

## Constitutional and Legislative Affairs Committee

---

Meeting Venue:  
**Committee Room 2 – Senedd**

---

Meeting date:  
**11 March 2013**

---

Meeting time:  
**14:30**

---

Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



For further information please contact:

**Gareth Williams**  
Committee Clerk  
029 2089 8008/8019  
[CLA.Committee@wales.gov.uk](mailto:CLA.Committee@wales.gov.uk)

**Ruth Hatton**  
Deputy Committee Clerk  
029 20898019  
[CLA.Committee@wales.gov.uk](mailto:CLA.Committee@wales.gov.uk)

---

### Agenda

---

- 1. Introduction, apologies, substitutions and declarations of interest**
- 2. Instruments that raise no reporting issues under Standing Order 21.2 or 21.3**

#### Negative Resolution Instruments

##### **CLA217 – The Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) Order**

Negative Procedure. Date made 19 February 2013. Date laid 21 February 2013.  
Coming into force date 16 March 2013

##### **CLA218 – The Coleg Cambria Further Education Corporation (Government) Regulations 2013**

Negative Procedure. Date made 20 February 2013. Date laid 22 February 2013.  
Coming into force date 26 March 2013

##### **CLA219 – The Coleg Cambria (Incorporation) Order 2013**

Negative Procedure. Date made 20 February 2013. Date laid 22 February 2013.  
Coming into force date 26 March 2013

**CLA220 – The Rehabilitation Courses (Relevant Drink Offences) (Wales) Regulations 2013**

Negative Procedure. Date made 19 February 2013. Date laid 22 February. Coming into force date 15 March 2013

**CLA221 – The Bovine Semen (Wales) (Amendment) Regulations 2013**

Negative Procedure. Date made 21 February 2013. Date laid 25 February 2013. Coming into force date 18 March 2013

**CLA223 – The Marine Licensing (Delegation of Functions) (Wales) Order 2013**

Negative Procedure. Date made 26 February 2013. Date laid 26 February 2013. Coming into force date 1 April 2013

**3. Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3**

**CLA222 – The Natural Resources Body for Wales (Functions) Order 2013 (Pages 1 – 3)**

Affirmative Procedure. Date made not stated. Date laid not stated. Coming into force date 1 April 2013

CLA(4)–08–13(p1) – Legal Adviser’s Report

CLA(4)–05–13(p2) – CLA189 The Natural Resources Body for Wales (Functions) Order 2012 (Previous Report) (Pages 4 – 21)

**4. Evidence in relation to the Inquiry on Law Making and the Church in Wales (Pages 22 – 41)**

15:00 – CLA(4)–08–13(p3) – Professor Norman Doe, Cardiff Law School, Cardiff University

15:45 – CLA(4)–08–13(p4) – Professor Thomas Glyn Watkin, Cardiff Law School, Cardiff University

**5. Papers to note (Pages 42 – 43)**

CLA(4)–08–13(p5) – Letter from Leighton Andrews AM, Minister for Education and Skills, to the Chair of the Constitutional and Legislative Affairs Committee

**6. Motion under Standing Order 17.42 to resolve to exclude the Public from the meeting for the following business:**

A Committee may resolve to exclude the Public from a meeting or any part of a meeting where:

(vi) the Committee is deliberating on the conclusions or recommendations of a report it proposes to publish.

## **7. Consideration of the Draft Report on the Local Government Democracy (Wales) Bill** (Pages 44 – 68)

CLA(4)-08-13(p6) – Draft Report on the Local Government Democracy (Wales) Bill

## **8. Consideration of the Draft Report on the Human Transplantation (Wales) Bill** (Pages 69 – 95)

CLA(4)-08-13(p7)– Draft Report on the Human Transplantation (Wales) Bill

### **Date of next Meeting**

Monday 18 March 2013

### **Transcript**

View the [meeting transcript](#).

# Agenda Item 3.1

## Constitutional and Legislative Affairs Committee Draft Report

CLA(4)-08-13

### CLA222 – The Natural Resources Body for Wales (Functions) Order 2013

The Natural Resources Body for Wales (Establishment) Order 2012 established a new statutory body, the Natural Resources Body for Wales and provided for its purpose, membership, procedure, financial governance and initial functions. This Order makes further provision about the Body, including provision about the modification and transfer of environmental functions to the Body.

This Order was initially laid in draft on 15 November 2012. Having taken account of issues raised by Assembly Committees and others, the Minister for Environment and Sustainable Development revised the draft. Annex 2 of the Explanatory Memorandum sets out the changes that have been made in detail.

#### **Procedure: Affirmative**

#### **Technical Scrutiny**

Under Standing Order 21.2 the Assembly is invited to pay special attention to the following draft instrument:

#### **21.2 (i) – that there appears to be doubt as to whether it is intra vires**

The consent of the Secretary of State and Minister which is required under Section 17 of the Public Bodies Act 2011 has not yet been obtained.

Section 17 provides that:–

*(1) The Secretary of State's consent is required for an order under section 13 or 14 which transfers a function to, or confers a function on—*

*(a) the Environment Agency,*

*(b) the Forestry Commissioners, or*

(c) *any other cross-border operator.*

(2) *The Secretary of State's consent is required for an order under section 13 or 14 made by virtue of section 15 which in any other way modifies the non-devolved functions of a person referred to in subsection (1).*

(3) *A Minister's consent is required for an order under section 13 or 14 which transfers a function to, or modifies the functions of, the Minister.*

The explanatory memorandum states that:-

*“The making of the Order is conditional upon the consent of the Secretary of State being obtained in advance under Section 17 of the Public Bodies Act 2011. Consent has been provided subject to agreement being reached between officials on the outstanding details and technicalities relating to the Natural Resources Body for Wales Transfer Scheme, Shared Service Agreements and Delegated Functions, and the Government of Wales Act Order. Discussions on all these are progressing well and we expect discussions to be finalised before the Order is voted upon”*

**21.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements**

**Schedule 3**

**Forestry Commission Byelaws 1982**

**Paragraph 17 (2)**

The definition of “the Commissioners” needs to be omitted from the amendment as it does not make sense.

## **Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999**

Paragraph 104 (2) - “the Commissioners” appears in the opening words to Regulation 16 rather than paragraph a.

## **Hazardous Waste (England and Wales) Regulations 2005**

Paragraph 205 (4) (b)- “)” needs to be added after Northern Ireland. Without this, it could be confusing as all the added words remain within the brackets.

## **Plant Health Forestry Order 2005**

Paragraph 208 (9) - the reference should refer to “European Union” rather than “European Community”.

## **Schedule 5**

## **Countryside Access (Draft Maps) (Wales) Regulations 2001**

### **Paragraph 3**

There is no definition of “the Council” in regulations 3-7.

It would be reasonable for the reporting points highlighted above to be corrected on publication, as they make no material change to the draft Order.

## **Merits Scrutiny**

Under Standing Order 21.3 the Assembly is invited to pay special attention to the following instrument:-

No Risk Impact Assessment (RIA) accompanies the draft Order. Paragraph 6 of the Explanatory Memorandum provides the reasons for this.

## **Legal Advisers**

Constitutional and Legislative Affairs Committee  
March 2013

Cynulliad  
Cenedlaethol  
Cymru  
National  
Assembly for  
Wales



## **Constitutional and Legislative Affairs Committee**

**Report: CLA(4)-05-13 (Report 2): 4 February 2013**

The Committee reports to the Assembly as follows:

### **CLA 189: The Natural Resources Body for Wales (Functions) Order 2012**

The Committee questioned John Griffiths AM, Minister for Environment and Sustainable Development on the draft Order.

This scrutiny session followed the Committee's initial consideration of the draft Order on 21 January 2013. The relevant extract of the committee report for that date, including the advice of the Committee's legal advisers, is attached at Annexe 1.

Prior to the meeting, the Minister wrote to the Committee addressing the reporting points outlined at the meeting on 21 January 2013. The letter is attached at Annexe 2.

The Minister was questioned about the mechanism for delivering the policy objectives contained in the draft Order and in particular why it was not possible to set out the functions of the new body clearly in a single, consolidated legislative text, rather than amending existing pieces of legislation.

In response, the Minister explained that the nature of the draft Order meant that amending existing legislation in the way it had been done was the most timely, practical and pragmatic approach.

The Minister confirmed that he will be amending the draft Order in response to evidence that the Committee has received from RSPB Wales, Wales Environment Link and Wildlife Trust Wales regarding the wording of the nature conservation duty in the draft Order. He also indicated that he is satisfied that all EU obligations have been complied with.

The Minister further re-assured the Committee that the draft Order would be amended in order that the Environment Agency remain subject to the requirement to prepare a Welsh language scheme, and

in the future to comply with Welsh language standards under the Welsh Language (Wales) Measure 2011.

The explanatory memorandum accompanying the draft Order explains that the making of the Order is conditional upon the consent of the Secretary of State being obtained. The Minister agreed to write to the Committee outlining the provisions within the draft Order for which consent is being sought and when it has been obtained.

The Committee wishes to draw the Assembly's attention to the following points:

- the Committee welcomes the Minister's intention to address the points raised by a number of environmental organisations regarding the wording of the nature conservation duty in the draft Order.
- the Committee welcomes the Minister's clarification that the draft Order will be amended to ensure that the Environment Agency will remain subject to the requirement to prepare a Welsh language scheme and that Welsh language standards will apply in future.
- the Committee considers that while a Bill would have been preferable as the legislative vehicle to deliver the Welsh Government's policy objectives, the use of an Order is a reasonable alternative on this occasion;
- the Committee notes the Minister's view that it was not practicable for the drafting of an Order, setting out the functions of the new environmental body, to follow the Counsel General's preferred approach to drafting new legislation, namely that it should be drafted in a way that simplifies the statute book by consolidating Welsh legislation and separating it from legislation that also applies to England<sup>1</sup>.

The transcript of the meeting will be available on the Assembly's website:

<http://www.senedd.assemblywales.org/mglIssueHistoryHome.aspx?lId=1242>

**David Melding AM**

Chair, Constitutional and Legislative Affairs Committee

**4 February 2013**

**Annexe 1**

---

<sup>1</sup> National Assembly for Wales, Plenary, *RoP: Statement: Access to Welsh Laws and Developing a Welsh Statute Book - An Update*, 26 June 2012



## **Constitutional and Legislative Affairs Committee**

### **Extract: Report of CLA(4)-03-13 : 21 January 2013**

The extract from the report is as set out below:

1. CLA 189: The note and action points arising from the meeting.
2. CLA 189: The annexed reporting points for the Order.
3. CLA 189: Annex A referred to within the reporting points.

#### **1. CLA189 – The Natural Resources Body for Wales (Functions) Order 2012**

Super Affirmative Procedure

Coming into force: 1 April 2013

The committee noted the reporting points for the Order (annexed below) and the evidence submitted by RSPB Wales, Wales Environment Link and Wildlife Trust Wales.

**Action:** The Committee agreed to invite the Minister for Environment and Sustainable Development to its meeting on 4 February 2013 for a further scrutiny session.

#### **2. CLA 189 – Annexe containing reporting points**

### **Constitutional and Legislative Affairs Committee Draft Report**

#### **Title: The Natural Resources Body for Wales (Functions) Order 2012**

The Natural Resources Body for Wales (Establishment) Order 2012 established a new statutory body, the Natural Resources Body for Wales and provided for its purpose, membership, procedure, financial governance and initial functions. This Order makes further provision about the Body, including provision about the modification and transfer of environmental functions to the Body.

#### **Procedure: Enhanced Affirmative**

The enhanced affirmative procedure:-

- Extends the period from the date on which a draft order was laid from 40 to 60 days
- Requires the Welsh Ministers to have regard to any representations, and resolution of the National Assembly for Wales and any recommendations of a committee charged with reporting on the draft Order made during the 60 day period

- Requires the draft Order to be re-laid before the Assembly with a statement summarising the changes, in the event that any material changes are made.

The revised draft order once laid will be subject to the normal affirmative procedure.

### Technical Scrutiny

Under Standing Order 21.2 the Assembly is invited to pay special attention to the following instrument:

#### **21.2 (i) - that there appears to be doubt as to whether it is intra vires**

#### **Preamble**

The consent of the Secretary of State and Minister which is required under Section 17 of the Public Bodies Act 2011 has not yet been obtained<sup>2</sup>.

Section 17 provides that:-

*(1) The Secretary of State's consent is required for an order under section 13 or 14 which transfers a function to, or confers a function on—*

*(a) the Environment Agency,*

*(b) the Forestry Commissioners, or*

*(c) any other cross-border operator.*

*(2) The Secretary of State's consent is required for an order under section 13 or 14 made by virtue of section 15 which in any other way modifies the non-devolved functions of a person referred to in subsection (1).*

*(3) A Minister's consent is required for an order under section 13 or 14 which transfers a function to, or modifies the functions of, the Minister.*

---

<sup>2</sup> Page 3 of the Explanatory Memorandum states that the Order will not be made without obtaining the necessary consent.

## **21.2 (v) That for any particular reason its form or meaning needs further explanation**

### **Articles 5, 6 & 7**

“local enactment” is not defined which could lead to uncertainty as these Articles in effect tidy up other legislation that is not specifically referred to in any of the Schedules.

### **Schedule 3**

#### **Welsh Language (Wales) Measure 2011**

Paragraph 4 (2) – As the Environment Agency still exercise functions in relation to Wales it should still be subject to the Welsh Language (Wales) Measure 2011. The effect of the amendment would be to remove the EA from the requirement to comply with welsh language standards.

### **Schedule 4**

#### **General Drainage Charges (Relevant Quotient) Regulations 1993**

Paragraph 31 (3) –The reference to the Flood and Coastal Erosion Risk Management (Levies) (England and Wales) Regulations 2011 refers to the Environment Agency (Levies) (England and Wales) Regulations 2011 which are renamed later in the Order. This is confusing to the reader who would be assisted by a suitable footnote.

## **21.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements**

### **Schedule 2**

#### **Forestry Act 1967**

Paragraph 42 (3) – The reference to subsection 4 (a) is incorrect and should refer to subsection (4).

#### **Highways Act 1980**

Paragraph 102 (3) – It is not clear whether the reference to “organisation” is in respect of the first or second occasion where it occurs.

#### **Water Resources Act 1991**

Paragraph 198 (2) – There is no reference to the Environment Agency in section 118(b).

## **Clean Air Act 1993**

Paragraph 256 – The reference to ‘appropriate authority’ should refer to ‘appropriate agency’.

## **Schedule 3**

### **Control of Pesticides Regulations 1986**

#### Paragraph 20 (2)

This should refer to (if the area in which the intended aerial application is to take place in Wales).

### **Plant Health (Export Certification) (Forestry) (Great Britain) Order 2004**

Paragraph 158 (3) (b) and (5) – the date cannot just be substituted as the 2005 Order refers to Plant Health (Forestry) Order 2005, rather than the Plant Health (Forestry) (**Great Britain**) Order 1993.

### **Welsh Language Schemes (Public Bodies) Order 1996**

Paragraph 72 – Because the Environment Agency still exercise functions in relation to Wales they should still be subject to the Order. The effect of the amendment is to remove the EA from the requirement to prepare a Welsh language scheme under the Welsh Language Act 1993.

### **Bathing Water Regulations 2008**

Paragraph 232 – Paragraph 231 changes all references to Agency without excepting regulation 2, there is no definition to omit and the definition does not then make sense.

Paragraph 233 – The reference is to ‘Agency’ rather than ‘Environment Agency’

### **Infrastructure Planning (National Policy Statement Consultation) Regulations 2009**

Paragraph 260 (2) (a) – the entry should refer to ‘forests and woodlands’ rather than ‘forests or woodlands’.

## **Regional Flood and Coastal Committees (England and Wales) Regulations 2011**

Paragraph 317 (2) – The reference to ‘opening words’ in this paragraph does not make sense.

## **Waste (England and Wales) Regulations 2011**

Paragraph 325 – There is no reference to the Environment Agency or the Agency in regulation 3.

## **Greenhouse Gas Emissions Trading Scheme Regulations 2012**

Paragraph 334 – the reference to regulation 21 is incorrect and should refer to regulation 20.

Paragraph 335 – the reference to regulation 28 is incorrect and should refer to regulation 27.

Paragraph 336 – the reference to regulation 48 (5) is incorrect and should refer to regulation 45 (5).

Paragraph 337 – the reference to regulation 87 is incorrect and should refer to regulation 86.

Paragraph 338 – the reference to regulation 89 is incorrect and should refer to regulation 87.

Paragraph 339 – the reference does not make sense.

## **Schedule 5**

### **Wildlife and Countryside (Sites of Special Scientific Interest, Appeals) (Wales) Regulations 2002**

Paragraph 6 – “the Countryside Council for Wales” only appears on one occasion.

## **Merits Scrutiny**

Under Standing Order 21.3 the Assembly is invited to pay special attention to the following instrument:–

This Order is being brought forward under the powers contained in Sections 13 to 15 of the Public Bodies Act 2011.

The Legal Briefing note dated November 2012 (at Annex A) provides further background information to the Order.

The Committee has received correspondence which amongst other matters highlights issues as to whether various provisions of the Order introduced by Schedule 1 are ultra vires, because they do not meet the test under Section 16 of the Public Bodies Act 2011 in that they remove necessary protections.

The test under the Act is whether **the Welsh Ministers consider** that:

- (a) the Order does not remove any necessary protection, and
- (b) the Order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably be expected to continue to exercise.

Within the preamble to the Order, the Welsh Ministers state that they consider that the Order

*does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise*

At page 11 of the Explanatory Memorandum, it states:-

*In drafting this Order we have followed the general principle that we are transferring the existing functions of the three bodies in a manner which retains all existing protections and does not add any new restrictions on individual rights or freedoms.*

It would be difficult for the Committee to anticipate the practical effect of particular provisions within the Order; however should the Committee wish, evidence could be taken from the Minister for Environment and Sustainable Development as to the statement made within the preamble, prior to the final Order being laid.

### **Legal Advisers**

Constitutional and Legislative Affairs Committee

**January 2013**

### 3. CLA 189 – Annex A referred to within the reporting points

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chynghor i Aelodau'r Cynulliad a'u cynorthwyyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cynghor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partïon.

This document has been prepared by National Assembly for Wales lawyers in order to provide information and advice to Assembly Members and their staff in relation to matters under consideration by the Assembly and its committees and for no other purpose. Every effort has been made to ensure that the information and advice contained in it are accurate, but no responsibility is accepted for any reliance placed on them by third parties

## Constitutional and Legislative Affairs Committee

### The Natural Resources Body for Wales (Functions) Order 2012

#### Legal Briefing Note

#### 1. Background

- 1.1 On 15 November 2012, the Minister for Environment and Sustainable Development, John Griffiths AM, laid a draft of *The Natural Resources Body for Wales (Functions) Order 2012*.
- 1.2 The Order is to be made in accordance with the powers conferred by sections 13, 14, 15 and 35 of the *Public Bodies Act 2011* (“the 2011 Act”).
- 1.3 This is the second order concerning the Natural Resources Body for Wales (‘the Body’), its having been established on 19<sup>th</sup> July 2012 by the *Natural Resources Body for Wales (Establishment) Order 2012 No 1903 (W.230)*.
- 1.4 The Order is subject to a form of affirmative procedure which is explained on page 2 of the Explanatory Memorandum that accompanies the draft Order. The procedure set out in Section 19 of the Public Bodies Act 2011, requires that the Order be laid in draft for 40 days, but that within 30 days of the laying of the draft Order, the Assembly may resolve or a committee charged with reporting on the draft Order may recommend that the enhanced affirmative procedure set out in Section 19 (6) – (9) should apply.

If no such resolution is made, or if a recommendation of the committee is overruled by a resolution of the Assembly, after 40 days a motion to approve the draft Order can be made.

The enhanced affirmative procedure

- extends the period from the date on which a draft order was laid to 60 days

- requires the Welsh Ministers to have regard to any representations, and resolution of the National Assembly for Wales and any recommendations of a committee charged with reporting on the draft Order made during the 60 day period.
- requires the draft Order to be re-laid before the Assembly with a statement summarising the changes, in the event that any material changes are made.

The revised draft Order would then be subject to normal affirmative procedure.

- 1.5 The Committee has recommended in its report laid on 23<sup>rd</sup> November 2012, that the enhanced affirmative procedure should apply to the Order. Unless this is overruled by a resolution of the Assembly by 11<sup>th</sup> January 2013 (the latest date this could be considered in Plenary would be 9<sup>th</sup> January 2013) then the Committee has until 10<sup>th</sup> February 2013 to report on the Order

## **2. Requirements of The Public Bodies Act 2011**

- 2.1 Section 13 of the Act provides the Welsh Ministers with the powers to modify or transfer functions of the Countryside Council for Wales (CCW) and the devolved functions of the Environment Agency (EA) or the Forestry Commission (FC), the functions of the Welsh Flood and Coastal Committee or any devolved Welsh environment functions of any person to:
- Welsh Ministers
  - To one of the existing organisations or,
  - To a new body
- 2.2 Section 16 (1) of the Act states that an Order may only be made under Section 13 for the purposes of improving the exercise of public functions having regard to efficiency, effectiveness and securing accountability to Welsh Ministers. Section 16 (2) states that an Order may only be made as long as it does not remove any necessary protection or does not impinge upon the exercising of any existing rights by individuals.
- 2.3 Section 17 requires the consent of the Secretary of State for an Order which transfers or confers a function on the EA, FC or other cross-border operator, or if it modifies a non-devolved function of one of the aforementioned bodies. A Minister's consent is required for an order which transfers a function to, or modifies the functions of the Minister.
- 2.4 Section 18 (1) of the Act states that in making an Order under Section 13, Welsh Ministers must consult any organisation or person exercising public functions to whom the proposals relate, other



persons whose interests will be substantially affected by the proposals and any other person deemed appropriate.

- 2.5 Section 18 (2) of the Act provides that if, having carried out its consultation under Section 18 (1), the Welsh Ministers consider it appropriate to change the whole or part of the proposal, then they must carry out such further consultation with respect to the changes as seems appropriate.
- 2.6 Sections 21 –23 of the Public Bodies Act 2011 contain restrictions on the creation of functions, transfer and delegation of functions and the creation of criminal offences by Welsh Ministers.
- 2.7 The Welsh Government sets out how it has complied with each of these requirements within the Explanatory Memorandum.
- 2.8 It is important to note that the making of the Order is conditional upon the consent of the Secretary of State and any Minister being obtained in advance under section 17 of the Public Bodies Act 2011, and whilst the preamble to the draft Order states that the consent has been obtained, this will need to be satisfied before Welsh Ministers can make the Order.

### **3. The Order**

- 3.1 The purpose of the Order is to transfer functions to the Body from CCW, EA and FC, and to ensure that the Body's general functions are appropriate for the range of functions it will exercise.
- 3.2 The Order transfers all CCW functions to the Body (apart from functions which are removed to avoid duplication). It also transfers a number of wildlife licensing functions of the Welsh Ministers to the Body.
- 3.3 The Order transfers most FC functions in respect of Wales to the Body, including its forestry management functions. The FC's powers to make subordinate legislation in relation to Wales and its functions relating to plant health are instead transferred to the Welsh Ministers.
- 3.4 EA functions are generally transferred to the Body in relation to Wales (and remain exercisable by the EA in relation to England). However certain functions relating to the water resources and flood risk management are divided differently; eg. functions relating to the regulation and management of cross-border rivers for the purposes of the Water Framework Directive become jointly exercisable by the EA and the Body. In addition, the transfer does not include the Wye Navigation or a small number of functions which the EA will continue to exercise on a UK-wide basis.

- 3.4 The Order also makes provision to abolish the CCW and the Welsh Environment Protection Advisory Committee and Regional and Local Fisheries Advisory Committee of the EA.
- 3.5 The details relating to the functions of the body are contained in the Schedules to the Order.

#### **4. Action for Committee**

- 4.1 The Committee's Legal Advisers will prepare a draft report in accordance with Standing Order 21, together with a detailed advice, for the Committee's consideration.

**Legal Services  
November 2012**

John Griffiths AC /AM  
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy  
Minister for Environment and Sustainable Development



Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref: MB/JG/0491/13

David Melding AM  
Chair  
Constitutional and Legislative  
Affairs Committee  
National Assembly for Wales  
Cardiff Bay  
CARDIFF  
CF99 1NA

31 January 2013

*Dear David,*

**The Natural Resources Body for Wales (Functions) Order 2012**

Thank you for sharing a draft of your Committee's report on the draft Functions Order. I look forward to discussing some of the matters raised in the report with you and committee members when you next meet on Monday 4 February.

Your report raises a number of technical drafting points where the Government agrees that it would be right to amend the Order when a revised version is re-laid at the end of February. These are summarised below:

**Provisions reported under Standing Order 21.2(v):**

- Articles 5, 6 and 7 (a definition will be added)
- Schedule 3, paragraph 4(2) (the amendment to remove the EA will be deleted)
- Schedule 4, paragraph 31(3) – General Drainage Charges (Relevant Quotient) Regulations 1993 (a footnote will be added)

**Provisions reported under Standing Order 21.2(vi):**

- In Schedule 2:
  - Paragraph 42(3) – Forestry Act 1967
  - Paragraph 102(3) – Highways Act 1980
  - Paragraph 198(2) – Water Resources Act 1991
  - Paragraph 256 – Clean Air Act 1993

Bae Caerdydd • Cardiff Bay  
Caerdydd • Cardiff  
CF99 1NA

*Wedi'i argraffu ar bapur wedi'i ailgylchu (100%)*

English Enquiry Line 0845 010 3300  
Llinell Ymholiadau Cymraeg 0845 010 4400  
Correspondence: John.Griffiths@wales.gsi.gov.uk  
*Printed on 100% recycled paper*

- In Schedule 4:
  - Paragraph 20(2) – Control of Pesticides Regulations 1986
  - Paragraph 72 – Welsh Language Schemes (Public Bodies) Order 1996 (the amendment to remove the EA will be deleted)
  - Paragraphs 232 and 233 – Bathing Water Regulations 2008
  - Paragraph 260(2) – Infrastructure Planning (National Policy Statement Consultation) Regulations 2009
  - Paragraph 325 – Waste (England and Wales) Regulations 2011
  - Paragraphs 344-399 – Greenhouse Gas Emissions Trading Scheme Regulations 2012
  
- In Schedule 5, Paragraph 6 – Wildlife and Countryside (Sites of Special Scientific Interest, Appeals) (Wales) Regulations 2002

*Beet wahan,*



**John Griffiths AC / AM**

Gweinidog yr Amgylchedd a Datblygu Cynaliadwy  
Minister for Environment and Sustainable Development

## LAW MAKING AND THE CHURCH IN WALES

Norman Doe

Like other religious organisations, the Church in Wales is regulated by two broad categories of law: the (external) law of the State and the (internal) law of the church. This short paper sets out the fundamentals of the position of the Church in Wales under State law and its consequences for law-making for the church by the State and its institutions (e.g. Parliament, Courts, National Assembly for Wales and Welsh Government) and for law-making within the church (by e.g. its Governing Body).

### 1. The Welsh Church Act 1914: Disestablishment and Ecclesiastical Law

*The foundation of the Church in Wales resulted from the disestablishment of the Church of England in Wales under the Welsh Church Act 1914. The ecclesiastical law of England and Wales ceased to apply to the Church in Wales as the law of the land, but some elements of it continue to apply as such (e.g. marriage and burial).*

The foundation of the institutional Church in Wales under State law followed the disestablishment of the Church of England in Wales by Parliament in 1920 through the Welsh Church Act 1914. Until 1920 ‘the Church of England and the Church in Wales were one body established by law’.<sup>1</sup> On the day of disestablishment (31 March 1920), the Church of England, in Wales and Monmouthshire, ceased to be ‘established by law’ (s. 1): no person was to be appointed by the monarch to any ecclesiastical office in the Church in Wales; every ecclesiastical corporation was dissolved; Welsh bishops ceased to sit in the House of Lords; and bishops and clergy were no longer disqualified from election to the House of Commons (ss.1, 2, 3).<sup>2</sup>

The 1914 Act also provides that, as from the date of disestablishment, ‘the ecclesiastical law of the Church in Wales shall cease to exist as law’ for the Welsh church (s. 3(1)). Before 1920, the ecclesiastical law, applicable to the established Church of England in Wales, formed part of the law of the land: ‘the ecclesiastical law of England...is part of the general law of England – of the common law – in that wider sense which embraces all the ancient and approved customs of England which form law’.<sup>3</sup> However, this ecclesiastical law (found in both State-made and church-made law) did not lose all its authority for the Welsh Church. The 1914 Act provides that pre-1920 ecclesiastical law continues to apply to the Church in Wales as if its members had assented to it (s. 3(2)); this is what might be styled the statutory contract of the Church in Wales. This was to fill the juridical vacuum left by disestablishment, and to ensure a degree of continuity. The 1914 Act does not define ‘ecclesiastical law’, but various definitions exist in case-law: e.g. ‘the term “ecclesiastical law” means the law relating to any matter concerning the Church of England administered and enforced in any court’ (temporal or ecclesiastical).<sup>4</sup> Moreover, some ecclesiastical laws continue to apply to the Church in Wales as part of the law of the land - the so-called ‘vestiges of establishment’ (e.g. on marriage and burial: see below).

---

<sup>1</sup> *Re Clergy Corporation Trusts* [1933] 1 Ch 267.

<sup>2</sup> See N. Doe, *The Law of the Church in Wales* (University of Wales Press, Cardiff, 2002), Ch. 1.

<sup>3</sup> *Mackonochie v Lord Penzance* (1881) 6 App Cas 424 at 446.

<sup>4</sup> *AG v Dean and Chapter of Ripon Cathedral* [1945] Ch 239.

## 2. The Self-Governance of the Church in Wales

*The Welsh Church Act 1914 provides for the freedom of the Church in Wales to govern itself by means of its own system of law. This includes the power to alter the pre-1920 'received ecclesiastical law' and create new 'enacted ecclesiastical law'.*

The 1914 Act provides for the self-government of the Church in Wales: its freedom to set up its own system of government and law. Nothing in any Act of Parliament, law or custom is to prevent the bishops, clergy and laity of the church from holding synods or electing representatives to them, nor the framing in such manner as they think fit 'constitutions and regulations for the general management and good government of the Church in Wales', its property and affairs (s. 13(1)). The power (by means of a constitution and regulations) to alter ecclesiastical law includes the power of alter such law so far as it is contained in any Act of Parliament forming part of the pre-1920 ecclesiastical law (s. 3(4)). The Constitution of the Church in Wales lists pre-1920 statutes which have been dis-applied by the church since 1920 and it classifies the pre-1920 terms of its statutory contract as the 'received ecclesiastical law', and those created by the church and its institutions since disestablishment (its post-1920 instruments) as the 'enacted ecclesiastical law'. However, again, several 'vestiges of establishment' remain today for the Welsh Church: the duty of its clergy to solemnize the marriages of parishioners, the right of parishioners to burial in the churchyard, and the duty of the church to provide for prison chaplains (see below).

## 3. The Legal Nature and Position of the Church in Wales

*The Church in Wales has been classified by State courts as 'disestablished', as 're-established', and as a 'voluntary association' (without legal personality). It may also be classified legally as a 'religious organisation' and, for the purposes of the vestiges of establishment (marriage, burial, prisons) as 'established' or 'quasi-established'.*

The legal nature and position of the Church in Wales may be approached from two perspectives. From the ecclesiastical perspective, the Church in Wales defines itself as 'the ancient Church of this land, catholic and reformed', proclaiming and maintaining 'the doctrine and ministry of the One, Holy, Catholic and Apostolic Church'.<sup>5</sup> In the wider ecclesiastical context, the Church in Wales is also an autonomous member of the global Anglican Communion, a fellowship of churches in communion with the See of Canterbury, with its own system of canon law.<sup>6</sup>

From the secular perspective, State law contains several ideas about the nature and position of the Church in Wales. First, in civil law, a 'church' it is the aggregate of the individual members of a religious body or a quasi-corporate institution carrying on the religious work of the denomination whose name it bears'.<sup>7</sup> Secondly, the Church in Wales is sometimes classified as a 'disestablished church',<sup>8</sup> but, technically, it was the Church of England that was disestablished in 1920, not the new institutional

---

<sup>5</sup> Book of Common Prayer 1984, 692.

<sup>6</sup> See N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1996) Ch. 1.

<sup>7</sup> *Re Barnes, Simpson v Barnes* [1930] 2 Ch 80.

<sup>8</sup> *Representative Body of the Church in Wales v Tithe Redemption Commission and Others* [1944] 1 All ER 710 at 711.

church coming into being as a result of the WCA 1914.<sup>9</sup> The WCA 1914 itself provides that this was ‘An Act to terminate the establishment of the Church of England in Wales and Monmouthshire’. Thirdly, it has also been said judicially that the object of the 1914 Act was ‘to re-establish the Church in Wales on a contractual basis’.<sup>10</sup> The institutional Church in Wales was indeed founded as a direct result of the legislative activity of civil power. Given the vestiges of establishment (e.g. marriage, burial) the Church in Wales may be classified as ‘established’ (or ‘quasi-established’) for these purposes. Fourthly, the State courts treat the Church in Wales as a consensual society classified in law, like non-established religious organisations, as ‘a voluntary organisation of individuals, held together by no more than the contract implied by their mutuality’.<sup>11</sup> Consequently, ‘the Church in Wales is a body whose legal authority arises from consensual submission to its jurisdiction’; it has ‘no statutory (*de facto* or *de iure*) governmental function’, but is, rather, ‘analogous to other religious bodies which are not established as part of the State’,<sup>12</sup> namely, organised ‘as a matter of agreement between the persons who are members of that body’.<sup>13</sup> Thus, being an unincorporated voluntary association, the Church in Wales has no separate legal personality, though institutions within it do (e.g. Representative Body: see below).<sup>14</sup> Finally, the church is also a ‘religious organisation’ enjoying religious freedom under the European Convention on Human Rights.<sup>15</sup>

#### 4. The Bodies of Law Applicable to the Church in Wales

*The Church in Wales is regulated by two bodies of law: external and internal. State law is found in e.g. Acts of Parliament, secondary legislation, the common law, European law, and legislation of the National Assembly for Wales. Church law is found in the Constitution and other regulatory instruments of the Church in Wales.*

**State Law:** External State law applying directly or indirectly to the Church in Wales is found in: UK primary legislation enacted by the Parliament;<sup>16</sup> secondary legislation;<sup>17</sup> the common law (judicial decisions); and European Union law.<sup>18</sup> The National Assembly for Wales and Welsh Government have competence over, e.g. religious education (to be mainly Christian); agreed religious education syllabuses; daily acts of collective worship (to be broadly Christian); rights of parents and teachers to opt out of religious education and worship; the functions of a SACRE on religious education and worship; the religious rights of children in care; health care (including spiritual

<sup>9</sup> *Re MacManaway* [1951] AC 161 at 165 (*arguendo*).

<sup>10</sup> *Powell v Representative Body of the Church in Wales* [1957] 1 All ER 400 at 403.

<sup>11</sup> *R v Dean and Chapter of St Paul’s Cathedral and Church in Wales, ex parte Williamson* (1998) 5 EccLJ 129.

<sup>12</sup> *R v Provincial Court of the Church in Wales, ex parte Revd. Clifford Williams* (1999) 5 EccLJ 217.

<sup>13</sup> *Re Clergy Orphan Corporation Trusts* [1933] 1 Ch 267.

<sup>14</sup> The Representative Body is incorporated by royal charter under the WCA 1914; the Governing Body is recognised as an ‘appropriate authority’ under the Sharing of Church Buildings Act 1969.

<sup>15</sup> The Human Rights Act 1998 itself employs the category ‘religious organisation’ (s. 13).

<sup>16</sup> E.g. Welsh Church (Burial Grounds Act) 1945 and Ecclesiastical Courts Jurisdiction Act 1860. By constitutional convention Parliament does not legislate for the Church of England without its consent: Lord Sainsbury, 19 July 2005, GC 192-193; *quaere*: does this apply to the Church in Wales?

<sup>17</sup> E.g. Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994 (now the responsibility of the National Assembly for Wales).

<sup>18</sup> E.g. as one of those ‘churches’ with which ‘the Union shall maintain an open, transparent and regular dialogue’: EURT Art. 17.3; see N. Doe, *Law and Religion in Europe* (Oxford, 2011) Ch. 10.

care in hospitals); ecclesiastical exemption; burial grounds and fees.<sup>19</sup> In the exercise of such functions the Assembly and Government cannot violate religious freedom.<sup>20</sup>

**Church Law:** The principal legislator for the Church in Wales is the church itself and its institutions (principally, its Governing Body composed of bishops, clergy and laity). The regulatory instruments of the Church in Wales (created by the church for itself under the freedom provided for it in the WCA 1914, s. 13) fall into four broad categories: (1) the Constitution of the Church in Wales (composed e.g. of chapters, canons, rules and regulations made by or under the authority or with the consent of the Governing Body of the Church in Wales); (2) pre-1920 ecclesiastical law, which continues as part of the statutory contract under the WCA 1914 unless modified or dis-applied by the church (WCA s. 3),<sup>21</sup> as post- 1920 ‘enacted ecclesiastical law’ prevails over pre-1920 ‘received ecclesiastical law’;<sup>22</sup> consequently, sources of pre-1920 ecclesiastical law which continue to bind the church, to the extent that they do not conflict with the Constitution or have not been dis-applied or abrogated since 1920, include: Acts of Parliament;<sup>23</sup> judicial decisions of the ecclesiastical and secular court;<sup>24</sup> the Canons Ecclesiastical 1603/4; and pre-Reformation Roman canon law;<sup>25</sup> (3) extra-constitutional legislation;<sup>26</sup> and (4) ecclesiastical quasi-legislation (such as codes of practice). Some instruments made by the church (once approved by the State) have the status of secondary legislation under civil law.<sup>27</sup> The purpose of these internal laws is to facilitate and order the life of the Church: ‘The Constitution [of] the Church in Wales exists to serve the sacramental integrity and good order of the Church and to assist it in its mission and its witness to the Lord Jesus Christ’.<sup>28</sup>

## 5. The Status and Enforceability of Church Law in Civil Law:

*The internal law of the Church in Wales has the status in civil law of the terms of a contract binding on its members. Its internal law is enforceable in (a) the State courts in relation to property and rights under civil law (with the effect that State courts make law for the Church in Wales); and (b) the courts and tribunals of the Church in Wales but these exercise a voluntary jurisdiction not a coercive jurisdiction.*

One effect of the nature in civil law of the Church in Wales is that its internal law (both pre- and post-1920) has the status of a contract entered by the members of the church: ‘It is binding upon all members of the Church in Wales, both clerical and lay,

---

<sup>19</sup> Hill, Sandberg, and Doe, *Religion and Law in the United Kingdom* (Kluwer, 2011) par. 167-172.

<sup>20</sup> Government of Wales Act 1998, s. 107; Government of Wales Act 2006, ss. 81 and 94(6).

<sup>21</sup> The Church in Wales Constitution, I.5, lists UK statutes which no longer apply to the church (e.g. the Clergy Discipline Act 1892); also: ‘the Courts of the Church shall not be bound by any decision of the English Courts in relation to matters of faith, discipline or ceremonial’; so, pre-1920 ecclesiastical law ‘shall be binding on the Members’ of the church ‘in so far as it does not conflict with anything contained in [its] Constitution’.

<sup>22</sup> N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 17.

<sup>23</sup> E.g. Sacrament Act 1547.

<sup>24</sup> E.g. *R v Dibdin* [1910] P 57: on admission to Holy Communion.

<sup>25</sup> If not repugnant to the royal prerogative, laws, statutes and customs of the realm (Submission of the Clergy Act 1533, s. 3); *Bishop of Exeter v Marshall* [1868] LR 3 HL 17: it is incorporated as custom.

<sup>26</sup> I.e. that which is not contained in the Constitution of the Church in Wales, such as Standing Orders of Governing Body, and cathedral constitutions, statutes, ordinance and customs, diocesan decrees.

<sup>27</sup> E.g. the Governing Body may authorise rules made by e.g. the Representative Body (e.g. Rules made under the Welsh Church (Burial Grounds) Act 1945, s. 4(2) and approved by the National Assembly).

<sup>28</sup> Constitution of the Church in Wales, Prefatory Note.



but not upon the people of Wales generally, and, in common with the rules of other voluntary associations, it is enforceable in certain circumstances in the civil courts'.<sup>29</sup> Pre-1920 ecclesiastical law, whilst it ceases to exist as the law of the land, together with post-1920 modifications or alterations to it (duly made according to the constitution and regulations of the church), have the status of a statutory contract, 'binding on the members for the time being of the Church in Wales in the same manner as if they had mutually agreed to be so bound'.<sup>30</sup> Its post-1920 law (not being modifications to the pre-1920 ecclesiastical law), has the same status: a church 'in places where there is no Church established by law, is in the same situation with any religious body...and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them'.<sup>31</sup>

Consequently, generally, the domestic law of the Church in Wales is enforceable in the civil courts as a matter of private law and sometimes as a species of public law (e.g. when approved by the Assembly).<sup>32</sup> Under the WCA 1914, pre-1920 ecclesiastical law and post-1920 modifications or alterations to it are 'capable of being enforced in the temporal courts in relation to any property...held on behalf of the...Church and its members'.<sup>33</sup> The same applies to new post-1920 law (not being modifications or alterations to the pre-1920 ecclesiastical law) dealing with property; '[t]he law imposes upon [a] church a duty to administer its property in accordance with the provisions of [its] book of rules'.<sup>34</sup> Moreover, in non-property cases, domestic church law may be enforced in civil courts when breaches of it within the church result in the violation of a right or interest under civil law.<sup>35</sup> So, its internal law is inferior to the law of the State: 'the Church in Wales remains bound by the secular law of England and Wales'.<sup>36</sup> However, if a State court entertained a challenge to the domestic law of the church,<sup>37</sup> the court must have particular regard to the importance of the right of freedom of religion.<sup>38</sup> Indeed, it would be unlawful for

<sup>29</sup> Constitution of the Church in Wales, Prefatory Note and I.2: 'The Constitution shall be binding on all Members of the Church in Wales, as defined in Part II of this Chapter'.

<sup>30</sup> Welsh Church Act 1914, s. 3(2); see also *Welsh Church Commissioners v Representative Body of the Church in Wales and Tithe Redemption Commission* [1940] 3 All ER 1 at 6: as to a property matter, Greene MR speaks of the 'quasi-contractual obligation enforceable in the temporal courts'.

<sup>31</sup> *Long v Bishop of Cape Town* (1863) 1 Moo NS 411; *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323: 'The church is...an unincorporated body of persons who agree...to practise the same doctrinal principles by means of the organisation and in the manner set forth in the constitutional deed'.

<sup>32</sup> However, the Welsh Church (Burial Grounds) Act 1945 Rules, made by the Representative Body in pursuance of s. 4(2) of the 1945 Act, as State approved secondary legislation, have status in the public law of the State and are enforceable as such.

<sup>33</sup> WCA 1914, s. 3(2): pre-1920 ecclesiastical law with modifications and alterations effected after the passing of the Act, duly made under the rules of the church, 'shall be capable of being enforced in the temporal courts in relation to any property which by virtue of this Act is held on behalf of the said Church or any members thereof, in the same manner and to the same extent as if such property had been expressly assured upon trust to be held on behalf of persons who should be so bound'.

<sup>34</sup> *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323 at 329.

<sup>35</sup> See e.g. *Buckley v Cahal Daly* [1990] NIJB 8; *Forbes v Eden* (1867) LR 1 Sc & Div 568.

<sup>36</sup> CW Constitution, Prefatory Note: especially 'regarding such matters as the ownership and management of property, the solemnisation of marriage and rights of burial in its churchyards'.

<sup>37</sup> *R v Dean and Chapter of St Paul's Cathedral and the Church in Wales, ex parte Williamson* (1998) 5 EccLJ 129: a challenge, to the Church in Wales' decision to ordain women priests, was dismissed - the applicant, a vexatious litigant under the Supreme Court Act 1981, s. 42, lacked *locus standi*.

<sup>38</sup> Human Rights Act 1998, s. 13.

a civil court (a public authority) to fail to have regard to this right, or to act in a way which is otherwise incompatible with this or other European Convention rights.<sup>39</sup>

The Church in Wales may establish its own ecclesiastical courts, but these are forbidden to exercise coercive jurisdiction.<sup>40</sup> Submission to them is voluntary, and compliance with their decisions is effected by means of declarations made by prescribed classes.<sup>41</sup> In exercising their jurisdiction ‘the Courts of the Church in Wales shall not be bound by any decision of the English Courts in relation to matters of faith, discipline or ceremonial’.<sup>42</sup> It has been held that in disciplinary cases the High Court lacks jurisdiction over the consensual jurisdiction of the church courts.<sup>43</sup>

## **6. The Direct Applicability of Public Law to Church in Wales Prison Chaplains**

*Several bodies of State law apply directly to the Church in Wales which have survived disestablishment (and continue as vestiges of establishment). For the purposes of these bodies of law, the church continues to be established. One such is that by statute prison chaplains in Wales are clerics of the Church in Wales with public functions.*

Every prison in Wales must have a chaplain and, if large enough, may also have an assistant chaplain. The chaplain (and assistant) must be a cleric of the Church in Wales. Appointment belongs to the Secretary of State. Prior to appointment, notice of the nomination must be given to the diocesan bishop. They may officiate only under the authority of a licence from the bishop.<sup>44</sup> The chaplain must, for example: interview every prisoner belonging to the Church in Wales soon after the prisoner’s reception in the prison and shortly before his release; regularly visit prisoners belonging to the Church in Wales; and visit daily all such members who are sick, under restraint or undergoing cellular confinement. Special rights to the ministry of the chaplain are enjoyed by prisoners who are not members of the Church in Wales; for example, they must be allowed to attend chapel or be visited by the chaplain. The chaplain must conduct divine service for prisoners belonging to the Church in Wales at least once every Sunday and other listed occasions, and, if other arrangements have not been made, read the burial service at the funeral of these who die in the prison.<sup>45</sup>

## **7. The Direct Applicability of Marriage Law: Common Law and Statute**

*A second vestige of establishment is that clergy of the Church in Wales have a duty at common law to solemnise the marriages of parishioners and those with a qualifying connection to the parish. Parliament has by statute lifted this duty with regard to the marriages of divorced persons and the government proposes to do so with regard to marriages for same sex couples. The Church in Wales may also solemnise marriages in accordance with common licences and special licences recognised in public law.*

---

<sup>39</sup> Human Rights Act 1998, s. 6.

<sup>40</sup> WCA 1914, s.3(3).

<sup>41</sup> See e.g., for clergy, Const. VI.10: clergy undertake ‘to accept, submit to, and carry out any sentence of...any Court or the Tribunal of the Church in Wales’.

<sup>42</sup> Const. I.5: no definition of ‘the English Courts’ is given.

<sup>43</sup> *R v Provincial Court of the Church in Wales, ex p Reverend Clifford Williams* (1998) CO/2880/98.

<sup>44</sup> Prison Act 1952, ss. 7 and 9; s. 53(4): references to the Church of England must be construed as including references to the Church in Wales.

<sup>45</sup> Prison Rules 1999, rr. 10, 14-16.

***The Duty to Solemnise Marriages:*** State law provides that nothing in the Welsh Church Act 1914 or the Welsh Church (Temporalities) Act 1919 affects ‘the law with respect to marriages in Wales and Monmouthshire’ or ‘the right of bishops of the Church in Wales to license churches for the solemnisation of marriages’.<sup>46</sup> As a result, pre-1920 ecclesiastical law on marriage continues to apply to the Church in Wales as the law of the land (‘a vestige of establishment’),<sup>47</sup> as does the current general marriage law of the State.<sup>48</sup> The right to marry in the parish church has been recognised by Parliament,<sup>49</sup> the secular courts,<sup>50</sup> and pre-1920 decisions of the ecclesiastical courts.<sup>51</sup> The origin of the right is difficult to ascertain but the right may be conceived as a powerful legal fiction.<sup>52</sup> The Marriage (Wales) Act 2010 extends the right to marry in church to those with a ‘qualifying connection’ to the parish.<sup>53</sup> The duty to solemnise also extends to the marriages of un-baptised persons.<sup>54</sup>

***Common Licences:*** Marriage according to Church in Wales’ rites, without banns, may follow the grant of a licence by a diocesan bishop, a diocesan chancellor or surrogate,<sup>55</sup> provided all civil and ecclesiastical conditions are satisfied.<sup>56</sup> There is no right to a licence: the grant is discretionary.<sup>57</sup> Licences may also be available, as a matter of discretion, in the case of marriage of the un-baptised and divorced persons.

***Special Licences:*** In exceptional circumstances, the Archbishop of Canterbury may grant a special licence for the solemnisation without banns, at any convenient time or place, of a marriage according to Church in Wales’ rites. If satisfied that all civil and ecclesiastical conditions have been observed, the minister of the parish is bound to solemnise the marriage on production of the special licence.<sup>58</sup> The archbishop’s power is regulated by civil law,<sup>59</sup> and by English ecclesiastical and canon law.

---

<sup>46</sup> Welsh Church (Temporalities) Act 1919, s. 6 (which repealed WCA 1914, s.23: ‘[t]he law relating to marriages in churches of the Church of England (including any law conferring any right to be married in such a church) shall cease to be in force in Wales and Monmouthshire’).

<sup>47</sup> T.G. Watkin, ‘Disestablishment, self-determination and the constitutional development of the Church in Wales’, in N. Doe (ed), *Essays in Canon Law* (Cardiff, 1992) 25 at 33ff.

<sup>48</sup> Marriage Act 1949, s. 78(2): ‘Any reference in this Act to the Church of England shall, unless the context otherwise requires, be construed as including a reference to the Church in Wales’.

<sup>49</sup> See e.g. Matrimonial Causes Act 1965, s.8: that ‘No clergyman of...the Church in Wales shall be compelled’ to solemnise the marriages of divorced persons (see below) is an exception to the duty.

<sup>50</sup> *Davis v Black* (1841) 1 QB 900; *R v James* (1850) 3 Car & Kir 167; *R v Dibdin* [1910] P 57 (CA) at 129: ‘One of the duties of the clergyman within this realm is to perform the ceremony of marriage, and parishioners have the right to have that ceremony performed in their parish church’.

<sup>51</sup> *Argar v Holdsworth* (1758) 2 Lee 515.

<sup>52</sup> See N. Doe, *The Legal Framework of the Church of England* (1996) 357-362.

<sup>53</sup> N. Roberts, ‘The historical background to the Marriage (Wales) Act 2010’ (2011) 13 *EccLJ* 39: other examples include the Marriage (Wales) Act 1986 (to deal with the effects of grouping benefices); see also Gender Recognition Act 2004 which inserts a new s. 5B in the Marriage Act 1949 lifting the duty on Church in Wales clergy to solemnise the marriages of those with an acquired gender.

<sup>54</sup> N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 257.

<sup>55</sup> Welsh Church (Temporalities) Act 1919, s. 6(b): nothing in the WCA 1914 or the 1919 Act affects ‘the right of bishops of the Church in Wales to grant licences to marry’; Marriage Act 1949, s.5: the power is one of dispensation (to dispense with the requirement for banns).

<sup>56</sup> BCP (1984) 737, 2; see also Marriage Act 1949, s. 16(4). For fees, see RODC, Sched. of Fees.

<sup>57</sup> *Prince Capua v Count de Ludolf* (1836) 30 LJPM & A 71n.

<sup>58</sup> BCP (1984) 737, 2.

<sup>59</sup> Marriage Act 1949, s. 79(6).

**Re-Marriage after Divorce, Clerical Discretion and Conscientious Objection:** State law provides: ‘No clergyman...of the Church in Wales shall be compelled (a) to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living; or (b) to permit the marriage of such a person to be solemnised in the church or chapel of which he is the minister’.<sup>60</sup> The church understands this to allow clerics ‘to refuse to solemnise such remarriages and to refuse to allow the churches of which they are the ministers to be used for such a purpose’; the decision is that of the individual cleric concerned (being based on a personal statutory right or discretion).<sup>61</sup> In short, the right to marry in the parish church does not apply to divorced persons (and a cleric is not required to solemnise such a marriage), provided the cleric has a conscientious objection to it.<sup>62</sup>

**Same Sex Marriage:** The Marriage (Same Sex Couples) Bill permits a non-established religious organization to opt-in and perform same sex marriages if its governing body so decides; it is not a matter for individual ministers of religion to determine.<sup>63</sup> Also, no minister or organization will be compelled to solemnize, consent to, be present at, or otherwise participate in a same-sex marriage.<sup>64</sup> The Equality Act 2010 will be amended so that no discrimination claims can be brought against religious organizations or individuals for refusing to marry a same sex couple or allowing premises to be used for this. The Bill makes special provision for the Church of England,<sup>65</sup> and the Church in Wales,<sup>66</sup> in view of their common law duty to solemnize marriages.<sup>67</sup> The effect of this is to lift ‘the common law duty’ with respect to marriage.<sup>68</sup> However, both churches may opt in and, if they so choose, to celebrate same sex marriages: this would be achieved by the enactment of a Measure by the Church of England,<sup>69</sup> and by ministerial order (of the Lord Chancellor) for the Church

---

<sup>60</sup> Matrimonial Causes Act 1965, s. 8(2).

<sup>61</sup> *Marriage and Divorce* (1998) pars. 5.1,5.2; see also *Marriage and Divorce: Guidelines* (issued by the Bench of Bishops: undated), par. 3.13: ‘clergy who themselves have conscientious objections may allow the church(es) of which they are the minister to be used for...such a marriage by another cleric’.

<sup>62</sup> S. 8(2) lifts what would otherwise be a duty to marry; similar provisions in other marriage statutes have been seen by State courts to confer a right of conscientious objection: see e.g. *R v Dibdin* [1910] P 57; it is submitted that if the cleric has no objection in conscience, the ordinary duty to marry operates.

<sup>63</sup> Marriage (Same Sex Couples) Bill cl. 4 and 5.

<sup>64</sup> Marriage (Same Sex Couples) Bill cl. 2; the so-called ‘quadruple lock’: EMTGR, par. 4.19.

<sup>65</sup> Marriage (Same Sex Couples) Bill, cl. 1(3): ‘No Canon of the Church of England is contrary to section 3 of the Submission of the Clergy Act 1533 (which provides that no Canons shall be contrary to the Royal Prerogative or the customs, laws or statutes of this realm) by virtue of its making provision about marriage being the union of one man with one woman’. If the Church in Wales were to decide to solemnize such marriages, a similar provision would have to be created for the Church in Wales.

<sup>66</sup> Explanatory Notes, 50: ‘Since the Statement to Parliament by the Minister for Women and Equalities on 11 December 2012, the Government has worked to understand and accommodate the position of the Church in Wales in its equal marriage Bill. As a disestablished church with a legal duty to marry the Church in Wales is uniquely placed. The Bill provides protection for the Church whilst still enabling it to make its own decision on same-sex marriage. Under the Bill, the duty of Church in Wales ministers to marry will not be extended to same-sex couples. However, should the Church’s Governing Body decide in the future that the Church wishes to conduct such marriages, there is provision in the Bill for the law to be altered without the need for further primary legislation by Parliament. Instead, a resolution from the Church’s Governing Body would trigger an order by the Lord Chancellor for the necessary legal changes to be made’.

<sup>67</sup> Marriage (Same Sex Couples) Bill, cl. 1(4): ‘Any duty of a member of the clergy to solemnize marriages (and any corresponding right of persons to have their marriages solemnized by members of the clergy) is not extended by this Act to marriages of same sex couples’.

<sup>68</sup> Explanatory Notes, 10: ‘the common law duty on the clergy of the Church of England and the Church in Wales to marry parishioners is not extended to same sex couples’.

<sup>69</sup> Church of England, Marriage (Same Sex Couples) Commons Second Reading Briefing, Q&A.

in Wales without the need for a further Act of Parliament.<sup>70</sup> The Lord Chancellor does not have a duty to agree to the request from the Church in Wales.<sup>71</sup> The Bill places the Church of England and the Church in Wales on much the same footing; and the ministerial order would be subject to affirmative resolution in Parliament.<sup>72</sup>

## **8. The Direct Applicability of Burial Law: The Duty to Bury**

*A third vestige of establishment is the law of burial. Every person resident in a parish has a right to burial in the parish churchyard provided this is still open for burials. Responsibility for its administration belongs to the National Assembly for Wales.*

The law of burial applicable to the Church in Wales is found in both church-made and state-made law. As to church law, according to pre-1920 ecclesiastical law: ‘No Minister shall refuse or delay...to bury any corpse that is brought to the Church or Churchyard, convenient warning being given thereof before, in such manner and form as is prescribed’ by the rites of the church.<sup>73</sup> Moreover, only parishioners are entitled, as of right, to be buried in the parish burial ground, namely: persons normally residing in the parish; persons dying in the parish; ex-parishioners and non-parishioners for whom family graves or vaults are desired to be opened and whose close relatives have been buried in the churchyard; and persons on the electoral roll at the date of death.<sup>74</sup>

According to State law, except so far as rights are preserved by the Welsh Church

---

<sup>70</sup> Marriage (Same Sex Couples) Bill cl. 8: ‘Power to allow for marriage of same sex couples in Church in Wales: (1) This section applies if the Lord Chancellor is satisfied that the Governing Body of the Church in Wales has resolved that the law of England and Wales should be changed to allow for the marriage of same sex couples according to the rites of the Church in Wales. (2) The Lord Chancellor may, by order, make such provision as the Lord Chancellor considers appropriate to allow for the marriage of same sex couples according to the rites of the Church in Wales. (3) The provision that may be made by an order under this section includes provision amending England and Wales legislation. (4) In making an order under this section, the Lord Chancellor must have regard to the terms of the resolution of the Governing Body mentioned in subsection (5) If it appears to the Lord Chancellor - (a) that a reference in this section to the Governing Body has ceased to be appropriate by reason of a change in the governance arrangements of the Church in Wales, the reference has effect as a reference to such person or persons as the Lord Chancellor thinks appropriate; or (b) that a reference in this section to a resolution has ceased to be appropriate for that reason, the reference has effect as a reference to such decision or decisions as the Lord Chancellor thinks appropriate. (6) In Schedule 7 to the Constitutional Reform Act 2005 (functions of the Lord Chancellor which may not be transferred under the Ministers of the Crown Act 1975), in paragraph 4, at the end of Part A insert - “Section 8”’.

<sup>71</sup> Explanatory Notes, 49: ‘Clause 8 sets out a procedure by which the Church in Wales can choose to allow marriages of same sex couples to take place according to its rites. Its Governing Body may request that the Lord Chancellor make an order to enable it to do so, which would amend legislation as necessary (in particular the Marriage Act). The Governing Body...must first resolve that the law should be so changed and the Lord Chancellor must have regard to the terms of that resolution’.

<sup>72</sup> Explanatory Notes, 50: ‘The Church in Wales is in the same position as the Church of England as regards marriage law despite the disestablishment of the Church in Wales by virtue of the Welsh Church Act 1914. However, this disestablishment means that the Church in Wales is not itself able to put legislation before Parliament (unlike the Church of England). The power in this clause is therefore required so that the law can be changed to allow the Church in Wales to marry same sex couples (if it were to resolve to allow it), without the need for primary legislation. An order under this clause is subject to the affirmative procedure’.

<sup>73</sup> Canons Ecclesiastical 1603, Can. 68; see also *Cure of Souls* (1996) 9: ‘Failure to observe this canonical requirement within the parish...is a breach of duty’.

<sup>74</sup> Church in Wales’ Burial Grounds Rules (hereafter BGR), Sched. 2, Notes; however, Canons Ecclesiastical 1603, Can. 68 excludes persons who have been excommunicated, ‘for some grievous and notorious crime, and no man able to testify of his repentance’; and perhaps the un-baptised and suicide; *Halsbury Laws of England* (1910 Edn) par. 1412; see also Burial Laws (Amendment) Act 1880, s. 13.

(Burial Grounds) Act 1945, no discrimination may be made between the burial of a member of the Church in Wales and that of other persons.<sup>75</sup> The right to burial in the parish burial ground,<sup>76</sup> if not closed by Order in Council,<sup>77</sup> is understood as a vestige of establishment.<sup>78</sup> The Welsh Church (Burial Grounds) Act 1945 provided for the transfer and maintenance of burial grounds to the Representative Body of the Church in Wales, which may make rules relating to burial provided they have been approved by the National Assembly.<sup>79</sup> Any right of burial, in a burial ground vested in the Representative Body, is subject to such conditions as to fees as may be prescribed in the rules of the Church in Wales.<sup>80</sup> Fees for interment are legally prescribed.<sup>81</sup>

## 9. The Public Law Status and Functions of the Representative Body

*A fourth area which might also represent a vestige of establishment concerns the Representative Body of the Church in Wales, a creature of statute and royal charter. Its functions include those of a public law nature and are subject to judicial review.*

The Welsh Church Act 1914 empowers the Church in Wales to frame constitutions and regulations for the property of the church.<sup>82</sup> The Governing Body may legislate on church property.<sup>83</sup> Moreover, the domestic law of the church in relation to any property,<sup>84</sup> held on behalf of the church or its members, is enforceable in the courts of the State.<sup>85</sup> The 1914 Act enables the bishops, clergy and laity of the Church in Wales to appoint persons to represent them and ‘hold property for any of their uses and purposes’, and the Crown by charter to incorporate such persons, as a Representative Body.<sup>86</sup> Incorporated by royal charter at disestablishment, the Representative Body is a charitable trust corporation, and holds the legal title to churches, parsonages, and other forms of property,<sup>87</sup> on behalf of the members of the Church in Wales. The Representative Body is subject to such alterations in its powers and duties, as may from time to time be adopted by the Governing Body. This is the case provided always that such rules, regulations and alterations in them do not conflict with the statutory authority, powers and duties of the Representative Body.<sup>88</sup> The Representative Body is also subject to the jurisdiction of State courts.<sup>89</sup> The

---

<sup>75</sup> BGR, Sched. 2, Notes; strictly, in law, the right is that of the personal representatives, as it is they (rather than the deceased) who would seek to enforce it; Welsh Church (Burial Grounds) Act 1945, s. 4: there must be no discrimination except as may be necessary to comply with any trust or condition affecting any part of a burial ground which is a private benefaction under the WCA 1914.

<sup>76</sup> See N. Doe, *The Legal Framework of the Church of England* (Oxford, 1996) 386ff.

<sup>77</sup> *Re Kerr* [1894] P 284.

<sup>78</sup> See T.G. Watkin, ‘Disestablishment, self-determination, and the constitutional development of the Church in Wales’, in N. Doe (ed), *Essays in Canon Law* (Cardiff, 1992) 25 at 36ff: the duty to bury was retained as churchyards were not (as originally planned) transferred to local authorities.

<sup>79</sup> Welsh Church (Burial Grounds) Act 1945, s. 4.

<sup>80</sup> Welsh Church (Burial Grounds) Act 1945, s. 4(2): they must be approved by the National Assembly.

<sup>81</sup> BGR, r. 7; see Schedule 2: fees are payable for e.g. services rendered by a cleric.

<sup>82</sup> WCA 1914, s. 13(1).

<sup>83</sup> CW Const. II.

<sup>84</sup> WCA 1914, s. 38(1): “‘property’ includes all property, real and personal’.

<sup>85</sup> WCA 1914, s. 3(2): this includes pre-1920 ecclesiastical law.

<sup>86</sup> WCA 1914, s. 13.

<sup>87</sup> For WCA 1914, ss. 4 and 8.

<sup>88</sup> Const. III.1.

<sup>89</sup> See *Welsh Church Commissioners v Representative Body of the Church in Wales* [1940] 3 All ER 1(CA); *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228 and [1944] 1 All ER 710 (HL); *Powell v Representative Body of the Church in Wales* [1957] 1 All ER

Parochial Church Council is responsible to the Representative Body for the proper care, maintenance and upkeep of all churchyards in the parish.<sup>90</sup>

## 10. Heritage and Church Buildings in the Parish: Ecclesiastical Exemption

*Heritage law and the ecclesiastical exemption (the responsibility of the National Assembly) reflect the entanglement of the Church in Wales in the fabric of the State. Internal church law commonly provides for collaboration with public bodies in this field. This is not technically a vestige of establishment: other religious organisations in Wales are also subject to heritage law and may enjoy the ecclesiastical exemption.*

Under the law of the State, an ecclesiastical building which is used for ecclesiastical purposes is exempt from the need for listed building consent.<sup>91</sup> The ecclesiastical exemption applies to buildings of the Church in Wales vested in the Representative Body,<sup>92</sup> and its continued enjoyment depends on the church having in place a satisfactory internal system of control.<sup>93</sup> This is achieved by the faculty system administered by each Diocesan Court.<sup>94</sup> This is not a vestige of establishment – the exemption is enjoyed by other churches also. However, it is arguable that the faculty jurisdiction of the Diocesan Court of the Church in Wales is subject to the supervision of the secular courts by way of judicial review, insofar as this jurisdiction may be understood as containing a public element, being exercisable, under the ecclesiastical exemption, in place of that enjoyed by the planning authorities of the State.<sup>95</sup>

Within the heritage context, the internal law of the Church in Wales also requires collaboration with CADW (responsible to the Assembly etc). For example, some members of the provincial Cathedrals and Churches Commission, a sub-committee of the Finance and Resources Committee of the Representative Body,<sup>96</sup> are appointed after consultation with CADW;<sup>97</sup> an archaeological consultant is appointed to a cathedral after consulting CADW;<sup>98</sup> notice of a faculty petition is sent to CADW in prescribed cases involving listed buildings; and members of the Diocesan Advisory Committee include an archaeologist appointed after consulting with CADW.<sup>99</sup>

---

400. Whether the Representative Body is a public authority for the purposes of the Human Rights Act 1998 is a matter which has not been treated by the courts of the State.

<sup>90</sup> CYR, rr.1-2.

<sup>91</sup> Planning (Listed Buildings and Conservation Areas) Act 1990, s. 60(1). Although ‘ecclesiastical building’ is not defined, clergy residences are expressly excluded (s. 60(3)). Ecclesiastical purposes denote use for corporate worship and this may extend to any purpose which church authorities consider likely to foster Christian fellowship: *AG ex rel Bedfordshire County Council v Howard United Reformed Church Trustees, Bedford* [1975] 2 All ER 337 (HL). Listed building consent is not required for the alteration or extension of a listed ecclesiastical building used for ecclesiastical purposes.

<sup>92</sup> Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, SI 1994/1771, arts. 4,5: e.g., any church building; any object or structure within a church building; any object or structure fixed to the exterior of a church building. In England, the new 2010 Order enables a freer regime.

<sup>93</sup> The system must be approved by the State which may restrict or exclude particular buildings or categories from the exemption: Planning (Listed Buildings and Conservation Areas) Act 1990, s. 60(5).

<sup>94</sup> N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 91-104.

<sup>95</sup> N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 117, n. 239.

<sup>96</sup> CACCR, r. 2: the Commission is not subject to the direction or control of the RB.

<sup>97</sup> CACCR, r. 5: 7 members with knowledge of e.g. archeology, architecture, archives, art, manuscripts, history, and liturgy: of 7, 1 must be appointed after consulting the Secretary of State for Wales, and 1 after consultation with CADW.

<sup>98</sup> CACCR, r. 40.

<sup>99</sup> RODC.

## INQUIRY ON LAW MAKING AND THE CHURCH IN WALES

### Evidence submitted to the Constitutional and Legal Affairs Committee of the National Assembly for Wales

Thomas Glyn Watkin<sup>1</sup>

#### *Disestablishment and the Church in Wales*

1. The Church in Wales is an autonomous Church within the Anglican Communion. It came into being following the disestablishment of the Church of England within Wales by the Welsh Church Act 1914 (as amended by the Welsh Church (Temporalities) Act 1919), which came into force on 31 March 1920. The Act disestablished the then four Welsh dioceses of Llandaff, St. David's, Bangor and St. Asaph, which had previously been part of the province of Canterbury within the Church of England. The Act did not create the province of Wales; the decision to form a new province with its own archbishop was taken by the Welsh Church itself, which also provided for its own future governance by agreeing a Constitution, which became binding on all members of the Church in Wales by virtue of their contractual agreement to abide by its terms.

2. Under the law of England and Wales, the Church in Wales is an unincorporated association of its members. Clerical members become members by accepting office within the Church; lay members become members by having their names entered on the electoral roll of a parish within one of the now six dioceses. Members are entitled to participate in the governance of the Church according to its Constitution, and are subject to the jurisdiction of the Church's courts, a system of private courts set up under the Constitution. The Church in Wales did not avail itself of the opportunity afforded by the 1914 Act to allow for a final appeal from its courts to the provincial court of the Archbishop of Canterbury.

3. As an unincorporated association, the Church in Wales lacks the legal personality needed to own property, be subject to obligations, etc. Accordingly, as permitted by the 1914 Act, The Representative Body of the Church in Wales was created as a charitable trustee corporation, incorporated by royal charter, to hold property on trust for the purposes of the Church in Wales. The 1914 and 1919 Acts provided for the vesting in the Representative Body of churches, parsonages and other Church property situated in Wales. Other items of former Church property and funds were transferred under the disendowment provisions of the Acts for the benefit of various secular bodies in Wales, including county councils, the University of Wales, its constituent colleges and the National Library.

---

<sup>1</sup> Professor Thomas Glyn Watkin, now retired, is an honorary professor at both Bangor and Cardiff Law Schools. Prior to his retirement he was First Welsh Legislative Counsel to the Welsh Assembly Government (2007–10), Professor of Law and Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), having previously been successively Lecturer, Senior Lecturer and Reader in Law at Cardiff (1975–2001) and Legal Assistant to the Governing Body of the Church in Wales (1981–1998).



## ***The Church in Wales and the Ecclesiastical Law of the Church of England***

4. Section 3(1) of the 1914 Act provided that:

As from the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales shall cease to exist as law.

5. The words ‘the ecclesiastical law of the Church in Wales’ in section 3(1) mean ‘the ecclesiastical law of the Church of England in Wales’ and not the ecclesiastical law of ‘the Church in Wales’ as an institution in the post-disestablishment sense. The *Church in Wales* as a separate body did not exist at that time, has never had ecclesiastical law in the sense used in the section, and references in the Act to the Church within Wales are frequently, as in the short title, to ‘the Welsh Church’.

6. It is worth noting that the Act provides that ecclesiastical law *ceases to exist as law* in Wales, not that ecclesiastical law ceases to *apply* in Wales. When ecclesiastical laws are now made by the Church of England, they are stated to *extend* to the provinces of Canterbury and York. The ecclesiastical law of the Church of England neither extends nor applies to Wales.<sup>2</sup>

7. As from the date of disestablishment, the then ecclesiastical law of the Church of England became binding on the members of the Church in Wales ‘as though they had mutually agreed to be so bound’. Persons becoming members, or renewing their membership, after disestablishment expressly agree to those terms which now form a contract governing the terms of their membership under the private law of England and Wales. Subsequent changes to that law had no effect upon that implied agreement; instead, the Church in Wales was empowered to modify or alter the terms of that implied agreement by means of its own constitution and regulations. This power expressly included the alteration or modification of previous ecclesiastical law embodied in Acts of Parliament.

### ***Ecclesiastical law and canon law***

8. In many countries, a clear distinction is made between ecclesiastical law and canon law. The former is part of the public law of the State, governing relations between the State and a Church or Churches. The latter is the internal law of the Church itself, and may not therefore be, and is unlikely to be, part of the law of the land.

9. That useful distinction is blurred or even confused in the law relating to the Church of England as a consequence of establishment, as the canon law of the Church is part of the law of the land because the Church is part of the State. The abolition of the jurisdiction of ecclesiastical courts in Wales at the same time as ecclesiastical law ceased to exist suggests that the meaning of ecclesiastical law in the 1914 Act was the law administered by those courts.

---

<sup>2</sup> It is also worth noting that the meaning of *Wales* in this context is different both from its meaning according to the Interpretation Act 1978 and in the Government of Wales Acts. Here, *Wales* means the territory of parishes within one of the Welsh dioceses. Parishes which straddled the border between Wales and England at the time of disestablishment were consulted as to whether they wished to remain in the Church of England or not, and allocated to English or Welsh dioceses. As a consequence, there are parts of Wales which are in England for ecclesiastical purposes and *vice versa*.

### *Ecclesiastical law and the Church of England*

10. In England, ecclesiastical law means the law of the Church of England as administered by the ecclesiastical courts, and relates to the constitution of the Church, its property, its clergy, benefices and services.

11. The ecclesiastical courts, with a statutory jurisdiction separate from those of criminal and civil jurisdiction, were the ones abolished in Wales at disestablishment, and the law administered by those courts ceased to exist as law in Wales. Its substance continued as the terms of a contract binding by agreement upon the members of the Church in Wales and administered by the private courts of the Church in Wales leading to its being referred to within the Church as the canon law of the Church in Wales, the internal law of that Church in the same manner as the canon law of the Roman Catholic Church is its internal law. It is not part of the law of the land and the State courts will not take judicial notice of its terms, but will require proof of its terms as questions of fact in any litigation before those courts where it is relevant, in the same manner that they would require proof of the terms of any other private contract.

12. The ecclesiastical law of the Church of England is made by its General Synod in the form of Measures, which require the approval by resolution of both Houses of Parliament before they can be submitted for royal assent and 'have the force and effect of an Act of Parliament'. Such measures may 'relate to any matter concerning the Church of England' and can amend or repeal any Act of Parliament. The breadth of this law-making power justifies the need for the statutory affirmative procedure before both Houses.<sup>3</sup> The power is not confined to the law administered by the ecclesiastical courts of the Church of England.

### *The Solemnization of Marriages and the Church in Wales*

13. At the time of the disestablishment of the Church in Wales, marriages in England and Wales could be solemnized broadly speaking in one of two ways:

- either according to the rites of the Church of England following ecclesiastical preliminaries – publication of banns, the obtaining of a common or special licence,
- or by means of a civil marriage conducted in a Register Office or registered building following civil preliminaries – obtaining a superintendent registrar's certificate or licence.

Marriages in places of worship other than those belonging to the Church of England fell into the second category.

14. Section 23 of the 1914 Act provided that, from the date of disestablishment, church weddings in Wales should for the future fall into the second category in the same manner as religious ceremonies in the places of worship of other Christian denominations. They were to take place following civil preliminaries, with Welsh churches being classified as registered buildings for the purpose of solemnizing marriages, and with the incumbent completing the formalities of registration as an authorized person.

---

<sup>3</sup> The General Synod can also pass canons, the scope of which is more restricted.

15. That section, however, never came into force. It was repealed by section 6 of the 1919 Act. As a consequence, marriages solemnized according to the rites of the Church in Wales are solemnized following ecclesiastical preliminaries, with churches being licensed for the solemnization of marriages by the bishop of each diocese and with the incumbent or other minister officiating by virtue of his or her being a clerk in Holy Orders rather than being authorised by a civil authority.

16. The Marriage Acts refer to marriages solemnized according to the rites of the Church of England, but, by way of interpretation, provide that references to the Church of England 'shall, unless the context otherwise requires, be construed as including a reference to the Church in Wales'. The law of marriage of England and Wales therefore, by and large, treats the Church in Wales in the same manner as the Church of England, as though, for these purposes, disestablishment had not occurred, but recognizing that Wales is now an ecclesiastical province and that that province is not part of the Church of England but a Church in its own right.

17. The powers of the Church of England to legislate have been used to amend the law relating to the solemnization of marriages, even though that law is contained in a statute which makes provision for marriages generally in England and Wales and not just ecclesiastical ceremonies in England.

### ***Ecclesiastical Law and Civil Law***

18. Section 3(1) of the Welsh Church Act 1914 abolished ecclesiastical law in Wales. Section 6 of the Welsh Church (Temporalities) Act 1919 stated that nothing in the 1914 Act affected "the law with respect to marriages in Wales or Monmouthshire" and repealed section 23 of the 1914 Act which would have changed that law by placing the Church in Wales in the same position as the other Christian denominations.

19. Section 6 makes no mention of any effect on the provisions of section 3 of the 1914 Act. The implication therefore is that the law with respect to marriages is not part of ecclesiastical law but part of, what for convenience one might call, the civil law of England and Wales. The alternative would be to hold that to the extent that the law with respect to marriages according to the rites of the Church of England is part of ecclesiastical law, ecclesiastical law continues to exist as law in Wales even though there are no longer ecclesiastical courts to administer it.

20. At this point, the history of the English law relating to marriage becomes relevant. Until the middle of the eighteenth century, questions relating to the nature of marriage and the validity of marriages were dealt with in the ecclesiastical courts. The secular law's interest in marriage related to its civil effects upon such things as property rights between spouses and inheritance rights to freehold land, as well as ensuring that heiresses were not tricked into marriage so as to lose them control of their fortunes.

21. The Church regarded as valid any contract of marriage whereby the parties agreed to accept one another as man and wife in words using the present tense, or promised to take each other as man and wife using the future tense if the promises were followed by consummation of the union. Although the Church had for centuries encouraged such unions to be blessed by a priest and, from the sixteenth century, required that a register be kept of all such marriages, together with a register of baptisms and burials, neither the blessing nor the

registration were necessary for the marriage to be valid. Nor were any formalities, such as the calling of banns, essential to its validity. Suits relating to the validity of a marriage were heard before the ecclesiastical courts.

22. It was not until Lord Hardwicke's Marriage Act of 1753 that Parliament legislated regarding the validity of marriages generally. With the exception of Jewish and Quaker weddings, all other marriages had to take place following banns or the issue of a common or special licence to be valid. Suits concerning the validity of marriages continued to be heard in the ecclesiastical courts.

23. The stringency of this law, which made the formalities essential to validity, were relaxed in 1823, when the Marriage Act of that year altered the significance of formal defects. For the future, those defects were only to be fatal to the validity of a marriage if both parties knowingly and wilfully contracted their union while aware of them. In 1836, a civil form of marriage was introduced by statute whereby those who did not wish to marry according to the rites of the established Church were enabled to marry either in their own places of worship or in register offices. Given that the established Church had never regarded the location or form of the marriage ceremony as essential to validity, such marriages remained entirely valid in the eyes of the Church, and the ecclesiastical courts remained the forum for litigation concerning their validity. This continued until 1857 when jurisdiction over matrimonial causes was taken away from the ecclesiastical courts and vested in the new Divorce Court, subsequently passing to the Probate, Divorce and Admiralty Division of the High Court created in 1875, the precursor of the current Family Division. From 1857, the jurisdiction of the ecclesiastical courts with respect to marriages was limited to matters concerning the conduct of clergy.

24. The question therefore arises of whether, at the date of disestablishment, the law with respect to marriages was part of ecclesiastical law or part of civil law in England and Wales. The distinction was of little relevance in England and Wales before that date, and has been of no little importance in England since. This is perhaps why its greater significance for post-disestablishment Wales has been often overlooked.

### ***The Impact upon Wales of English Ecclesiastical Measures***

25. The Marriage Act 1949, which replaced much of the nineteenth-century marriage legislation, is the principal Act with respect to the formation of marriage in England and Wales. It deals with both marriages according to the rites of the Church of England and civil ceremonies. As such, its provisions relate to a matter concerning the Church of England, thus giving the Church of England competence to legislate in relation to it. As however the Act applies to Wales as well as England, such changes made for England have an impact upon Wales even though they are of no effect in Wales. The impact is that they introduce differences between the law relating to marriages in England and that law in Wales.

26. In the case of the legislation made by the National Assembly, the Secretary of State has a statutory power to intervene to prevent Welsh legislation becoming law if he or she has reasonable grounds to believe that it would have an adverse effect on the operation of the law in England. With regard to Church of England Measures, the report of the joint Ecclesiastical Committee of both Houses of Parliament, which must accompany a draft measure when it is laid before the Houses, provides an opportunity for its effect on the Church in Wales to be raised. As such Measures cannot extend to Wales, it is questionable whether it is appropriate

for them to be used to amend laws which extend to Wales in the absence of any mechanism by which equivalent legislative provision can be made for Wales. These laws do not merely regulate the life of the Church, they affect the qualifications of citizens to marry according to the civil law of marriage. Some examples follow of the problems which have arisen.

#### *The Church of England Marriage Measure 2008*

27. The 1949 Act provides that marriages according to the rites of the Church of England are to be solemnized following the publication of banns in the church or one of the churches where banns have been published. Banns are to be published in the parish church where the parties reside, and can in addition be published in the church which is the usual place of worship of one or both them. Thereafter, originally, the couple could only marry in one of those churches. The couple could also marry in those churches without banns if they obtained a common licence, but could only marry elsewhere by obtaining a special licence from the Archbishop of Canterbury.<sup>4</sup> The Church of England legislated by measure in 2008 to allow marriages to take place without the need for such a special licence in other churches with which the couple, or one or other of them, had a ‘qualifying connection’.

28. The Measure was passed by the General Synod and approved by Parliament and therefore became law – in the provinces of Canterbury and York, but not in Wales. It did not become law in Wales because as a Measure of the Church of England it was part of ecclesiastical law even though it amended the Marriage Acts. As can happen with UK parliamentary legislation for England on a devolved subject, legislation for England led to a difference between the law in England and the law in Wales regarding where a couple might marry. While the Church of England has a guaranteed route to obtaining legislation as a consequence of its establishment, the Church in Wales has no such route and has to rely on promoting a private bill before parliament to achieve the same result. The Marriage (Wales) Act 2010 successfully restored the parity of the relevant provisions between the two nations. Nevertheless, the English measure had an impact upon the operation of the law in Wales.

29. This was not the first occasion when differences had arisen between the law of marriage in England and that in Wales, and, as will be seen, the parity restored has since been lost as a consequence of the Church of England Marriage (Amendment) Measure 2012.

#### *The Marriage (Wales) Act 1986*

30. A number of sections in the Marriage Act 1949 made provision for the Church of England but not for the Church in Wales. Very interestingly, given the terms of the Government of Wales Act 2006 with regard to Assembly Acts, the 1949 Act specifically states that these provisions are not ‘to extend to Wales’ and they are listed in a schedule headed ‘Provisions of Act which do not Extend to Wales’.

31. The provisions of the Marriage Act 1949 relating to where a church marriage might be solemnized are part of the law of England and Wales; they both extend to and apply in both countries. In so far as they extend to Wales, they cannot be ecclesiastical law as there is

---

<sup>4</sup> This was a pre-Reformation papal power of granting a dispensation from the usual legal rules which was vested in the archbishop as a statutory power by the Ecclesiastical Licences Act 1533. It is as a consequence exercisable by him not only in his province of Canterbury but also in the province of York and, even after disestablishment, in the province of Wales.



no such law in Wales. Can the same provisions extend to both England and Wales and yet be ecclesiastical law in England but civil law in Wales? Yet, that is the conclusion one is forced to reach regarding the amendments made by the Measure and later replicated by the Marriage (Wales) Act 2010.

32. As Legal Assistant to the Governing Body of the Church in Wales, I was personally involved in the promotion of the Marriage (Wales) Act 1986. That Act dealt with the following problem. Section 23 of the 1949 Act provided that where parishes had been grouped under one incumbent, it should be possible for banns to be called in one church in the group and for the marriage to take place in another. However, the section, specifically referred to such groupings being made under a Measure of the Church of England and therefore the section was listed as not extending to Wales. Yet the Church in Wales was powerless to make similar provision because, although this section appeared to be treated as a provision of ecclesiastical law, it affected the operation of other provisions in the Act which did extend to Wales and therefore were not ecclesiastical law. A private bill had to be promoted. To succeed, it had to be introduced in both Houses, which required finding members willing to do this. Furthermore, it was clear that if any objection were raised to the bill passing without demur, the time required for full private bill procedure to be followed rendered it highly unlikely that it would ever become law, despite the expense of time, effort and cost which would have been put into it by that stage. Fortunately, it passed in both Houses without opposition, being introduced in the Commons by Mr Donald Coleman MP and in the Lords by Lord Gibson-Watt.

*The Church of England Marriage (Amendment) Measure 2012*

33. The 2008 Measure did not provide for persons who had a qualifying connection with one church which was part of a group of churches to have their banns called in another church of the group in accordance with section 23 of the 1949 Act so as to allow them to marry in the church with which they had the qualifying connection. The 2012 Measure provides for this eventuality.

34. Unfortunately, there is no similar provision combining the effect of the Marriage (Wales) Acts 1986 and 2010. The law on this matter is therefore once again not the same for couples wishing to marry in Wales as it is England.

*The Marriage (Same Sex Couples) Bill*

35. This Bill makes separate provision for the Church in Wales by conferring a power upon the Lord Chancellor to change the law of England and Wales so as to allow same sex couples to marry according to the rites of the Church in Wales if the Governing Body of the Church in Wales has resolved that it wishes such a change to be made.

36. While the provision obviates the need for the Church in Wales to promote a private bill to achieve this aim, there is nevertheless something slightly bizarre in a disestablished Church having to involve the Lord Chancellor in order to achieve something which all other denominations can do for themselves.

### *Possible Solutions*

37. The problem for the Church in Wales is twofold:

- first, other than by private bill, it cannot effect any changes to the law of marriage of England and Wales which applies to it;
- secondly, because the Church of England has a mechanism by which it can change the law of marriage in England, it (the Church in Wales) may find itself governed by a marriage law which is no longer the law in England and which it cannot change for Wales other than by the uncertain outcome of a private bill.

38. Several solutions may be suggested short of moving to a system of universal civil registration of marriages.

1. The most radical solution, and the one which in my view makes most sense short of universal civil registration, would be to revert to the original intention of the 1914 Act and cut the connection with the marriage law of the Church of England and convert the position of the Church in Wales to that which applies to other Churches.
2. Alternatively, the mechanism which has been introduced into the Marriage (Same Sex Couples) Bill might be made of more general application, so as to allow the Church in Wales, by resolution of its Governing Body, to request such changes to the laws with respect to marriage as it deems desirable. This would appear to fly in the face of disestablishment.
3. Another alternative would be to place the Church of England under a statutory duty to consult the Church of Wales with regard to any proposed legislation which would produce a difference in the law of England and Wales as between the English provinces and Wales, with a mechanism whereby the Church in Wales could, if it wished, obtain by order an identical or similar change for itself in Wales.
4. A final alternative might be to construct a solution along the lines of that employed with regard to burials, whereby the Church itself can amend certain rules subject to the approval of an appropriate civil authority. This would require a demarcation of those rules which it is proper for the Church itself to determine, that is to demarcate what is the proper scope of civil law on the one hand and ecclesiastical or canon law on the other. This should have consequences for the Church of England as well.

### *The Law relating to Burial and the Church in Wales*

39. Another area in which disestablishment was intended to make a substantial difference in Wales related to the burial of deceased parishioners in churchyards. The issue had been a major bone of contention in the later years of the nineteenth century when clergy of the established Church had, on occasion, attempted to prevent the burial of non-conformist parishioners in their churchyards or attempted to insist that such burials had to be conducted according to the rites of the Church of England.

40. Section 24 of the 1914 Act set out a solution to this problem by providing that churchyards and other church burial grounds should in effect be confiscated and taken over by local authorities. Under the provisions of that section, church burial grounds were to pass

into the ownership of the local authority as and when the incumbent of a parish, who until disestablishment had the freehold, died, retired or moved to another living. In effect, instead of the legal title vesting in the Representative Body at that time, it was to pass to the local authority. The title of the local authority was subject to rights of way and other rights to protect the use of the church for public worship.

41. Within a generation, it had been recognized that this approach was very inconvenient for all concerned. Accordingly, at the end of the Second World War, the Welsh Church (Burial Grounds) Act 1945 was passed. Under the provisions of this Act, burial grounds which had not passed to local authorities were instead, on the death or resignation of the incumbent, to pass into the ownership of the Representative Body. In addition, it was open to the Representative Body to agree with a local authority for any burial ground which had been transferred into their ownership to be granted back to the Representative Body. Some, but by no means all, burial grounds were returned to the Church under this Act.

42. The Church's continued ownership of such churchyards and burials grounds left the question of how to protect the interests of those who were not members of the Church in Wales. Section 4 of the 1945 Act dealt with the issue by providing that "no discrimination shall be made between the burial of members of the Church in Wales and of other persons in any burial ground vested in the representative body", but the right of burial in such burial grounds was to be subject 'to such conditions... as may be prescribed by rules made with the approval of the Secretary of State by the representative body'.

43. The scheme so established provided a very neat solution to the problem. The Welsh Church (Burial Grounds) Act Rules are made by the Representative Body, which, subject to its duties as a charitable trustee under the law of England and Wales, is subject to the direction of the Governing Body of the Church in Wales, composed of the bishops and elected and co-opted members of the clergy and laity. The interests of members of the Church are thus protected. The interests of other persons are protected by requiring that the Secretary of State approve the Rules – and revisions of them – as he would originally have been accountable in Parliament for his decisions regarding the Rules. This in effect prevented the Church from, for instance, introducing different levels of fees to discourage the burial of persons other than members. With devolution, the role of approving the Rules was transferred initially to the National Assembly and now lies with the Welsh Ministers. The scheme respects the independence of the Welsh Church but also safeguards the interests of those who are not members.

44. One bone of contention remains, which is also a fossil of the original settlement. In England, when the Church closes one of its burial grounds, in that it served the needs of the local community, responsibility for its upkeep can pass to the local authority. In Wales, probably because it was intended that all such burial grounds would in the course of time pass to local authorities, there is no such provision. The Church therefore remains responsible for their upkeep, despite the fact that they have probably become full as a consequence of the Church's statutory obligation to offer burial to all parishioners.

**Thomas Glyn Watkin**  
*2 March 2013*





Leighton Andrews AC / AM  
Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills

Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref MB/0910/13

David Melding AM  
Chair - Constitutional & Legislative Affairs Committee  
Ty Hywel  
Cardiff Bay  
Cardiff  
CF99 1NA

25 February 2013

Dear David,

## **CLA200 - the Welsh Language Schemes (Public Bodies) Order 2012 and the implementation of the Welsh Language (Wales) Measure 2011**

Thank you for your letter of 24 January on behalf of the Constitutional and Legislative Affairs Committee regarding the timetable for making Welsh language standards.

I have today issued a Written Statement to Assembly Members which explains my decision with regard to the Welsh Language Commissioner's proposals for Welsh language standards. That Statement explains that I have informed the Welsh Language Commissioner that I am unable to support the standards or methodology set out in her report. I have reached this decision for a number of reasons, as explained in the Written Statement and in my letter to the Commissioner, which was published with my Written Statement.

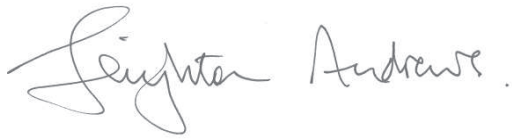
I propose to build on the Commissioner's consultation to develop a set of standards that will meet the policy aims reflected in the Welsh Language (Wales) Measure 2011, and the commitments given to the National Assembly for Wales, to achieve linguistic rights for citizens. I will liaise closely with the Commissioner as I do so.

The steps I will need to take to develop the standards will include:

- developing a revised set of standards for consultation;
- undertaking a comprehensive consultation with the public and the organisations to be affected by the standards;
- after taking account of the results of the consultation, preparing regulations making standards, along with regulations making those standards specifically applicable to persons, to be approved by the Assembly; and
- preparing a regulatory impact assessment to present to the Assembly alongside the regulations.

I estimate that we can make the regulations making standards, alongside the regulations making standards specifically applicable to persons, by the end of 2014.

Yours sincerely,

A handwritten signature in black ink that reads "Leighton Andrews". The signature is written in a cursive style with a large initial 'L'.

**Leighton Andrews AC / AM**  
Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills

Document is Restricted

Document is Restricted