

GENERAL SYNOD**The Diocesan Boards of Education Measure 1991: proposals for change****Summary**

The Diocesan Boards of Education Measure 1991 (“the Measure”) provides the legal framework within which the Church of England’s dioceses engage and work with Church schools. Changes to the education landscape since 2006 when the Measure was last amended mean that it should be reviewed to ensure that the range of functions and powers it bestows on DBEs are sufficient to enable them to play their part in supporting and promoting the development of Church schools. A new Measure would also support the Archbishops’ Council’s Simplification agenda, with more efficient procedures for future updating. Formal consultation has now taken place on the most appropriate way for DBEs (including joint DBEs) to be constituted, the extent of DBE powers and the range of topics on which it might be suitable to provide Archbishops’ Council guidance to support and assist DBEs. Following consideration of the responses certain key changes have been made to the plans for the draft Measure. These include our proposal to replace the current options for DBEs to be established either as an incorporated body or an unincorporated body (separate from the DBF) with the options of being either an incorporated body or a statutory committee of the DBF. This has been modified such that both current options will be retained but , additionally, the third option of being a statutory committee will also be available. Drafting work will now proceed and it is intended to present the draft to Synod in July 2019.

Background

1. The Diocesan Boards of Education Measure 1991 (the “Measure”) provides the legal framework within which the Church of England’s dioceses engage and work with the Church schools in their diocese.
2. The Measure provides for the establishment and constitution of a Diocesan Board of Education (“DBE”) in each diocese and confers powers, functions and obligations on DBEs to enable the Church’s state education functions to be discharged at diocesan level. The Measure also sets out the occasions on which the advice or consent of the DBE is required by Church schools, and the powers that the DBE has to give directions to the governing bodies of Church schools and to the trustees of “church educational endowments”.
3. Although various Acts of Parliament have amended the Measure since 1991, there have been significant changes to the structure of the school system since 2010, such as the conversion of poorly performing and other schools into academies and the proliferation of Multi Academy Trusts (“MATs”), which have had an impact on the activities and sphere of engagement of DBEs. Therefore, the Measure needs to be reviewed and updated to reflect the current realities of the environment within which the DBEs are functioning.
4. A review of the Measure is also timely, as it supports the Archbishops’ Council’s Simplification agenda.

5. Changes to the education landscape mean that it is important to review the Measure to ensure that the range of functions and powers it bestows on DBEs are sufficient to enable them to play their part in supporting and promoting the development of Church schools.

Initial process

6. An informal consultation on changing the Measure was undertaken with the Diocesan Directors of Education (“DDEs”) during the course of 2016, followed by a short discussion between DDEs and DBE Chairs at a meeting in Lambeth in March 2017.
7. Following these informal consultations, the proposal to update the Measure was taken to the National Society Council in February 2017 and subsequently to the Archbishops’ Council. Both bodies approved the proposal.
8. Best practice in the charity sector has moved on in the last 10-15 years both in terms of the form and content of charity constitutions and the manner in which charities are expected to operate. One development has been the tendency for charities that employ staff and regularly enter into contracts to be established as incorporated bodies not least because this is a way to protect charity trustees from incurring personal liability. The intention from the outset of the review process was to produce a new Measure which required minimal change to the way in which individual DBEs are currently constituted. We hope to achieve this by providing options as to how DBEs may be constituted, rather than imposing a “one size fits all” structure on all dioceses.
9. The current Measure requires DBEs to be a separate entity from the Diocesan Board of Finance “DBF” (and to have either a separate registered charity number or to be registered as a ‘linked charity’) and offers two alternative ways in which that separate entity may be constituted: an incorporated entity or an unincorporated association. What became clear during the review process was that the current constitutional form of many DBEs may not be wholly consistent with the requirements in the Measure in that a number of DBEs appear to be operating as committees of the DBF, while the constitutional position of other DBEs is unclear. As a result we sought views as to what the Measure should permit.
10. One development in the period since the enacting of the current Measure has been the development of different forms of joint working between Dioceses. In one case this has led to the formation of a joint DBE and it was considered that making some express provision for both the establishment and disestablishment of such an arrangement in the new Measure would be advisable.
11. In pursuit of simplification it is also intended to enable the Archbishops’ Council to update the new Measure by Order, where changes proposed to the new Measure are being made in consequence of provision about education made by or under an Act of Parliament. This avoids the delays and additional workload imposed on Synod currently as such changes can only be made through Synod’s legislative process under the current Measure.
12. Following the responses to the informal consultations and an internal review of the Measure, advice was taken from the Legal Office in Church House and it was decided to hold a formal consultation on how DBEs may be constituted and structured. Those consulted were Diocesan Bishops, DBFs, Diocesan Secretaries,

DDEs and Chairs of both DBFs and DBEs. The responses would then inform the drafting of the new Measure and enable the Measure to facilitate DBEs functioning well to continue to do so.

Consultation

13. The Consultation was designed to increase understanding of how the Measure is being implemented in practice and to establish some of the key parameters for revisions to the Measure. Questions were focused on the constitution of DBEs, the employment arrangements for their staff and a particular aspect of their functions and powers.
14. As part of this Consultation we sought to ascertain whether, instead of providing for the continuation of the status quo (i.e. for DBEs to be separately constituted as incorporated or unincorporated entities) the new Measure should provide for DBEs either to be a separately constituted incorporated entity, or to be formally constituted as a statutory committee of the DBF, in order to facilitate the continuation of the status quo for DBEs in many dioceses (see paragraph 17 below for further detail of this proposal).
15. A DBE set up as an incorporated entity (such as a company limited by guarantee or a Charitable Incorporated Organisation or “CIO”¹), has an independent legal personality. This means that the directors/charity trustees of an incorporated DBE have the protection of limited personal liability. In addition, an incorporated DBE is able to hold property and employ people in the name of the DBE itself. As a result, where a DBE is a separate incorporated entity, the DBF does not need to act as trustee of the DBE’s education funds or to hold the legal title to any of the education property. 14 DBEs are set up in this way.
16. The majority of DBEs (25) are currently unincorporated. Unincorporated associations do not have independent legal personality. This means that an unincorporated DBE is not able to hold property or employ people in the name of the DBE and so an unincorporated DBE must do so in the names of its members. Where a DBE is a separate entity from the DBF but is unincorporated, it appears that, in practice, many of the DBE’s contractual arrangements are entered into by the DBF, purportedly on the DBE’s behalf. Many unincorporated DBEs do not prepare their own accounts separate from the DBF. There also seems to be some variation as to the way in which the DBE arrangements are reflected in DBF accounts.
17. In practice it appeared that many DBEs are operating as committees of the DBF. One option considered for inclusion in the new Measure, therefore, was to regularise the current position and permit DBEs to be constituted formally as a committee of the DBF. One way in which this could be achieved would be for the diocesan synod to make a scheme, either to appoint the existing incorporated DBF (or a new incorporated entity set up for the purpose where no incorporated DBF currently exists) as the DBE, or to designate the DBF as the DBE for the diocese. If the DBF is designated as the DBE, the scheme would require the DBF to delegate its functions and powers under the new Measure to a statutory committee called the DBE, which would be constituted in accordance with the new Measure. This would enable dioceses to decide whether the DBE should be a separate incorporated entity or, alternatively, should be a statutory committee of (and so not a legally separate entity

¹ A CIO is an incorporated charitable vehicle which is registered with and regulated by the Charity Commission only.

from) the DBF. There is precedent for enabling such choices to be made by the diocesan synod under a scheme in this way, as what is proposed is similar to the process for constituting Parsonages Boards²

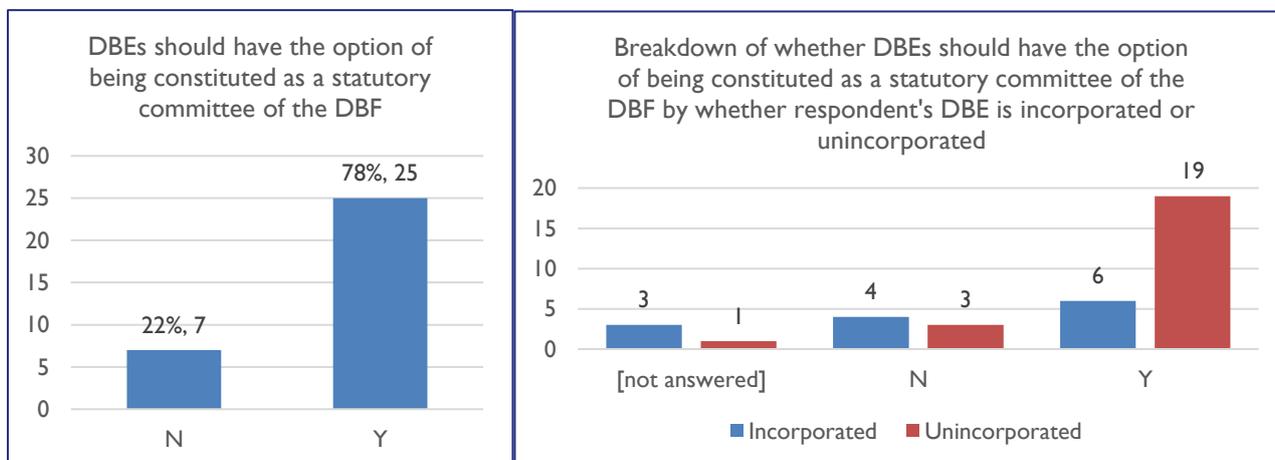
Consultation Response

18. Four of the Dioceses did not respond at all. Several did not respond to the questions directly but wrote a response that did not follow the format requested by the consultation and did not address the questions directly. Some dioceses submitted more than one response from different members of the diocese. Taking all of these factors into account there were 36 responses from individual dioceses and 41 responses when including dioceses that submitted responses from different members.

Consultation Questions

Should DBEs have the option of being constituted as a statutory committee of the DBF?

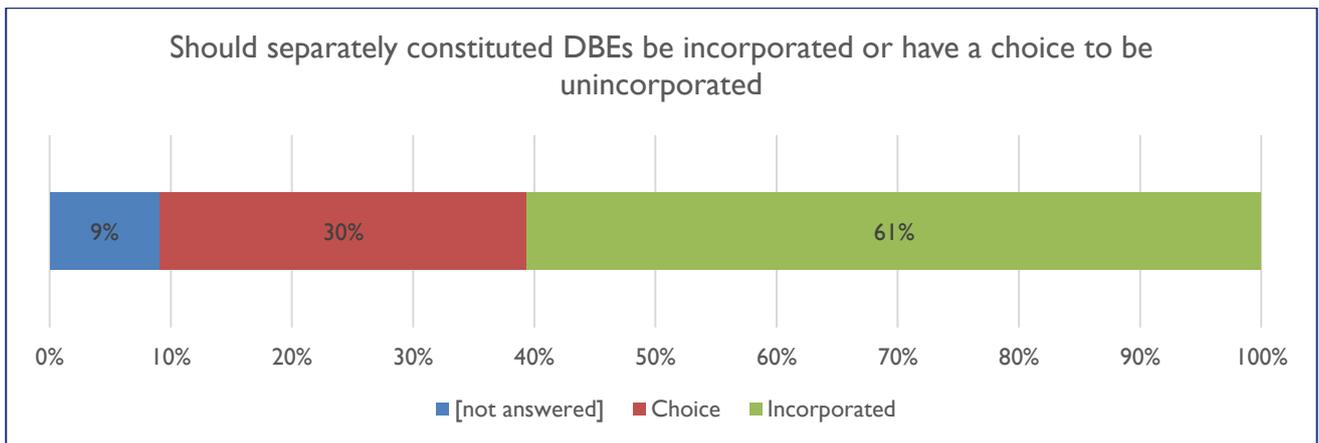
19. Excluding those who did not answer the question, 25 respondents (78%) were in favour of DBEs being constituted as a statutory committee of the DBF. Seven (22%) respondents were not in favour of this option. Some of the respondents did not agree because they considered the DBE being an incorporated entity as the best option and did not consider it necessary to have an alternative option of a statutory committee.



If DBEs are separately constituted from the DBF should they be required to be incorporated entities, or should there should be a choice as to whether a separate DBE is incorporated or unincorporated?

20. 21 respondents said incorporated was the best option but with a considerable minority (10 respondents) in favour of choice. Four dioceses did not answer the question. Two dioceses considered remaining unincorporated to be the best option, which is the constitution of their DBE. This was for reasons of cost, administrative burden and integration.

² See s.1 Repair of Benefice Buildings Measure 1972



Do the current employment arrangements for the DDE and other DBE staff work well in the diocese and are there any concerns with the current arrangements?

21. Main points raised by respondents:

(a) Unincorporated DBEs:

- Structure allows for connectivity, support and greater capacity through the DBF.
- Flexibility for employees to be employed part-time by the DBE and part-time in other diocesan roles, which is helpful for smaller dioceses.
- Line management can be inconsistent and relies on good relationships rather than clear policies.

(b) Incorporated DBEs:

- Better recruitment and retention
- Greater control of staffing structure, policies and processes
- Can have line management structures that lead to diocesan integration, 'holding accountability to the DBF and the diocesan synod.'

Should the functions and powers of a DBE include a power to enable a DBE to intervene where the standards of education in a Church school are a cause of concern.

22. The main issues raised were:

(a) The importance of clearly defining intervention

(b) The extra cost of intervention and where extra funding would come from

(c) Managing the increased accountability that comes with increased powers

(d) The challenge of not always having access to school performance data in a timely way

Are there any specific areas in which they would find it helpful to have guidance from the Archbishops' Council?

23. Areas suggested by respondents were broadly as follows:

- (a) Legal/Structure/Funding
- (b) Relationships with church schools and other internal and external stakeholders
- (c) Staffing

Consideration is being given to all suggestions including what guidance should be Archbishops' Council Guidance to which DBEs and DBFs would be required to have regard and whether there are, in addition some areas where general guidance could usefully be supplied to support/assist DBEs and which could be used as required.

Next Steps

24. Having considered the responses to the consultation and discussed them at a meeting with Diocesan Directors of Education, it will now be proposed to the National Society Council that the revised Measure

- (a) Should retain the current option for DBEs to be constituted either as freestanding unincorporated associations or corporate bodies but also introduce the new option proposed in the Consultation for DBEs to be constituted as a statutory committee of the DBF. Retaining the option for a DBE to be a free standing unincorporated association is not what was originally proposed but reflects the views of many of the respondents to the Consultation;
- (b) Should be supported as suggested in the Consultation document by guidance from Archbishops' Council to clarify relationships between the DBF and the DBE as well as statutory duties and powers;
- (c) Should include such facilitative provision as can be agreed with DfE to increase DBEs' access to school data; and
- (d) Address all necessary updating and modernisation issues.

25. It is intended to bring a draft of the proposed new Measure to Synod for its consideration at its July 2019 meeting, following further discussion with stakeholders.

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