

Future of Church Safeguarding

Advice note

31 January 2025

1 Executive summary

- 1.1 This note addresses the implications for Diocesan Boards of Finance (**DBFs**) of Model 4 in paper GS 2378 prepared for the General Synod (**Synod**) of the Church of England (the **Church**) and published on 23 January 2025 (**GS 2378**). Model 4 proposes that safeguarding delivery, preventative work and casework within the Church is vested in a single "*national external delivery body*" (we refer to this in this note as the **EDB**) and that all DBF and Cathedral employees engaged in safeguarding (**Safeguarding Staff**) will be transferred to the EDB, together with most of the members of the "National Safeguarding Team" (**NST**) employed by the Archbishops' Council.
- 1.2 All DBFs are established as charitable companies under the management and control of a board of individuals who owe duties as directors under company law and as charity trustees under charity law. We refer to the directors of a DBF in this note as its **Trustees**.
- 1.3 The Trustees of a DBF owe a number of duties to it and a breach of their duty which results in losses for the DBF could result in personal liability for the Trustees.
- 1.4 Part of the description of Model 4 in GS 2378 (that "*bishops/chapter will continue to hold overall responsibility for safeguarding in a diocese or cathedral*") does not in our view fully reflect the relevant legislation and regulation of safeguarding (both under ecclesiastical and secular law) by DBFs and the duties owed by their Trustees. DBFs clearly have an important part to play under Church legislation, as well as currently being the employers in practice of every Diocesan Safeguarding Officer and other Safeguarding Staff.
- 1.5 This description also does not take into account the requirements of charity law and regulation which apply to DBFs and their Trustees as regards safeguarding, where the Charity Commission (the **Commission**) regard charity trustees as under a duty to take reasonable steps to protect from harm all of the people who come into contact with their charity (not just children and vulnerable adults) and where a failure by a charity's trustees to manage safeguarding risks adequately is likely to be considered by the Commission to constitute misconduct and/or mismanagement in the administration of the charity and may also lead to a breach by the trustees of their duties.
- 1.6 While GS 2378 does not expressly identify the EDB as the sole supplier of safeguarding services, the key objectives of Model 4 would appear to be lost (or at least at risk of not being delivered effectively) if it does not create a single EDB which delivers safeguarding services to all DBFs.
- 1.7 We agree with the legal advice dated 10 January 2025 provided by the Chief Legal Adviser to the Archbishops' Council (appendix 6 to GS 2378) (the **Legal Advice**) in relation to delegation by Trustees to the EDB. The key point of principle is that, in order to ensure that delegated powers are being exercised properly and in the best interests of their charity, trustees must retain oversight over the exercise of those powers by the delegates, with the capacity to take whatever action is necessary (including revoking the delegation) in the best interests of their charity.
- 1.8 While we agree with the Legal Advice that it is possible in principle for a DBF's Trustees to decide to delegate their powers in relation to safeguarding to the EDB by way of a contract, the key issues for the Trustees will be (in order to protect the interests of their DBF and ensure that they comply with their duties to it):

- 1.8.1 The **oversight** they retain over (and **accountability** for) the supply of those services and the effectiveness of the safeguarding which is delivered for all of those who come into contact with the DBF.
- 1.8.2 Their ability to exercise **control** by taking steps under the contract to address defects in the delivery of safeguarding services by the EDB and, if necessary to terminate the contract with the EDB in order to bring the services back in-house or, in principle at least, to out-source them to a different provider.
- 1.9 If the reality is that the EDB is to be the only provider of safeguarding services for all DBFs (with the efficacy of Model 4 at risk if this is not the case), it is in our view very difficult to see how the Trustees of a DBF can retain sufficient oversight, accountability and control over a contract with the EDB to enable them to comply with their duties to the DBF, including in particular their duty when delegating, which places them at risk of acting in breach of their duties to the DBF, with the possibility of personal liability as a consequence.
- 1.10 In our view, the advice provided by the Commission (in their letter dated 22 January 2025 to the Archbishops' Council (appendix 7 to GS 2378)) (the **CC Advice**) is essentially making the same point as regards the Trustees' duties.
- 1.11 We suspect that this issue is why the possibility of imposing a "legal requirement" on DBFs and their Trustees to require that the functions of the Diocesan Safeguarding Officer (**DSO**) should be provided externally is addressed in the Legal Advice, which states that this approach would limit the responsibility of a DBF's trustees *"in a way that meant that they would not need to consider (because it would not be lawful) whether it was in the best interests of their charity for the DSO function to be carried out by an employee of their charity"*.
- 1.12 We agree that it would be possible in principle to design Church legislation which could modify the duties owed by the Trustees, but we would suggest that this kind of modification would need to extend beyond the external provision of a DSO's functions to create a clear and binding obligation on all DBFs to engage the EDB to deliver safeguarding services on a mandatory basis (with no option for the DBF to terminate that relationship) and with a corresponding limitation on the liability of the DBF's Trustees in respect of any breach of duty which arises as a consequence of the mandatory engagement of the EDB.
- 1.13 If the engagement of the EDB by DBFs is mandatorily required by legislation, that legislation should also specify the basis on which the engagement will work and there are a range of other legal and regulatory considerations that would need to be addressed in the legislation in order to ensure that the interests of DBFs are properly protected and that neither they nor their Trustees are inadvertently exposed to legal or regulatory risk. The allocation of risk between the EDB and DBFs would need to be addressed, including in particular which of the EDB and the DBF should be liable for any loss or damage which arises where e.g. there is a defect in the delivery of safeguarding services by the EDB.
- 1.14 More generally, while a delegation of safeguarding powers by DBFs to the EDB mandated by Church legislation is therefore possible in principle, this approach would in our view be novel because it will effectively divest a DBF's Trustees of any control over what is an intrinsic part of the safe and effective operation of their DBF. We recognise that this is of course an important part of the rationale for Model 4, but it is worth recognising that there are in our view no obvious precedents for this approach within the wider charity sector.

- 1.15 This suggests to us that the legislation which is in our view required to enable Model 4 to be implemented without creating the risk of breach of duty by a DBF's Trustees would need very careful consideration and sufficient time to formulate and introduce.
- 1.16 While the Commission have made clear their expectations as regulator to all DBF Trustees who are also members of Synod, we would suggest that the adoption of Model 4 (if that is what members of Synod decide to do) should be expressly subject to an assessment of the status and scope of the legislation required to implement the provisions we have identified above.
- 1.17 While the Commission's Advice has been provided, we also suggest that the Commission should be asked at an early stage to confirm that modifying the duties owed by a DBF's Trustees by way of Church legislation is acceptable to them in principle.
- 1.18 Model 3 does not involve changes for DBFs (and Chapters) which are as extensive as those proposed to Model 4 and we have not carried out a detailed assessment of the implications of Model 3. While Model 3 does not in our view raise the more significant issues in relation to the discharge of trustees' duties as will arise in relation to Model 4, we have commented briefly on some aspects of Model 3 in paragraph 4 below.
- 1.19 The position of the members of a Cathedral's Chapter is analogous to the position of the Trustees of a DBF and where relevant we have commented in this note on the position of Cathedrals and their Chapters.

2 Background

- 2.1 Safeguarding in the Church is under close scrutiny. The Church has been developing its safeguarding framework for many years.
- 2.2 Following The Independent Inquiry into Child Sexual Abuse, and specifically the publication of The Anglican Church Investigation Report, action has been taken by the Church to consider how best to implement change to address its historic safeguarding failings.
- 2.3 The Church instructed reviews which led to findings and recommendations from Dr Sarah Wilkinson in December 2023 and from Professor Alexis Jay in February 2024. We are aware that Synod debated the findings and recommendations in February 2024 and July 2024.
- 2.4 Following the February 2024 debate, a "**Response Group**" led by the lead safeguarding Bishop, the Right Reverend Dr Joanne Grenfell (the **Lead Safeguarding Bishop**), was asked by Synod to look in more detail at the recommendations made by Dr Wilkinson and Professor Jay.
- 2.5 The recent publication of the Makin Review has further accelerated the need for the Church to revise its approach to effective safeguarding governance.
- 2.6 We understand that four governance models were initially identified, but that only two have been taken forward to Synod, following detailed scrutiny by the Response Group:
- 2.6.1 Model 3 (the "Independent decision-making" model).
- 2.6.2 Model 4 (the "Reference" model).
- 2.7 Further detail in relation to Model 4 is set out below in paragraph 4.

- 2.8 We understand that members of the Synod will be asked at the February 2025 session of Synod to vote on the proposed Models 3 and 4. We note from GS 2378 that the Lead Safeguarding Bishop¹ commends Model 4.
- 2.9 We have been asked by our client, the Gloucester Diocesan Board of Finance (**GDBF**), to advise on the implications of Model 4 in the context of the ability for DBFs and their Trustees to meet the duties and responsibilities which relate to safeguarding under charity law and the legal requirements imposed on DBFs under the Church of England's legislative framework relating to safeguarding.
- 2.10 We have also commented on some areas where Model 4 may be relevant to Cathedrals.
- 2.11 In order to prepare this note, we have reviewed GS 2378, including the Legal Advice from the Chief Legal Adviser to the Archbishops' Council and Synod, the CC Advice from the Commission to the Archbishops' Council and a letter to members of the Synod from the Commission dated 24 January 2025 (the **CC Letter**).
- 2.12 We note that GS 2378 proposes the establishment of an external and independent scrutiny body (**Scrutiny Body**) (section 5). We have not reviewed or commented on the proposals in relation to the Scrutiny Body except to the extent that they relate to Model 4.
- 2.13 We have prepared this note for our client, GDBF, but we understand that it may be made available to other DBFs, Cathedral Chapters and members of Synod for their information (although we should confirm that we have no liability to any person other than our client, GDBF, in relation to the advice set out in it).

3 Diocesan Boards of Finance

- 3.1 GS 2378 refers in a number of places to "*dioceses*" and "*diocesan ... safeguarding practitioners*". In the context of Model 4, we interpret these as references to the DBFs which exist for each of the dioceses within the Church and which are currently the employers of staff engaged in safeguarding.
- 3.2 This is because, in a diocesan context (and with the exception of each diocesan Bishop, who is a "corporation sole"), the DBF is the only entity with legal personality capable of employing staff, holding assets, incurring liabilities and entering into contracts.
- 3.3 All DBFs are incorporated as companies and because of the purposes for which they are established² are charities under English Law. DBFs are registered with and regulated by both Companies House (for company law purposes) and the Commission (for charity law purposes). In practice, the Commission is the more active regulator and in this context has demonstrated its regulatory interest in the consideration of safeguarding within the Church by Synod via the CC Advice and the CC Letter.
- 3.4 Each DBF is under the management and control of a board of Trustees, who will typically include the diocesan Bishop. The Trustees of a DBF owe duties as directors under company law and, because of the DBF's charitable status, as charity trustees under charity law.
- 3.5 The Trustees of a DBF will typically act on a voluntary basis, without remuneration for acting as trustees, as required by charity law.

¹ Note that the Response Group itself is not making a recommendation

² As set out in the Diocesan Boards of Finance Measure 1925

- 3.6 The Trustees owe a number of specific duties to their DBF, but their most important duties are reflected in the Commission's guidance (CC3):
- 3.6.1 To ensure that the DBF is carrying out its charitable purposes for the public benefit.
 - 3.6.2 To comply with the DBF's governing documents and the law.
 - 3.6.3 To manage the DBF's resources responsibly, reasonably and honestly.
 - 3.6.4 To ensure that the DBF is accountable.
- 3.7 The Trustees also owe a duty to the DBF to act with reasonable care, skill and diligence. This is the standard by which a Trustee will be judged in relation to any allegation that they have acted in breach of their duties to their DBF.
- 3.8 Liability for breach of duty owed by a Trustee to their DBF is personal, in the sense that any losses suffered by the DBF as a result of a Trustee's breach of duty are potentially recoverable by the DBF from the Trustee's own assets.
- 3.9 Instances of personal liability of this kind are rare in practice (there are a number of reasons which make it less likely that a claim of this kind is pursued in practice), but this is the position in principle.
- 3.10 A Cathedral is under the management and control of the members of its **Chapter**, which is a body corporate established by way of a Measure³. The members of its Chapter are the charity trustees of a Cathedral for the purposes of charity law⁴. The position of the members of a Cathedral's Chapter is therefore analogous to the position of the Trustees of a DBF and, as indicated above, where relevant we have commented in this note on the likely position of Cathedrals and their Chapters.

4 Key features of Model 4

- 4.1 The key features of Model 4 are:
- 4.1.1 All safeguarding delivery, preventative work and casework is vested in a single "*national external delivery body*" (we refer to this in this note as the **EDB**).
 - 4.1.2 The constitution and status of the EDB has not yet been confirmed; this will be determined at a later stage.
 - 4.1.3 All DBF (and Cathedral) Safeguarding Staff will be transferred to the EDB, together with most of the members of the "National Safeguarding Team" (**NST**) employed by the Archbishops' Council.
 - 4.1.4 Safeguarding Staff will continue to be located ("*and working alongside the local context*") in the relevant DBF or Cathedral (they will be "*embedded in dioceses - working from diocesan offices, attending diocesan meetings, able to provide advice locally*" (paragraph 60 GS 2378)).
 - 4.1.5 Legislation will be brought forward which will require diocesan Bishops and Cathedral Chapters to transfer their Safeguarding Staff to the EDB (as above) and to procure and receive safeguarding services from the EDB (paragraph 60 GS 2378). We interpret references to diocesan Bishops in this context as references to DBFs (and

³ Section 2(2) of the Cathedrals Measure 2021

⁴ Section 8(4) of the Cathedrals Measure 2021

Cathedral Chapters) given that DBFs are the employers of Safeguarding Staff and the entities to which safeguarding services will need to be delivered.

- 4.1.6 GS 2378 (appendix 3, page 34) states that the "*...procurement of an external safeguarding delivery body presents various options*" and that detailed work on those options will be carried out during the "*policy development phase*".
- 4.1.7 One such option appears to be that Archbishops' Council would enter into a "*framework contract*" for the provision of safeguarding services with a "*specific provider*" (which we assume is a reference to the EDB) which "*Local Church entities*" (which we assume include DBFs and Cathedral Chapters) can then enter into "*individual*" contracts with.
- 4.1.8 The individual contracts would be standardised but with room to agree local priorities, to set priorities where the Scrutiny Body has identified gaps, to enable participation by the DBFs in local recruitment, to raise concerns about service provision by the EDB with the Scrutiny Body and to "raise disputes" with the EDB.
- 4.2 The "legislation" referred to in appendix 3 is also referred to in paragraphs 19 and 20 of the Legal Advice.
- 4.3 Model 3 does not involve changes for DBFs (and Chapters) which are as extensive as those proposed to Model 4 and we have not carried out a detailed assessment of the implications of Model 3. However, we note that, while the employment arrangements for diocesan and Cathedral Safeguarding Staff would not be changed, the new national body established under Model 3 would provide professional supervision of such Safeguarding Staff.
- 4.4 While this approach will not in our view raise the more significant issues in relation to the discharge of trustees' duties as will arise in relation to Model 4 (see paragraph 6 below), we do anticipate that it will have HR and employment law implications (in particular how the DBF's role as employer fits with any powers the new external body will have as a professional supervisor of the DBF's Safeguarding Staff) which would need to be addressed as part of the process of implementing Model 3.

5 Safeguarding responsibilities

- 5.1 The description of Model 4 in appendix 3 (page 37) states that "*bishops/chapter will continue to hold overall responsibility for safeguarding in a diocese or cathedral*".
- 5.2 This description does not in our view fully reflect the relevant law and regulation of safeguarding (both under ecclesiastical and secular law) by DBFs and the duties owed by their Trustees.
- 5.3 Church of England Canon C 30 does impose a duty on every Bishop to appoint a Diocesan Safeguarding Officer (a **DSO**) to advise them on the safeguarding of children and vulnerable adults (and also contains provisions for risk assessments of members of the clergy).
- 5.4 However, section 5A of the Safeguarding and Clergy Discipline Measure 2016 (the **2016 Measure**) requires the House of Bishops to issue and from time to time to revise a code of practice for "relevant persons" on safeguarding children and vulnerable adults. Bishops are obviously relevant persons for the purposes of the 2016 Measure, but so too are DBFs, Diocesan Boards of Education (**DBEs**) and Chapters.

- 5.5 It is not clear at this stage whether the obligations set out under the new Safeguarding Codes of Practice⁵, due to take effect from 1 September 2025, would continue to apply to DBFs and/or whether DBFs will be required to follow the guidance set out in the Codes of Practice.
- 5.6 In our view, DBFs do therefore clearly have an important part to play under Church of England legislation, as well as currently being the employers in practice of every DSO and other Safeguarding Staff.
- 5.7 This description also does not take into account the requirements of charity law and regulation which apply to DBFs and their Trustees as regards safeguarding.
- 5.8 The Commission's approach as regulator is clearly articulated in its guidance ("Safeguarding and protecting people for charities and trustees") (the **CC Guidance**):

"Protecting people and safeguarding responsibilities should be a governance priority for all charities. It is a fundamental part of operating as a charity for the public benefit.

As part of fulfilling your trustee duties, whether working online or in person, you must take reasonable steps to protect from harm people who come into contact with your charity.

This includes:

- *people who benefit from your charity's work*
- *staff*
- *volunteers*
- *other people who come into contact with your charity through its work*

Trustees are expected to report safeguarding matters to the relevant agencies (such as the police, social services or Ofsted) and for putting matters right if things go wrong.

In accordance with our regulatory and risk framework, the Charity Commission can hold trustees to account if things go wrong and can check that trustees followed this guidance and the law. We can look at how trustees have acted to protect beneficiaries, staff, volunteers and anyone else who comes into contact with their charity.

The Commission is not a safeguarding authority. We do not investigate individual allegations of abuse, decide whether any allegations are true or bring prosecutions. But we can refer concerns to relevant safeguarding agencies and other regulatory bodies to take further action."

- 5.9 In relation to the CC Guidance:
- 5.9.1 The Commission clearly regard charity trustees as under a duty to take reasonable steps to protect from harm people who come into contact with their charity.
- 5.9.2 That duty is in our view part of the wider duty on charity trustees to protect their charity's operations, assets and reputation, in order to ensure that the charity can best advance its charitable objects for the public benefit.

⁵ Managing Safeguarding Concerns and Allegations; and Reporting Safeguarding Concerns and Allegations

- 5.9.3 The safeguarding "duty" extends to a potentially numerically significant group of people, which is much wider than children and vulnerable adults.
- 5.9.4 A failure by a charity's trustees to manage safeguarding risks adequately is likely to be considered by the Commission to constitute misconduct and/or mismanagement in the administration of the charity and may also lead to a breach by the trustees of their duties.
- 5.10 This is reflected in the Commission's Inquiry Report into safeguarding at a school, which stated that the Commission "*... has an important regulatory role in ensuring that trustees comply with their legal duties and responsibilities in managing their charity. In the context of safeguarding matters, it has a specific regulatory role which is focused on the conduct of the trustees and the steps they take to protect the charity and its beneficiaries ... The Commission's aim is to ensure that vulnerable beneficiaries are protected from harm and the risk of abuse. It may consider any failure by trustees to do so as misconduct and/or mismanagement in the administration of the charity. It may also be a breach of trustee duty*" (Inquiry Report into Ampleforth Abbey and St Laurence Educational Trust).
- 5.11 The CC Guidance also states that all charity trustees "*... should have clear oversight of how safeguarding and protecting people from harm are managed within their charity. This means you need to monitor your performance, not just using statistics, but with supporting information, such as qualitative reports. This will help you to understand common themes, identify risks and gaps so you can ensure they are addressed*".

6 Delegation

- 6.1 GS 2378 (paragraph 83) refers to the selection and appointment of the EDB and the delivery of its services to DBFs as a delegation by the DBFs of their "*safeguarding functions*". It also confirms that charities "*cannot delegate their underlying duty to be responsible for good safeguarding*" (paragraph 85) and that arrangements will be required "*... to monitor the performance of the operational function and to be able to change provider if the service provided is not of the required standard*" (there is a reference here to arrangements with Bishops which must in our view properly be a reference to DBFs).
- 6.2 We also note that GS 2378 refers to:
- 6.2.1 The importance of carrying out due diligence in relation to the award of a safeguarding services contract.
- 6.2.2 The necessity for robust management of that contract.
- 6.2.3 Provisions being made in the contract to raise concerns about service provision, the right to raise disputes in line with clearly stated criteria, an escalation process for raising concerns and agreed thresholds for implementing sanctions and "*fall-back arrangements*" in the event that the services cannot properly be provided.
- 6.3 While paragraphs 83 to 88 do not expressly identify the EDB as the sole supplier of safeguarding services (and appear to suggest that there may be more than one such supplier - see e.g. the reference to "*the service provision of external bodies*" in paragraph 88 - our underlining), we assume that this must inevitably be the case. The key objectives of Model 4 (protecting against conflicts of interest, ensuring consistency, embedding processes locally and supporting parishes etc, as reflected in paragraph 5 of GS 2378) would appear to be lost (or at least at risk of not being delivered effectively) if it does not create a single EDB which delivers safeguarding services to all DBFs.

- 6.4 We agree with the analysis of the position as regards delegation set out in paragraphs 11 to 18 of the Legal Advice and would summarise the key points as follows:
- 6.4.1 The starting point is that the powers exercisable by a charity's trustees should be exercised personally by them unless they are expressly authorised to delegate their exercise to others. We anticipate that each DBF will have an express power to delegate within their respective articles of association. However, the terms attaching to that power are likely to vary between DBFs. DBFs are also likely to have supplemental governance documents such as policies and procedures which will be specific to each DBF and will therefore need to be considered prior to the implementation of the Model 4 arrangements. We anticipate that some DBFs may need to take action to ensure that their articles of association, policies and procedures dovetail with any new legislation that is brought in to provide for and implement Model 4.
- 6.4.2 While a Court may in some circumstances conclude that a delegate should be liable for a failure to exercise the powers delegated to them properly, trustees will generally remain personally responsible for the acts of their delegates.
- 6.4.3 In order to ensure that delegated powers are being exercised properly and in the best interests of their charity, trustees must retain oversight over the exercise of those powers by the delegates, with the capacity to take whatever action is necessary (including revoking the delegation) in the best interests of their charity.
- 6.5 The requirement to exercise oversight over the exercise of delegated powers is clearly articulated for the trustees of a charitable trust by section 22 of the Trustee Act 2000 (the **2000 Act**). While the 2000 Act does not apply directly to the Trustees of a DBF (because a DBF is a charitable company rather than a charitable trust), our view is that the same requirement applies to a DBF and its Trustees by analogy, which also appears to be the Commission's view.
- 6.6 The exercise of a power of delegation by the Trustees of a DBF would be subject to their general duty to act with reasonable care, skill and diligence. In general terms, the trustees of a charity seeking to procure a significant contract with a third party for the provision of services would expect to take a number of steps in order to comply with that duty, including identifying a potential supplier (usually by reviewing a number of suppliers and potentially by seeking responses against an invitation to tender), carrying out due diligence on the preferred supplier, benchmarking the supply in terms of quality and value for money and negotiating the terms of a contract which will protect the charity's interests.
- 6.7 While we agree with the Legal Advice that it is possible in principle for a DBF's Trustees to decide to delegate their powers in relation to safeguarding to a third party supplier of safeguarding services (including an EDB) by way of a contract, the key issues for the Trustees will be (in order to protect the interests of their DBF and ensure that they comply with their duties to it):
- 6.7.1 The **oversight** they retain over (and **accountability** for) the supply of those services and the effectiveness of the safeguarding which is delivered for all of those who come into contact with the DBF.
- 6.7.2 Their ability to exercise **control** by taking steps under the contract to address defects in the delivery of safeguarding services by the EDB and, if necessary to terminate the contract with the EDB in order to bring the services back in-house or, in principle at least, to out-source them to a different provider.

- 6.8 If the reality is that the EDB is to be the only provider of safeguarding services for all DBFs (with the efficacy of Model 4 at risk if this is not the case), it is in our view very difficult to see how the Trustees of a DBF can retain sufficient oversight, accountability and control over a contract with the EDB to enable them to comply with their duties to the DBF, including in particular their duty when delegating, which places them at risk of acting in breach of their duties to the DBF, with the possibility of personal liability as a consequence. This risk extends also to the appointment of the EDB and the terms of its contract with a DBF. While there is a recognition in GS 2378 that a contract with the EDB could be amended to reflect local requirements, it would presumably be the case that there would be no competitive procurement process and that a common approach to pricing and the commercial terms of the contract (as regards e.g. liability) would apply.
- 6.9 In our view, the CC Advice is essentially making the same point as regards the Trustees' duties; while recognising that it is open to a DBF to arrange for an EDB to deliver safeguarding services, they refer to the importance of not diluting or preventing the accountability of trustees for safeguarding, not fettering their ability to take action where necessary and to take such steps as the Trustees consider necessary to comply with their duty to keep people safe.
- 6.10 This concern is reflected in GS 2378 (paragraph 40), which states that "*the Response Group has heard concerns as to how and whether a diocese can discharge its accountabilities for safeguarding - accountabilities which the Charity Commission confirms cannot be outsourced from the trustees of a charity - and the precise nature of the relationship.*"
- 6.11 We should add that the Charity Governance Code for Larger Charities⁶ (paragraph 4.5.4) also states "*where a charity uses third party suppliers or services...the board assures itself that this work is carried out in the interests of the charity and in line with its values and the agreement between the charity and the supplier. The board makes sure that such agreements are regularly reviewed so that they remain appropriate*" and (paragraphs 7.3 and 7.4) "*the charity takes seriously its responsibility for building public trust and confidence in its work*" and "*the charity is seen to have legitimacy in representing its beneficiaries and stakeholders*".
- 6.12 While GS 2378 suggests that provisions could be developed in order to enable a DBF to terminate the provision of services by the EDB if the services provided are not of the required standard, we cannot see how this will deliver the objectives of Model 4 as it would inevitably lead to inconsistencies in approach across dioceses. Our concern would be that Model 4 is approved by Synod on a basis which, once the detailed arrangements between DBFs and the EDB are considered, is not possible to implement.
- 6.13 We should add that if there is an insufficient degree of oversight, accountability and control by a DBF over and for the EDB under the contract between them, and no real possibility of the EDB ceasing to provide safeguarding services, there is a possible argument that the EDB itself will acquire a fiduciary duty owed to the DBF given the importance of safeguarding to its operations. This would be on the basis that the EDB would be responsible for exercising powers which would usually be exercised by a charity's trustees and that, at least as regards those powers, they must be exercised in the interests of the DBF and its charitable objects. We note that appendix 4 of GS 2378 leaves open the question of the status of the EDB and would suggest that the capacity in which it exercises the powers delegated to it by DBFs should be carefully considered in the context of the Church legislation that is developed.

⁶ The Charity Governance Code is prepared by a committee separate to the Commission. However, the Code is endorsed by the Commission.

7 Legal requirement

- 7.1 We suspect that the issue identified in relation to the delegation of responsibility for safeguarding to the EDB by the Trustees of a DBF by GS 2378, the Legal Advice and the CC Advice is why the possibility of imposing a "legal requirement" on DBFs and their Trustees to require that the functions of DSOs should be provided externally (rather than by a DSO who is an employee of the DBF) is addressed in paragraphs 19 and 20 of the Legal Advice.
- 7.2 These paragraphs refer only to the functions of DSOs being provided externally and that this approach would limit the responsibility of a DBF's trustees *"in a way that meant that they would not need to consider (because it would not be lawful) whether it was in the best interests of their charity for the DSO function to be carried out by an employee of their charity"*.
- 7.3 If we have interpreted this correctly, the Legal Advice confirms that the duties owed by a DBF's Trustees can be modified by legislation.
- 7.4 We agree that it would be possible in principle to design legislation which could modify the duties owed by the Trustees of a DBF on basis that a Church of England Measure has the same status as an Act of Parliament and could therefore be used to modify other legislation in order to ensure that the Trustees are not exposed to any risk of breach of their duty to their DBF.
- 7.5 However, we would suggest that this kind of legislative modification would need to extend beyond the external provision of a DSO's functions in order to:
- 7.5.1 create a clear and binding obligation on all DBFs to engage the EDB to deliver safeguarding services on a mandatory basis (with no option for the DBF to terminate that relationship);
 - 7.5.2 but with a corresponding limitation on the liability of the DBF's trustees in respect of any breach of duty which arises as a consequence of the mandatory engagement of the EDB (including if its legal obligations under the Safeguarding and Clergy Discipline Measure 2006 cannot be (or cannot be appropriately) met).
- 7.6 The first requirement of this legislation is anticipated by GS 2378 (see paragraph 60), but neither that paper nor the Legal Advice appear to address expressly the second requirement.
- 7.7 We suspect that in order to modify the duties owed by Trustees in a way which eliminates any breach of duty by them, careful consideration would need to be given to the extent to which other relevant legislation might need to be amended, including e.g. the Companies Act 2006 and the Charities Act 2011.
- 7.8 If the engagement of the EDB by DBFs is mandatorily required by legislation (so that there is a binding legal obligation on each DBF to delegate its safeguarding powers which its Trustees would have an obligation to ensure that it complies with), our view is that legislation should also specify the basis on which the engagement will take place. Using a contract in these circumstances would appear to be something of a fiction given that the DBF and its Trustees are obliged to engage the EDB and there would in our view be a question about the approach taken in the relevant legislation e.g. should it mandate all aspects of the engagement in detail, or should it specify a "framework" for the engagement within which the detailed terms must then be agreed by the EDB and DBFs in the form of a contract?

- 7.9 We can foresee a number of issues requiring detailed consideration, particularly as regards the allocation of risk in relation to the engagement, including which of the EDB and the DBF should be liable for any loss or damage which arises where e.g. there is a defect in the delivery of safeguarding services by the EDB (where the obvious starting point would be that the EDB would be liable if its staff are responsible for defective delivery).
- 7.10 There are also a range of other legal and regulatory considerations that would need to be addressed in the legislation in order to ensure that the interests of DBFs are properly protected and that neither they nor their Trustees are inadvertently exposed to legal or regulatory risk. Some of these considerations are referred to in paragraph 8 below, but we should mention in particular the interplay between the Church legislation and the transfer of Safeguarding Staff to the EDB which would likely take effect under "TUPE" (the Transfer of Undertakings (Protection of Employment) Regulations 2006) as a result of the mandatory delegation of safeguarding to the EDB. In our view, there are likely to be a range of questions which arise in this context and which would need to be addressed in the relevant legislation, including:
- 7.10.1 Will the EDB be willing and able to take on Safeguarding Staff on their existing terms and conditions (which may vary between DBFs) without seeking to make any changes to working conditions or practices?
- 7.10.2 How will liability in relation to the TUPE requirements be apportioned between the EDB and DBFs?
- 7.10.3 At what point in time would DBFs need to comply with their obligations as transferring employer under TUPE as regards information and consultation?
- 7.11 More generally, while a delegation of safeguarding powers by DBFs to the EDB mandated by Church legislation is possible in principle, it would in our view be novel because it will effectively divest a DBF's Trustees of any control over what is an intrinsic part of the safe and effective operation of their DBF. We recognise that this is of course an important part of the rationale for Model 4 (i.e. in terms of adopting an independent and consistent approach to safeguarding across the Church), but it is worth recognising that there are in our view no obvious precedents for this approach within the wider charity sector. While many charities will have more than one regulator, they will very much act as regulators rather than delivery bodies with responsibility for functions that are an intrinsic part of the way in which the relevant charities operate.
- 7.12 We note that paragraph 39 of GS 2378 references "*highly federated structures such as health services*" as an example of where it has been possible to "*develop and enforce mandatory policies, procedures and practice even in highly complex environments*". We do not necessarily disagree with this statement, but would suggest that such environments do not include organisations operating within the charity sector, which presents an additional challenge.
- 7.13 This suggests to us that, as we have indicated above, the legislation which is in our view required to enable Model 4 to be implemented without creating the risk of breach of duty by a DBF's Trustees would need very careful consideration and sufficient time to formulate and introduce.
- 7.14 We appreciate that the Commission have made clear their expectations as regulator to all DBF Trustees who are also members of Synod (in their letter dated 24 January 2025) and that there is an obvious degree of urgency in seeking to take steps to improve safeguarding within the Church, but we would suggest that the adoption of Model 4 (if that is what

members of Synod decide to do) should be expressly subject to an assessment of the status and scope of the legislation required to implement the provisions we have identified above.

- 7.15 While the CC Advice has been provided, we also suggest that the Commission should be asked at an early stage to confirm that modifying the duties owed by a DBF's Trustees by way of legislation is acceptable to them in principle (the CC Advice does not address this point). They are also likely to have an interest in the timing implications of the requirement for legislation given their comments about timetable in the CC Advice.

8 Other legal and regulatory considerations

- 8.1 As indicated above, there are in our view some other considerations associated with Model 4 which it may be helpful to mention in general terms:

8.1.1 HR / employment

- (a) We note that one option would be for the Church to make legislation to provide for the transfer of diocesan safeguarding practitioners. Although they would then be employed by the EDB, they would continue to sit within their current diocesan office with other DBF staff.
- (b) Our view is that this type of arrangement will create complexities for DBFs in the way that they deal with and manage these Safeguarding Staff, on the basis that the DBF is no longer their employer.
- (c) We therefore anticipate that the EDB would need to enter into e.g. an agreement similar to a secondment agreement which would regulate the roles of the DBF and the EDB in relation to the relevant Safeguarding Staff, as well as control how e.g. confidential information is shared and maintained; where liability for the member of Safeguarding Staff sit, how insurance cover will work, as well as processes for raising grievances/complaints relating to the member of Safeguarding Staff.
- (d) An agreement of this kind would in our view need to be catered for by the legislation made by the Church to enable the implementation of Model 4, with sufficient detail about its content to avoid creating any risk for the DBF's Trustees that the terms of the agreement are not in the DBF's best interests.
- (e) While we have not considered the point in any detail, if there were no Church legislation made to provide for the transfer of Safeguarding Staff but a DBF's powers are delegated to the EDB, we think that the TUPE legislation is likely to apply to transfer the Safeguarding Staff in any event.

8.1.2 Data protection

- (a) GS 2378 provides that the EDB would need to have in place agreements with each of the DBFs to be able to access data.
- (b) We agree that there would need to be an agreed data sharing agreement in place but in order for the DBF Trustees to discharge their duties and responsibilities to the DBF, our view is that this agreement would need to be two-way and impose obligations on both the EDB and DBFs.

- (c) The terms of this agreement would in our view need to be catered for by the legislation made by the Church and are likely to be complex. As indicated above, the allocation of risk between the EDB and DBFs would need to be considered, as well as the interplay between the Church legislation and the applicable data protection legislation.

8.1.3 Confidentiality

- (a) In order for the DBF Trustees to exercise effective oversight, we anticipate that there will be information that will need to be shared only on a confidential basis.
- (b) In addition, the DBF Trustees would need to ensure that any confidential information shared with the EDB is treated as confidential in the EDB's hands.
- (c) We would therefore expect a mutual non-disclosure agreement to be required between each DBF and the EDB. The terms of this agreement would in our view also need to be catered for by the legislation made by the Church
- (d) Each DBF will also likely want the Safeguarding Staff (to be employed by the EDB) to enter into a non-disclosure agreement with the DBF.

8.1.4 Effective risk management

- (a) It is part of the role of the Trustees of each DBF to regularly review and assess the risks faced by their DBF, which will include risks relating to and arising from safeguarding matters.
- (b) There is also a requirement for all Trustees to report in the trustees' annual report on the steps their DBF has taken to manage risk. This links with the duty to be accountable.
- (c) It is difficult to see how the Trustees of a DBF could appropriately assess risk or report in the trustees' annual return without receiving and considering information relating to safeguarding matters as they affect their diocese. Our view is that the EDB would need to agree with each DBF the minimum level of information the EDB would make available to satisfy the Trustees that they can make reasonable decisions in relation to safeguarding risk management.

8.1.5 Serious incident reporting

- (a) DBFs are required to report "serious incidents"⁷, which include those matters which result in or risk significant harm to the DBF's beneficiaries, staff, volunteers or others who come into contact with the DBF through its

⁷ As defined in the Commission's guidance: "How to report a serious incident in your charity" and the Church of England specific guidance relating to serious incident reporting both in a safeguarding and non-safeguarding context

work, to the Charity Commission "promptly". For the purposes of the relevant guidance this means "as soon as reasonably possible after it happens, or immediately after your charity becomes aware of it".

- (b) Our view is that the EDB would need to agree with each DBF that it will share the details of actual or possible serious incidents to enable the DBF to comply with its reporting duty. If incidents are reportable, then the EDB would also need to agree to share sufficient information to complete the detailed report to the Commission.
- (c) DBFs will be required to confirm as part of their annual return to the Commission that all matters which are reportable as serious incidents have been reported. To provide false or misleading information to the Commission is an offence under the Charities Act 2011 and therefore DBFs and their Trustees will need to be sufficiently satisfied of this before submitting the DBF's annual return.
- (d) It is unclear whether diocesan secretaries will still be required to report safeguarding incidents on behalf of parochial church councils or whether this responsibility will be moved to the EDB.

8.1.6 Relationships with third parties

- (a) It is not yet clear whether the EDB will have charitable status. If not, in the context of a DBF's relationship with the EDB, Trustees will need to ensure that they are complying with the Commission's "Guidance for charities with a connection to a non-charity".
- (b) The guidance confirms that the Commission expects charity trustees to have applied the guidance. In particular, the Commission expects that trustees are satisfied that the relationship between the two parties is in the charity's best interests; that the charity is fully informed about the connected non-charity and that its trustees are satisfied that the non-charity is competent; the risks of engaging with the non-charity are understood; the charity is getting value for money; and that there are appropriate written agreements in place between the charity and non-charity.
- (c) We anticipate that each DBF is likely to want to ask a series of due diligence questions to understand more about the EDB as Model 4 is developed (assuming it is the model voted for by the Synod) to enable the Trustees to satisfy themselves that it is in their DBF's best interests to enter into the arrangements with the EDB.

8.1.7 Decision-making

- (a) The Commission's guidance on decision-making for charity trustees⁸ sets out the core principles of decision-making, including that Trustees must be sufficiently informed.

⁸ Publication CC27

- (b) If the Commission were asked to review a decision taken by a DBF's Trustees, it would want to be satisfied that the Trustees were aware of everything they reasonably could have known or found out. Our view is that, without sufficient information sharing arrangements in place between DBFs and the EDB, it is likely to be difficult for Trustees to be able to demonstrate they have sufficient information in relation to safeguarding delivery etc. to take well-informed decisions in the best interests of their DBF.

VWV

31 January 2025