



The Ordinariate – Some Questions and Answers on the Legal Position

BRIEFING

These Questions and Answers have been prepared by the Provincial Registrars and the Legal Office of the National Church Institutions for the guidance of diocesan bishops and their senior staff.

What is the Ordinariate?

It is a relationship of full communion with the Pope for former Anglicans - both ordained and lay - who wish to maintain their Anglican 'patrimony' under the aegis of an Ordinary appointed by the Pope. One or more Ordinariates can be established within the territory of a particular Roman Catholic Bishops' Conference.

The Ordinariate for England and Wales (known as "the Personal Ordinariate of Our Lady of Walsingham") was instituted by Papal Decree on 15th January 2011.

Following the establishment of the Ordinariate, its Ordinary (the Reverend Keith Newton) will be able to create personal parishes for the faithful of the Ordinariate and to appoint pastors to them.

How will clergy and congregations join the Ordinariate?

Guidance issued in connection with the Ordinariate seems to envisage "groups of faithful with their pastors" being "enrolled as candidates for the Ordinariate". Those seeking to join the

Ordinariate will be put under the pastoral care of a currently serving Roman Catholic bishop, pending their confirmation into the Roman Catholic Church. During the period before they can be confirmed, they will be ministered to sacramentally by local Roman Catholic clergy as arranged by the relevant diocesan Bishop. Each person will need to be individually received into full communion with the Roman Catholic Church, and (re)confirmed, probably during Holy Week or at Easter. Their ongoing period of formation as members of the Roman Catholic Church is expected to continue until Pentecost.

When will the former Anglican clergy be ordained?

The three former suffragan bishops who resigned their sees with effect from 31 December were (re)ordained as priests on 15th January. Two other, retired, Anglican bishops will be received and proceed to (re)ordination as priests in due course. None are expected to be (re)ordained as bishops.

Those clergy whose petitions for ordination have been accepted may be (re)ordained as deacons, during the Easter period, and as priests "around Pentecost". Those who are married will need to seek special dispensation from the usual canon law requirement of celibacy. That may take some time. Those who are unmarried will be expected



to observe the normal requirement of clerical celibacy applied in the Roman Church.

It is desirable that clergy leaving the Church of England should relinquish their Orders under the Clerical Disabilities Act 1870. Unless they take advantage of the procedure under the 1870 Act, they will, as a matter of English law, continue to be subject to the same jurisdiction as any other clerk in holy orders of the Church of England and therefore subject to the discipline of the Church of England (including the duty of obedience: see Canon C 1.4), as well as that of the Roman Catholic Church. However, some may be deterred from taking advantage of the 1870 Act by the cost involved in executing and enrolling the necessary deed. It is for each bishop considering recommending clergy to relinquish their orders to consider whether to provide assistance in that connection (eg by paying for his own or some other diocesan registrar to draw up the deed of relinquishment).

Will church buildings transfer to the Ordinariate?

No. Church buildings and churchyards will continue to be held by the corporation sole comprising the incumbent for the time being of the benefice concerned, for the (Church of England) purposes inherent in the office of the incumbent. As such they are effectively held for the benefit of the whole body of parishioners resident in the area as well as those whose names are on the electoral roll of the parish concerned. The parsonage, which is also vested in the corporation sole, represents property of the benefice and is again therefore

held for a Church of England purpose. Once an incumbent who is leaving for the Ordinariate resigns his benefice, the church and churchyard and the parsonage house automatically cease to be vested in him and the benefice will be subject to sequestration as with any vacant benefice.

Where parish halls and other clergy houses are not vested in the incumbent as corporation sole, they will be subject to charitable trusts for Church of England purposes. As such in many cases they are likely to be held by the relevant Church of England diocesan authority on behalf of the parochial church council ('PCC') or incumbent and churchwardens concerned under the Parochial Church Councils (Powers) Measure 1956 or the Incumbents and Churchwardens (Trusts) Measure 1964 respectively. The fact that clergy of a parish, or members of its PCC or congregation, have left the Church of England to join the Ordinariate will not change the fact that the trusts are for Church of England purposes.

Those who leave will accordingly leave behind any entitlement they have as clergy or parish officers of the Church of England to use these buildings. Their ability to use them in the future will thus depend (as in the case of any other prospective user) upon that use being consistent with the trusts and authorised by those entitled to administer them.

So far as responsibility for the management or control of property is concerned, an incumbent who leaves the Church of England to join the Ordinariate will of course cease to have any role in relation to any benefice property. Statutory



provisions allow others, including the diocesan bishop, to exercise various functions in relation to the property of the corporation whilst the benefice is vacant pending the institution or collation of a new incumbent.

In the case of trust property, trustees who are *ex officio* trustees (eg by virtue of being the incumbent or a churchwarden) will of course cease to be trustees on relinquishing the office in question. In the case of other sorts of trusteeship, it is a general principle of law that - even if the trusts do not expressly require it - where a charity is established for Church of England purposes, only members of the Church of England should act as its trustees. Thus those who leave the Church of England to join the Roman Catholic Church are no longer eligible to remain as trustees of any such charity. The vacancies which their departure creates stand to be filled, in the usual way by new trustees who are members of the Church of England.

Might it be possible for Ordinariate congregations to use existing church buildings?

The Roman Catholic Church has recognised that "because the previous places of worship used by the clergy and groups who will form the Ordinariate were in the ownership of the Church of England, it is unlikely that it will be possible for them to continue to be used by the Ordinariate members" and gone on to state that "in most cases, therefore, Ordinariate congregations will

probably use their local diocesan Catholic church".¹

It would be possible in law for any 'church building' (including *inter alia* church halls) to be used by a congregation of the Ordinariate under a sharing agreement made under the Sharing of Church Buildings Act 1969, given that the Church of England and the Roman Catholic Church are churches to which that Act applies. However, there are as yet unresolved legal questions about the precise application of the 1969 Act in that context.

So far as the Church of England is concerned, the Act requires that the incumbent and PCC (amongst others) should be party to any sharing agreement, and that the agreement should have the consent of the bishop and the Mission and Pastoral Committee. (A sharing agreement cannot be entered into in respect of a church building in a parish where the benefice is vacant unless a suspension period is in place and a priest in charge has been appointed for the benefice.)

The parties to a sharing agreement on the part of the Roman Catholic Church would seem to have to be determined by the bishop of the Roman Catholic diocese in which the church building is physically situated (rather than the Ordinary of the Ordinariate) and consent might also be needed from such person or body as that Roman Catholic bishop might specify (who might include the Ordinary). The view the Roman Catholic Church will take on these issues is not yet clear, however.

¹ See <http://www.catholic-ew.org.uk/Catholic-Church/Ordinariate/Background-Information>



Arrangements for the regular use of a church building by an Ordinariate congregation could alternatively be made by way of a licence agreement or (in exercise of the power conferred by the Pastoral (Amendment) Measure 2006) a lease. Such a licence or lease could only be granted if authorised by faculty. That would again effectively require, so far as the Church of England is concerned, the agreement of the incumbent and the PCC, who would need to petition for the grant of the faculty. Given the terms of Canon B 43.9, before granting a faculty the consistory court would no doubt wish to know that the proposal also had the approval of the bishop.

Use of a church by an Ordinariate congregation on an infrequent basis might not require the authority of a faculty but under Canon B 43.9 would nevertheless require the written approval of the bishop, the PCC and the incumbent or team vicar having a special cure of souls for the parish (or, where there is a vacancy, the rural dean and, where a suspension period is in operation, the priest in charge).

Whatever legal mechanism were proposed to be adopted to facilitate it, an assessment of the relevant pastoral issues would always be part of the consideration of any proposal for the use of a church building by an Ordinariate congregation, both at the level of individuals and groups within the worshipping congregations and also with regard to the expectation of ministry from the wider parishioners to whom the Church of England owes a legal and pastoral duty. There would be particular issues to assess where division had occurred in the congregation, between those who

wished to remain part of the Church of England and those who wished to enter into full communion with the Roman Catholic Church. Careful thought would also need to be given to the practical arrangements in relation to shared use (eg in relation to access and insurance), with a view to minimising the potential for future disagreement and misunderstanding.

Might the church building be declared redundant if the priest and congregation leave?

‘Redundancy’ as a concept was abolished some years ago, and has been replaced by the concept of a church ‘closed for regular public worship’. It does not follow that a church that has ceased to be used by a significant number of the current congregation’s members because they have joined the Ordinariate would necessarily be considered for closure for regular public worship: in most cases the church building is likely to continue to be required for use as a parish church, for the benefit of those members of the congregation who remain part of the Church of England, for others who wish to worship there in the future and for the parishioners in general.

There may be some cases where, as a result of departures to the Ordinariate, churches are considered for closure for regular public worship and schemes are brought forward under the Pastoral Measure 1983 or its successor legislation. These would need to be dealt with on a case-by-case basis and considered on their merits: the process could not be undertaken on



the basis that disposal to the Roman Catholic Church was the end in view.

Who will care for the parishioners if clergy leave the Church of England?

As one aspect of its established status, the Church of England relates to its 'parishioners', rather than simply to its 'members'. Its ministry is open to all comers, whether they are on its church electoral rolls or otherwise. Its parishioners have a legal right to be married in its churches (subject to only limited exceptions with regard to divorce and certain other matters) and to burial in its churchyards, unless they have been closed by Order in Council. The canons set out a comprehensive regime, enjoining those who have the 'cure of souls' to baptise, bring young people to the bishop for confirmation, use every opportunity to teach in parish schools, visit the sick and dying, and to provide cover to ensure that this ministry is carried out when they are unable to do so themselves (Canon C 24).

Until the point at which a priest who has the cure of souls ceases to hold office, he will continue to be subject to the canonical requirement to undertake this ministry personally or to make arrangements for some other authorised cleric (e.g. a curate) to undertake it on his behalf. Failure to do so would expose him to disciplinary proceedings for neglect of duty. But in any event a priest intending to join the Ordinariate will need to consider for how long, once his mind is made up, he can in conscience continue to hold office in the Church of England, in the light of the need to act with integrity towards both churches and

properly to discharge his responsibilities for the cure of souls. This is something that he will, no doubt, discuss privately with his diocesan bishop and the Ordinary of the Ordinariate before any public statement is made.

From the point at which a priest having the cure of souls resigns, the bishop as 'chief pastor and principal minister' in the diocese will be under a legal duty to see to it that this ministry is continued. It is for him to put arrangements in place for this purpose, working with his archdeacons, through rural and area deans and other local clergy, to ensure that ministry is continued during what could otherwise be a period of great uncertainty.

What is the significance of a PCC resolution to explore joining the Ordinariate?

Unless and until the individual members of the PCC resign, they continue to be subject to the legal responsibilities imposed on them as members of the institution charged with promoting the mission of the Church of England in the parish. As such, they have no power to concern themselves **as members of the PCC** with matters relating to the membership or internal affairs of another church. Thus any resolution passed by the PCC purportedly committing it to exploring membership of the Ordinariate can amount to no more than an expression of intent on the part of its members as individuals.

Additionally, any decision taken by a PCC (including decisions with regard to the use or application of funds and property) must be taken



solely by reference to the interests of the PCC as an Anglican institution: to do otherwise would be unlawful on the basis that it was inconsistent with the duties of a PCC's members (including their duty, as 'charity trustees', to act in the best interests of their charity) and could expose them, amongst other things, to investigation and action by the Charity Commission.

If members of a PCC resign individually or collectively, casual vacancies will arise, which will need to be filled in the usual way under Rule 48 of the Church Representation Rules.

Because the PCC is a corporation in law, its own existence continues even though for a time it may have no members. This is a legal reality, not simply a 'legal fiction' – all assets and liabilities of the PCC continue in its name pending the appointment of new members, however long that process may take. Given the timetabling of the implementation guidance issued by the Roman Catholic Archbishop of Westminster, the simplest step would be to advance the date of the next annual parochial church meeting in those cases where significant numbers of PCC members resign, so that the work of the PCC can continue with as little disruption as possible. (Rule 6(1) of the Church Representation Rules requires the annual parochial church meeting to be held not later than 30th April in each year. As the Rules do not prescribe any date after which the annual meeting must be held, it may be held at any time between 1st January and 30th April.)

What happens to the churchwardens if a congregation joins the Ordinariate?

Like the PCC, the office of churchwarden continues even though the individuals who occupy that office may resign. Section 7 of the Churchwardens Measure 2001 prescribes the procedure for the resignation of churchwardens. In order to resign, a churchwarden must serve written notice of his or her intention to resign on the bishop by post. The resignation has effect, and the office of churchwarden is vacated, two months after the notice has been served or on such earlier date as the bishop may determine, following consultation with the minister and any other churchwarden of the parish. The Measure expressly provides that churchwardens may not resign other than under this procedure.

If a churchwarden resigns, a casual vacancy arises. The general rule is that any person chosen to fill a casual vacancy is to be chosen in the same manner as was the churchwarden whose place he or she is to fill (section 4(8) Churchwardens Measure 2001). However, where the churchwarden concerned was appointed by the minister (rather than having been elected by the parishioners), and that minister has ceased to hold office, the new churchwarden to fill the casual vacancy is to be elected by a meeting of parishioners. Again, it would be advisable for that meeting to be convened as soon as is practicable. Churchwardens elected to fill casual vacancies must be admitted to office not later than three months after they have been chosen or by the date of the next annual meeting of parishioners if that is sooner (section 6(4)). Where casual



vacancies arise and are filled it may therefore be necessary for new churchwardens to be admitted separately on behalf of the bishop in advance of the usual Archdeacons' Visitation in May or June.

What happens to a church school if the members of the PCC join the Ordinariate?

The legal title to the sites of most Church of England schools is vested either in the incumbent and churchwardens or in the diocesan authority. The trusts on which they are held will generally require that education is given in accordance with the tenets of the Church of England, and there is a legal relationship between the schools and the Diocesan Boards of Education, articulated in the Diocesan Boards of Education Measure 1991.

The governing bodies of church schools will include a number of 'foundation governors', who are appointed for the purpose of securing that the religious character of the school is preserved and developed. Foundation governors are usually appointed either by the incumbent, churchwardens or PCC (or some combination of them) or by the Diocesan Board of Education. Foundation governors' appointments will be unaffected by the resignation of a priest or PCC members or churchwardens who decide to join the Ordinariate. Because the various Church of England parochial structures will remain in place, any future foundation governors will be appointed in the same way as their predecessors.

If individual foundation governors decide to join the Ordinariate, it will not bring their tenure of office as foundation governors to an end automatically. Whilst in certain circumstances a foundation governor can be removed from office by the person or body who appointed him/her, the appointing person or body may not wish to exercise that power, assuming it to be exercisable in the particular circumstances of the case (a matter on which they should seek legal advice.) But the duty to advance Christian education in accordance with the tenets of the Church of England would continue as it had before, and it would be for each individual foundation governor in those circumstances to decide whether his/her conscience allowed him/her to continue to serve out the remainder of his/her office, or whether he/she should in all conscience resign.

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