

INQUIRY ON LAW MAKING AND THE CHURCH IN WALES

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

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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.

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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.²

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.

² 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.³ 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.

³ 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 of 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.⁴ 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

⁴ 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.

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