that diocese). As a result, diocesan synods will not need to elect new DBE members for a term starting on 1 January 2022 (which is when the new triennium for elected DBE members starts) to be in post for no more than 1 year. The diocesan synod will only have to elect new DBE members to take office when the new scheme comes into force (which must be by 1 January 2023).

Special Amendment to clarify company law and CIO membership

125. The 1991 Measure makes no provision for who the company law members of an incorporated DBE should be (at present all incorporated DBEs are companies limited by guarantee (CLGs)) and the draft Measure also made no such provision. This Special Amendment clarifies who the company law members of a DBE which is a CLG are as well as who the members of a DBE which is a Charitable Incorporated Organisation (CIO) are under its constitution.
126. The Steering Committee considered this clarification to be important because all the references to “members of the DBE” in the draft Measure are to members of the DBE Board i.e. the trustees of the DBE, which reflects the way in which DBE trustees/board members are described in the 1991 Measure. Without this clarification it could be unclear in an incorporated DBE whether the provisions for the removal of a person as a member of the DBE refer to the removal of the person as a board member only (i.e. a trustee) or also as a company law/CIO member.

Final Approval

127. At Final Approval the concern was re-visited by a small number of members about the inclusion of an option for DBEs to be unincorporated charities. The Steering Committee informed Synod that it had been assured by the Church of England Education Office that guidance would be provided to DBEs and Boards of Finance to make clear the benefits of incorporation, as well as the risks inherent in selecting the option to be an independent unincorporated charity that would need to be mitigated and carefully managed. The Steering Committee also informed Synod that, as a result of engagement to date on this issue with DBEs and Boards of Finance by the Education Office, it was understood that only a very small number of dioceses were indicating that they would select this option.
128. The voting on the motion for the final approval of the Measure was as follows⁸:

	In favour	Against
Bishops	29	0
Clergy	114	12
Laity	112	22

Eight members in the House of Clergy and four members in the House of Laity recorded abstentions.

⁸ The voting figures announced by the Chair (but not the result) differ from those recorded here, as it was subsequently discovered that a number of duplicate votes were recorded by the remote voting platform. The figures shown here are the corrected figures recorded in the Business Done.

Conclusion

129. The Legislative Committee invites the Ecclesiastical Committee to issue a favourable report on the Measure. Should the Ecclesiastical Committee require any further information or explanation, the Legislative Committee stands ready to provide it.

On behalf of the Legislative Committee

Geoffrey Tattersall

Deputy Chair

January 2021