



Cathedrals charity registration – some of the key legal considerations

Introduction

1. The report of the Cathedrals Working Group of June 2018 makes numerous recommendations under the heads of governance, leadership, management, finance, buildings and safeguarding. Within these is a recommendation that cathedrals be registered with the Charity Commission under the provisions of the Charities Act. While the recommendation is a seemingly narrow one, amongst a wider field of proposed changes, it is of huge significance because it exposes cathedrals to the Statute and case law of charities which has been built up over hundreds of years, along with an extensive but fluctuating body of guidance and best practice. Cathedrals would join a club of over 168,000 charities¹ rather than being distinct ecclesiastical corporations governed by their own branch of ecclesiastical law.

The present status of cathedrals in charity law

2. What would a cathedral come to be if it converted into a mainstream charity? A charity in England and Wales is defined² as an institution which:
 - (a) is established for charitable purposes only, and
 - (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.
3. For the most part, any ecclesiastical corporation in respect of its corporate property, and any trust of property for purposes for which the property has been consecrated, is outside of the Charities Act³. The corporate body of the Cathedral – made up of the

¹ Charity Commission, November 2018

² Charities Act 2011, s1(1)

³ Charities Act 2011, s10.

Chapter, College of Canons and the Cathedral Council⁴ - is almost entirely outside of the Charities Act, although if it happened to be the trustee of some other – non-ecclesiastical charity – then it would, in that capacity, be subject to the Charities Act.

4. One effect of this is that the large body of requirements contained within the Charities Act, and interpreted and added to by the Charity Commission under its powers, do not apply to the cathedral. To look to what law does apply to the cathedral one looks primarily to the Cathedrals Measure 1999 and that cathedral's own constitution and statutes.
5. The degree to which that makes a difference varies. If cathedrals were to become mainstream charities the effects on them would be both marginal and significant. In part requirements in mainstream charity law have already been written into cathedral law, through the Cathedrals Measure and its amendments. But this has allowed the cathedrals legislator, General Synod, to pick and choose, adapt and particularise. If cathedrals are to migrate to being registrable charities then they could be exposed to the entire panoply of mainstream charity law and practice.

Charitable purposes

6. Both cathedrals and registered charities have purposes. Charities, I remind you are institutions which are established for entirely charitable purposes. Those purposes, which include the advancement of religion and the relief of poverty, have to be accepted by the Commission prior to registration and represent the core focus of what the charity is set up to do. Two of the cathedrals purposes or functions as presently set out are contained within the Cathedrals Measure. One is to be the seat of the bishop and the other is to be a centre of worship and mission⁵. But the Constitution and Statutes of individual cathedrals have much more bespoke purposes as have been surveyed by Norman Doe on his book on cathedral law. For example, Coventry's Constitution states that the cathedral is "the home of Christian faith from which the Episcopal ministry and mission to the Diocese proceed. It is a centre of worship and outreach, which exists for the glory of

⁴ Cathedrals Measure 1999, s9(1)(a)

⁵ Cathedrals Measure 1999, s1

God.”⁶ The Cathedral's Working Group quoted the theologian Albert Van Den Heuval's description of a cathedral:

"as a sign of pro-existence, a symbol of diversity in unity, a Pentecostal laboratory, a theatre of basic drama, a temple of dialogue, a centre of creativity, an academy of committed information, a clinic for public exorcism, an international exchange, a broadcasting station for the voice of the poor, a tower of reconciliation, a motel for pilgrims, a house of vicarious feasts, and the hut of the shepherd"

7. The report also cites Peter Atkins six ecclesial identities that in his view are present in a modern English cathedral:
 - i. Cathedral as seat of the bishop,
 - ii. Cathedral as monastery,
 - iii. Cathedral as 'college' or 'foundation',
 - iv. Cathedral as quasi-parish church community,
 - v. Cathedral as shrine,
 - vi. Cathedral as virtual church, addressing a global congregation.
8. It will be interesting to see whether new cathedrals legislation will prescribe a charitable purpose for all cathedrals or leave it to individual cathedrals to discern that for themselves and then negotiate their own purposes with the Commission.
9. Most of the cathedrals of the Church in Wales⁷ which appear to have been registered as a job lot in 2014 and 2015 have the same charitable purpose. This is to advance the Christian religion of the Church in Wales for the public benefit. In particular to promote the mission of the Church in Wales in and through the cathedral by promoting the

⁶ Constitution Art 1.1.

⁷ St Asaph, Brecon, Llandaff, Bangor.

statement of faith more particularly described in the Constitution of the Church in Wales and other legal sources.

10. Newport does its own thing, and I was not able to find an entry for St David's, probably because all cathedral property in the Church in Wales is vested in the Representative Body of the Church in Wales which may mean that St David's doesn't need separate registration. The purposes of St Woolos' Newport are similar to those for parochial church councils of the Church of England, which are normally registered with purposes drawn straight from the legislation for PCCs and refer to the whole mission of the Church, "pastoral, evangelistic, social and ecumenical"⁸, words which also appear in the Cathedrals Measure when referring to the Cathedral Council, but with the addition the characteristic "spiritual"⁹.

Trusteeship

11. Next, charity trusteeship is core to the way in which charities are regulated and run in the mainstream charity sector. The Cathedrals Measure does not expressly impose on Chapter members the like duties that a trustee of a mainstream charity would owe. Chapter members are not charity trustees, they are members of an ecclesiastical corporation. They are however the controlling mind of the cathedral, and animate most of what the cathedral's corporate body does. It is not explicit that members of Chapter owe a fiduciary responsibility to the cathedral although they will have sworn an oath to observe the laudable statutes of the cathedral, or words to that effect. A charity trustee is obliged to exercise reasonable care and skill in seeking to further the charity's purpose and must avoid conflicts of interest and loyalty. Ultimately a charity trustee could be held personally liable to the charity itself for failings and wrongdoing. But the individual responsibility of Chapter members is not exhaustively set out. Ordained members of Chapter have responsibilities as office holders, to the Canons of the Church of England, to their conscience and owe canonical obedience to the Bishop as well as to the collective good of the cathedral.

⁸ Parochial Church Councils (Powers) Measure 1954, s2

⁹ Cathedrals Measure 1999, s3(6)

| Cathedrals law | Mainstream charity law |
|--|---|
| <p>Who are the “trustees” of the “charity” – the members of Chapter</p> <p>Chapter members not charity trustees per se but are subject to the same disqualification provisions</p> <p>The Chapter is the “controlling mind” of the Cathedral corporate body</p> | <p>Who are the trustees of the charity – section 177 of the Charities Act</p> <p>“the persons having the general control and management of the administration of a charity”</p> |
| <p>Duties of Chapter – see Cathedrals Measure 1999 s4(8)</p> <p>“to direct and oversee the administration of the affairs of the cathedral”</p> <p>Including (eg) “manage all property vested in the cathedral and the income accruing from it and, in particular, ensure that necessary repairs and maintenance in respect of the cathedral and its contents and other buildings and monuments are carried out”</p> | <p>Duties of charity trustees</p> <p>Further charity’s purpose, act in good faith, exercise reasonable care and skill, avoid conflicts of interest/loyalty, have regard to beneficiaries, safeguard property of the charity, not benefit from the charity unless expressly authorised in the charity’s constitution or unless benefit is incidental...</p> <p>Duties contained in legislation and in case law overlaid with guidance from the Charity Commission</p> |

12. We might assume that should cathedrals come entirely under the Charities Act and the members of Chapter be bestowed with fiduciary obligations, that there will be much more attention on who is the right person to be a trustee of that entity, how they exercise themselves in that role and who is responsible when things go wrong. Handily, the disqualification provisions of the Charities Act have been applied to Chapter membership and so the ever-increasing list of ways in which a person is disqualified from being a charity trustee apply automatically to Chapter¹⁰.

13. These increased on 1st August 2018 and a relatively full list can be seen on screen.

¹⁰ Cathedrals Measure 1999, s4(4)

| Cathedrals law | Mainstream charity law |
|--|---|
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14. The present position where the Archbishop of the province can waive disqualification would presumably have to go if the Charity Commission became the principal regulator of cathedrals. With registered charities, those exercising senior management functions are also subject to the disqualification provisions¹¹, which is not presently the case for cathedrals. In practice most chapters will already be acting in a way which is consistent with the way in which trustee bodies of registered charities work, but what is best practice would become mandatory. Additionally, while the Cathedrals Measure sets out what the duties of Chapter as a whole are, registration as a charity may move the focus on the responsibility of individuals within the governing body of the charity.

15. The other consequence of converting Chapters into charitable trustee bodies would be emphasise the role of Chapter in proper governance. Ultimately, the Chapter, headed by the Dean, would be responsible for ensuring the charity was well governed, not anybody else. This would go hand in hand with the Cathedrals Working Group's desire to separate the functions of governance, ie making strategic decisions, from the functions of management, ie operational matters including implementing the strategy set for it.

¹¹ Charities Act 2016, s178

Crudely put, professionalised executive roles, such as the Dean, Chief Operating and Chief Finance Officer, would be the management, and the Chapter's role would be to govern.

Transactions involving land

16. The requirements around the acquisition of land is not dissimilar between cathedrals and most registered charities. The Chapter has powers of acquisition and disposal which it must exercise under specific parameters prescribed by the Church Commissioners, acting as an oversight body. Trustees of charities registered under the Charities Act will have a power of acquisition unless prevented from doing so under their trusts, but must act prudently. Disposals are more regulated and will depend on the trusts that the land is held under, but often the trustees will be able to dispose of land if they can show that the disposal is for the best terms, either supported by a long-form surveyors report in cases of leases for more than 7 years or freehold disposals or less comprehensive advice in case of more shorter term disposals. Probably cathedrals would be no worse or better off working under the Charities Act although bear in mind the large body of case law around charity property. Careful thought would also need to be given to the matter of granting leases to members of Chapter. Presently this is authorised under the Cathedrals Measure¹². Consideration would need to be given by Church House as to whether this could be squared with the Charities Act or whether specific legislative authority would need to be given in a new Cathedrals Measure for this to continue. Consecrated land would presumably continue to be outside of the Charities Act.

Insolvency

18. The Cathedral Working Group have recommended that the Company Voluntary Arrangement or CVA be expressly made available to cathedrals facing an insolvency event. While a court in 2000 decided that Bradford Cathedral could enter into a CVA, it was put beyond doubt that a CVA would not be available for a corporation not incorporated under the Companies Act or certain foreign companies when the Insolvency

¹² Cathedrals Measure 1999, s15(1)

Act 1986 was amended in 2005¹³. Putting the cathedral body into administration or entering into voluntary liquidation would also be unavailable. What the cathedral might try to do is to make an informal arrangement with its creditors. The creditors under such an arrangement might agree to defer payment of the debts and liabilities that the trustees have incurred on behalf of their charity, and/or agree to reduce the size of their claims. Such an arrangement falls outside the provisions of the Insolvency Act. If the arrangement is legally binding, it will only bind those creditors who are party to the agreement.

19. While it may be attractive to give cathedrals more options to help deal with an insolvency event, applying the whole of insolvency law to cathedrals would create other difficulties. Corporate insolvency in company law occurs when a company can't pay bills when they become due or where it has more liabilities than assets on its balance sheet. Determining whether the cathedral can't pay its debts on time is easy enough to establish perhaps. But determining whether the cathedral has more liabilities than assets on its balance sheet is fraught with difficulty. The cathedral building itself is bursting with liabilities and may have no real balance sheet value. In company law, a director who controls the affairs of an insolvent company may be held personally liable for company debts if they continue to trade and get the company further into debt. This is known as wrongful trading and if proved in court can entail personal liability for the directors. There are other offences, such as selling off assets of the company cheaply and repaying some creditors but not others. The criminal sanctions of the Insolvency Act do not apply to Chapter members currently, but if the entire insolvency regime were to apply to them, they would.
20. An alternative would perhaps be to adopt a bespoke insolvency regime which took some of the self-help provisions of the Insolvency Act around CVAs for example, but did not incorporate all the provisions intended to benefit creditors. Such bespoke insolvency regimes exist. The companies insolvency regime was borrowed and modified for Charitable Incorporated Associations. Another example is the new insolvency regime for

¹³ The Insolvency Act 1986 (Amendment) Regulations 2005 (which came into force on 13th April 2005) (the "Amendment Regulations") amended the Insolvency Act 1986 (the "1986 Act") to clarify that it is only companies as defined by the Companies Act and certain companies formed or incorporated outside the United Kingdom that can enter administration or a company voluntary arrangement.

further education and sixth-form colleges, which takes the companies insolvency regime but modifies it and creates something called Education Administration which has the 'special objective' to avoid or minimise disruption to existing students and to ensure that the FE body does not remain in education administration. It adjusts the priority from protecting the creditors interest at all costs, rescuing the FE body as a going concern; or transferring some or all of its undertaking to another FE body; or keeping the FE body going until the existing students have completed their studies; or arranging for students to complete their studies at another FE body. Might the General Synod and Parliament be convinced to grant cathedrals a similar bespoke regime in light of their national importance, which while borrowing from mainstream insolvency law would allow an order of the court to provide for a special type of administration which has as its focus keeping the cathedral as a going concern?

Legal jurisdiction and oversight

21. It is a characteristic of charities that they are subject to the jurisdiction of the High Court. Cathedrals are not presently themselves and have not been subject to the jurisdiction of the High Court, when they are within their jurisdiction in their application of their cathedral property and their internal affairs. Instead cathedrals have been subject to the discipline of the ecclesiastical courts and in particular, the Dean and Chapter has had the ordinary jurisdiction to regulate their own affairs according to their Statutes and powers of intervention and correction have been given to the Diocesan Bishop to act as their Visitor. When acting as a Visitor, the Bishop is exercising judicial powers, principally with a view to ensuring that the Constitution and Statutes of the Cathedral are adhered to. This jurisdiction was not taken away at the Reformation, and indeed the Bishops were given the like powers to enforce Statutes given by the Crown for new cathedrals, founded out of former monastic institutions. It is still good law that the statutes of a cathedral, are, so far as they are concerned with the internal regulation of the cathedral and its services by the Dean and Chapter, part of the ecclesiastical law, administered and enforced by the ecclesiastical courts alone. Thus in the case of *Attorney General vs the Dean and Chapter of Ripon Cathedral*, a case brought by the Royal College of Organists against the Dean and Chapter of Ripon Cathedral for dispensing with choral parts of some

services, was not amenable to judicial review¹⁴. In the case of *Regina v the Dean and Chapter of St Paul's Cathedral*¹⁵ a certain Reverend Paul Williamson sought to move for judicial review of a decision of the Dean and Chapter of St Pauls in relation to the appointment of a woman to the position of Minor Canon in that cathedral. One of the court's grounds for refusal was that the appropriate jurisdiction in this case was that of the Visitor, not the high court.

22. While the Cathedrals Working Group intends to retain the role of the Visitor, it remains uncertain where the charity jurisdiction of the High Court and the Charity Commission under its powers will meet the jurisdiction of the Visitor. The Working Group anticipates

"that the implementation of the recommendations in this report, including the introduction of the quinquennial assurance reviews, will mean in practice that Visitation will rarely be used, as there will be other mechanisms available to the bishop to undertake a review and to bring about improvements in financial or other governance matters at a cathedral. Visitation would continue to be available to resolve disputes of a specifically legal nature (for example as to the construction of, or disputes arising under, the constitution and statutes) although the bishop would generally be expected to commit the exercise of this type of Visitation to an ecclesiastical judge."

23. It is the core role of the Visitor to interpret the Statutes and to intervene when they are not adhered to, but any matter from financial mismanagement to safeguarding has come under that role – see for example the Visitations of Chichester and Exeter Cathedrals in recent years. There are examples in the charity sector, particularly the Colleges of Oxford and Cambridge and those public schools who have episcopal visitors which are both regulated by the Charity Commission and are subject to Visitations. In fact many are under the oversight of more than two bodies for different overlapping matters, such as the Office for Students in the case of the universities. If cathedrals were to be required to register as mainstream charities there may well be a move to a more purist role for the Visitor which will be to interpret the Statutes and not otherwise to get too involved in proactively giving recommendations about best practice. This is what seems to happen

¹⁴ *ATTORNEY-GENERAL v. DEAN AND CHAPTER OF RIPON CATHEDRAL*. - [1945] Ch. 239

¹⁵ *R v Dean and Chapter of St Paul's Cathedral and another ex parte Williamson* [1997] 5 Ecc LJ 129

in the Oxford and Cambridge colleges when squabbles break out amongst the fellows. Dual regulation can be made to work. What is likely however is for the Bishop to refer matters to the Charity Commission rather than getting personally stuck-in him or herself.

Continuity and change

24. It would be wrong to depict cathedrals as being entirely isolated from mainstream law and best practice. As this slide demonstrates, there is much law that cathedrals have to deal with now.

| Cathedrals already subject to | Cathedrals would be subject to |
|-----------------------------------|--|
| Data Protection Act 2018 and GDPR | Serious incident reporting |
| Corporate manslaughter | Justifying their “public benefit” |
| National Church Safeguarding | Fiduciary responsibility of charity trustees including conflict of interest rules on charity trustees |
| Health and Safety at Work | Justifying how they allocate their charitable funding |
| Occupiers Liability | More scrutiny of Chapter governance |
| Financial reporting requirements | Changing priorities of Charity Commission – transparency, improving trust and confidence in charities (Kids Club scandal etc). |
| Employment law (where employees) | Charity Commission would need to approve “regulated alterations” to the cathedral’s governing document |
| Tax law | Consecrated land and certain reserved matters would presumably remain outside of the Charity Commission’s purview |
| Whistleblowing (for employees) | Visitorial jurisdiction and other bespoke provisions preserved under a new Cathedrals Measure |

25. In the same way cathedrals, especially through the work of the Association of English Cathedrals, are conscious of what best practice in charity and corporate governance and finance looks like. That said some of the consequences of charity registration would be profound. Not least being subject to what the Charity Commission and the wider public interest in what a charity from time to time ought to be doing, and in this last slide to the powers of supervision and coercion that are held by the Charity Commission and ultimately be the secular courts.

| Cathedrals law | Mainstream charity law |
|--|--|
| <p>Church Commissioners Give consents to land and financial transactions Receive accounts and set reporting standards</p> <p>Cathedral Council Receive accounts and consulted on budget Can instigate a revision of the Statutes Request reports from the Chapter on any matter concerning the cathedral Discuss and declare its opinion on any such matter Draw any matter to the attention of the Visitor or the Church Commissioners.</p> <p>Bishop Many of the clerical appointments are in his or her gift Power of Visitation – considered something of a “blunt instrument”. “In the course of a visitation, the bishop may give such directions to the Chapter, to the holder of any office in the cathedral or to any person employed by the cathedral as will, in the opinion of the bishop, better serve the due observance of the constitution and statutes.”</p> <p>Cathedrals Fabric Commission –gives consent to alterations to the cathedral building or new building work</p> | <p>Charity Commission Annual return and accounts required (reporting requirements)</p> <p>Cathedrals would need to report any ‘serious incident’ to the Charity Commission.</p> <p>A ‘serious incident’ is an incident that has resulted, or could result, in a significant loss of funds or a significant risk to a charity’s property, work, beneficiaries or reputation.</p> <p>Commission powers include:-</p> <ul style="list-style-type: none"> • instituting inquiries, carrying out searches and calling for documents; • issuing official warnings to charity trustees; • establishing a scheme for the administration of a charity; • suspending or removing charity trustees, appointing an interim manager and appointing charity trustees; • directing that specified action must be taken, or must not be taken, by the charity trustees; • directing how property is to be applied |

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