

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Report on the Inquiry into Law- making and the Church in Wales

June 2013



Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

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Remit and Powers

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders 21. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Julie James
Welsh Labour
Swansea West



Eluned Parrott
Welsh Liberal Democrats
South Wales Central



Simon Thomas
Plaid Cymru
Mid and West Wales

In accordance with Standing Order 17.48, Vaughan Gething AM substituted for Julie James AM.



Vaughan Gething
Welsh Labour
Cardiff South and Penarth

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1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21¹ and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

Terms of reference

4. On 28 January 2013, we agreed to hold an inquiry into law-making and the Church in Wales. The terms of reference were as follows:

The Committee may:

- *take expert evidence on the legal background concerning ecclesiastical law as it affects the Church in Wales;*
- *take evidence on the processes for making laws regarding the Church in Wales at Westminster;*
- *take evidence from the Church in Wales about its inclusion in the UK Government’s Marriage (Same Sex Couples) Bill.*
- *make recommendations about law making and the Church in Wales.*

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, December 2012

5. The inquiry was prompted following an announcement by the UK Government of its proposals for equal marriage and some subsequent confusion about how the proposals were to apply to Wales. The UK Government's statement referred to the "established nature" of the Church in Wales but the Church in Wales has been disestablished since 1920.

Evidence

6. We took written and oral evidence from:

- Professor Norman Doe, Director of the Centre for Law and Religion at Cardiff University;
- Professor Thomas Watkin, Emeritus Professor of Law at Cardiff and Bangor Universities and Legal Assistant to the Governing Body of the Church in Wales from 1981 until 1998;
- The Most Reverend Barry Morgan, Archbishop of Wales and Bishop of Llandaff.

7. We are very grateful for the contribution, time and expertise they have provided to our inquiry.

2. Historical context

8. Part of the purpose of this inquiry was to seek background information surrounding the law as it is made and applies to the Church in Wales. This information is set out in the written evidence provided by witnesses and in the oral evidence sessions (details are provided at Annexe 1).

9. As is apparent from the evidence, this is a complex area. It is not the role of this committee to seek to provide a definitive version of the law as it applies to the Church in Wales and how it arose, based on the evidence received.

10. Nevertheless, for the purposes of our inquiry the following historical and general points are relevant and worth noting:

- 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 1914 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 1914 Act did not create a 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;²
- 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. 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

² CIW 2

part of the law of the land because the Church is part of the State”;³

- 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;⁴
- the *Welsh Church Act 1914* 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;⁵
- at disestablishment in 1920, the ecclesiastical law as it then was, ceased to be law in Wales, in the sense of being part of the law of the land, and was relegated to being an agreement that was implied among the members of the Church in Wales. Since then, the clergy who have been admitted to office in the Church in Wales and the lay persons whose names have been entered on electoral rolls in parishes within the Church in Wales have actually consented to be bound by the terms of that mutual contract. In the eyes of the law of the land, the Church in Wales is, therefore, an unincorporated association, the members of which are bound together by this agreement. They agree to abide by the rules when they become members. However, that is no longer law in the sense of being part of the law of the land. The courts would not take judicial notice of the terms of that agreement as being part of the law of the land; they would require it to be proved in the same way as any other contract;⁶
- some ecclesiastical laws continue to apply to the Church in Wales as part of the law of the land - the so-called ‘vestiges of

³ CIW 2

⁴ *Ibid*

⁵ *Ibid*

⁶ Constitutional and Legislative Affairs “CLA” Committee, *RoP [paragraph 17]*, 11 March 2013

establishment'. For example, in relation to marriage and burials.⁷

11. Chapters 3 and 4 of this report consider briefly the law relating to marriage and burials as it currently affects the Church in Wales.

⁷ CIW 1

3. Marriage law and the Marriage (Same Sex Couples) Bill

Marriage law as a vestige of establishment

12. Professor Doe described how marriage law has remained as a vestige of establishment:

“... 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’. 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’), as does the current general marriage law of the State. The right to marry in the parish church has been recognised by Parliament, the secular courts, and pre-1920 decisions of the ecclesiastical courts.”⁸

The Marriage Act 1949

13. The *Marriage Act 1949* (“the 1949 Act”) is the principal Act with respect to the act of marriage in England and Wales. It deals both with marriages according to the rites of the Church of England and with 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. .

The Marriage (Wales) Acts 1986 and 2010

14. Section 23 of the 1949 Act provided that where parishes had been grouped under one incumbent, it should be possible for banns⁹ to be called in one church in the group and for the marriage to take place in

⁸ CIW 1

⁹ The public declaration of an intended marriage, usually formally announced on three successive Sundays in the parish churches of both the betrothed.

another. This had been achieved in England by means of a Measure of the Church of England but the Church in Wales was obliged to seek a Private Member's Bill. *The Marriage (Wales) Act 1986* addressed this issue in Wales. It passed in both Houses, having been introduced in the House of Commons by Donald Coleman MP and in the House of Lords by Lord Gibson-Watt.

15. In 2008 the Church of England legislated by Measure to allow marriages to take place without the need for a special licence in other churches with which the couple, or one or other of them, had a "qualifying connection". 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. Legislation for England, therefore, led to a difference between the law in England and the law in Wales regarding where a couple might marry.

16. In Order to "catch up" with the legislation in England, a Private Member's Bill was introduced in the House of Lords by Lord Rowe Beddoe and taken through the House of Commons by the former MP for Cardiff South and Penarth, Alun Michael. The Bill passed in both Houses and became *The Marriage (Wales) Act 2010*. Alun Michael MP explained on his blog:

"The change in the law could not be more simple. Until now if two people wished to get married in church, it had to be the church where they lived or attended regularly. The Marriage (Wales) Act now allows them to get married in any Church where they have a 'significant connection', for example; the church where their parents or grandparents married or the Church where one of them was brought up, even if they have subsequently moved away.

"It is an irony that the Church of England was able to make this change in 2008 with a simple order, whereas the (disestablished) Church in Wales requires that most fragile of Parliamentary measures, a Private Members Bill."¹⁰

17. During the Second Reading Debate in the Lords, the Government Spokesman, Lord Bach clarified the position:

¹⁰ Alun Michael MP, Marriage (Wales Act) 2010, Blog Post, 25 March 2010 [accessed 13 December 2012]

“This change has to be made by a Private Member's Bill because, unlike the Church of England, which can pass its own rules, the Church in Wales cannot make legislative changes relating to its own administration and organisation. It therefore needs an Act of Parliament if it is to make such changes.”¹¹

18. Marriage law in Wales and England has again diverged following *The Church of England Marriage (Amendment) Measure 2012*. 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. The 2012 Measure provides for this eventuality. However, there is no provision combining the effect of the *Marriage (Wales) Acts 1986 and 2010*.

The Marriage (Same Sex Couples) Bill

19. In December 2012, the UK Government's Equalities Minister, the Rt.Hon. Maria Miller MP¹², made an announcement on equal marriage based on an extensive consultation. She outlined four key issues:

- the UK Government will make it explicitly clear in the legislation that no religious organisation or individual minister can be compelled to marry same-sex couples or to permit their premises to be used for this purpose;
- the UK Government will devise an 'opt-in' system where same-sex couples can only marry according to religious rites on religious premises where the governing religious body has expressly consented; and the legislation will make it clear that no law requires any religious organisations to opt in to that system;
- the UK Government will also amend the *Equality Act 2010* so that no discrimination claims can be brought against religious organisations or individual ministers for refusing to marry a same-sex couple or allowing their premises to be used for this purpose;
- the legislation will not apply to the Church of England or Church in Wales. Canon law – which bans the marriage of same-sex

¹¹ HL Debates, 11 December 2009, Col. 1293 [accessed 15 January 2013]

¹² The Rt.Hon. Maria Miller MP is the Secretary of State for Culture, Media and Sport and Minister for Women and Equalities

couples – will continue to apply. That means that it would require a change in both primary and Canon law before Church of England and the Church in Wales would be able to opt in to conduct same-sex marriages.¹³

20. Following the Equalities Minister’s statement in the House of Commons, the following question was put:

Kevin Brennan (Cardiff West) (Lab): I support the Minister’s statement today. Can she explain the reference in her statement to the “Churches of England and Wales”? She continued: “That provision recognises and protects the unique and established nature of those Churches.” The Church in Wales was disestablished in 1920, so will she explain in what sense she referred to it as an established Church in her statement?

Maria Miller: I welcome the hon. Gentleman’s comments and his support. I was recognising the different obligations on the Church of England and the Church in Wales and ensuring that the protections there reflect those obligations in full, but if he wants to go into any other details, I hope we can do so in the Bill Committee.¹⁴

21. However, when the Marriage (Same Sex Couples) Bill¹⁵ was published on Friday 25 January 2013, the UK Government had amended the provisions regarding the Church in Wales from the original announcement. The Lord Chancellor has been given specific powers in this area to make an Order if the Church in Wales decides to allow same sex marriage.

22. Clause 8 of the Bill stated:

(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.

¹³ [DCMS, *Marriage for everyone - Government sets out plan for equal marriage*, Press Release, 11 December 2012 \[accessed 13 December 2012\]](#)

¹⁴ HC Debates, 11 December 2012, col.161

¹⁵ [Marriage \(Same Sex Couples Bill\) 2013](#)

- (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 (1).
- (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.

23. During the committee stage in the House of Commons, MPs put down an amendment to change the wording of subclause 2 of Clause 8 so that the Lord Chancellor “shall” make an order, rather than “may”.

24. The Equalities Minister replied:

“As the Bill stands, if the governing body of the Church in Wales passes a resolution to enable same-sex marriages, the Lord

Chancellor must have due regard to the resolution that is made. He cannot simply ignore or refuse it: to do so could be deemed irrational and unreasonable, and would leave the Government highly vulnerable to legal challenge for unjustifiably restricting the religious freedom of the Church in Wales to conduct marriages of same-sex couples when it had chosen to do so.

“It could be, however, that the Lord Chancellor considers that the terms of that resolution make it difficult for him to make an order; for example, the terms in which a resolution is expressed might be inadvertently unlawful. In such a case the Lord Chancellor would enter into discussions with the Church in Wales to agree a resolution that enables the Church to conduct same-sex marriages in the way that best meets its needs. In our view, it would not be appropriate for the Lord Chancellor’s hands to be bound at the outset, forcing him to make an order even if he was sure for good reasons that that order would not enjoy the support of Parliament ... I do not think that there can be any doubt that the Lord Chancellor will, in practice, be bound, when properly requested by the Church in Wales, to make an appropriate order; he could not properly do otherwise. However, for the technical reasons that I have given, I must resist the amendment.”¹⁶

25. However, the UK Government reversed this position and tabled an amendment at the Report stage in the House of Commons that changed the wording in clause 8 from “may” to “must”.¹⁷

Power of the National Assembly to legislate

26. The National Assembly does not have any legislative competence in respect of marriage law.

¹⁶ HC Debates, 5 March 2013, c392

¹⁷ HC, Marriage (Same Sex Couples) Bill, Report Stage Proceedings, 20 May 2013

4. Burial law in Wales

Introduction

27. Burial grounds, memorials and the burial and exhumation of human remains are regulated under burial legislation in the interests of public health and the decent and respectful treatment of the dead.

Sections 214 and 215 of the Local Government Act 1972

28. Section 215 of the *Local Government Act 1972* (“the 1972 Act”) enables a parochial church council in England to serve notice on the relevant authority requiring it to take over responsibility for closed Church of England churchyards. This does not apply in Wales because the Church in Wales was disestablished in 1920 and section 215 applies to churchyards “outside the area subject to *Welsh Church Act 1914*”. When a churchyard is closed in Wales, therefore, it is not possible to compel the local authority to take it over. In order to extend the provision to Wales, primary legislation would need to be changed.

29. However, in both Wales and England a burial authority (a local authority or community council) has a general power under section 214 of the 1972 Act to contribute towards the expenses incurred by any other person in providing or maintaining a cemetery in which the inhabitants of the authority’s area may be interred. Section 214 therefore gives a general power to help financially with the maintenance of a cemetery where local people have been, or will be, interred; the word “cemetery” being defined in section 214 to include a burial ground or any other place for the interment of the dead. The power can be used, for example, to help a nonconformist, Jewish or Muslim body with the maintenance of its burial ground.¹⁸ However, there is no obligation or duty on the relevant authority to act.

¹⁸ [National Association of Local Councils, Legal Topic Note, Closed Churchyards and Disused Graveyards, LTN 65, November 2007](#)

Welsh Church (Burials) Act 1945

30. Church in Wales churchyards are governed by the *Welsh Church (Burials) Act 1945* (“the 1945 Act”).

31. In his written evidence, Professor Doe explained burial legislation as a vestige of establishment:

“According to State law, except so far as rights are preserved by the Welsh Church (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. The right to burial in the parish burial ground, if not closed by Order in Council, is understood as a vestige of establishment. 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. 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. Fees for interment are legally prescribed.”¹⁹

32. The Representative Body of the Church in Wales was created when the Church was disestablished to hold most of the Church's property. Almost every church building is vested in the Representative Body. A 2004 Report by the Church in Wales, *The Representative Body Review*, stated:

“Burial grounds also continue to be a source of concern because of the potential liabilities associated with both closed and used churchyards. It remains to be seen whether the current Home Office Review of burial ground legislation leads to the Church in Wales being placed in a similar position to the Church of England. This would enable the Church in Wales to transfer closed burial grounds to the local burial authority, move headstones, set its own burial fees etc.”²⁰

¹⁹ CIW 1

²⁰ Church in Wales, *The Representative Body Review*, Report of the Steering Group, 2004.

33. The report further recommended:

“... the stepping up of political discussions and representations at both Cardiff and Westminster about the long-term liability for Church buildings and Church graveyards. Wales differs from England in that graveyards are not transferred automatically to local authority care on closure.”²¹

34. The Ministry of Justice published the UK Government’s response, *Burial Law and Policy in the 21st Century: The Way Forward* in June 2007.²² It contained no proposals to change the legislation in respect of Wales.

35. The 1945 Act requires that burial fees are approved by Welsh Ministers. The Church in Wales is the only burial authority in Wales to have Government controlled burial fees.

Power of the National Assembly to legislate

36. Schedule 7 to the *Government of Wales Act 2006*, which lists the subjects on which the Assembly may legislate, includes “Burial and Cremation” under subject 6, Environment but exempts coroners’ functions.

37. Coroners’ functions remain the responsibility of the Ministry of Justice.

²¹ Church in Wales, *The Representative Body Review*, Report of the Steering Group, 2004

²² Ministry of Justice, *Burial Law and Policy in the 21st Century: The Way Forward*, June 2007

5. The current legal position: practical implications for law-making

38. During our evidence sessions we sought to identify some of the issues and complications that impact on law-making as it relates to the Church in Wales. Our findings are set out below, together with the recommendations we make, as a means of addressing some of the issues outlined by witnesses.

Vestiges of establishment – evidence

39. When asked why the vestiges of establishment remain relevant, Professor Doe said:

“It is because they have been imposed on the church by the state. The church still labours under them, and the state has not removed them.”²³

40. He added that:

“The vestiges survive because the church seems to enjoy what it sees as its privilege to minister to anybody who is resident in a parish. I presume that the church itself, although it has never articulated this fully in any formal document of its own constitutional order, still thinks that these are features of its life that retain theological and pastoral integrity. It sees its mission as one to the people and it so happens that the legal framework within which it works sustains and articulates that theological outlook—that the church is there to minister to the people and that it has a duty to solemnise their marriages and to bury them, along with a host of other duties that are not vestiges of establishment. They sustain the view that appears in the 1984 *Book of Common Prayer* that the church is this ancient church of this ancient land.”²⁴

41. In responding to these views, the Archbishop of Wales said:

“We are where we are because we are in a strange situation as a disestablished church that continues to administer the

²³ CLA Committee, *RoP [paragraph 17]*, 11 March 2013

²⁴ CLA Committee, *RoP [paragraph 20]*, 11 March 2013

sacrament of marriage to anyone who wishes to be married within its walls.”²⁵

42. The Archbishop acknowledged this as some kind of legacy from the past²⁶ and

“... as a missionary activity, in the sense that we as a church do not wish to be simply looking after our own members. We want to be a church that is willing to open its doors to everyone who wishes to make use of it. Therefore, this happens in terms of baptism, marriage and burial.”²⁷

43. He expanded on this point further saying:

“The way that we have looked at it in the Church in Wales is not as putting us in any kind of position of privilege—although others may think that we are—but to see it as a pastoral act. In other words, anybody who wants to get married within our doors can do so. You do not have to be a member or be on the electoral roll. You could be somebody who simply lives in the parish. Therefore, it is a deeper theological point, I suppose, of the church of God being open to all-comers.”²⁸

Development of the Marriage (Same Sex Couples) Bill – evidence

44. We sought to explore the way in which the Church in Wales had become aware of the UK Government’s intention to introduce legislation on same-sex marriage. The Archbishop told us:

“The Church in Wales was not consulted at all when the Government decided that it wanted to introduce a same-sex marriage Bill. It merely stated that the Church in Wales would be barred from holding these marriages. That seemed to be an extraordinary position, given the fact that there had been no consultation at all with us. The Church in Wales was faced with a difficulty. An anomaly of disestablishment is that we are forced by law to marry—and we do not mind that position at present—anyone who lives within our parishes; we have a duty to marry people. That means that, if the Government changes

²⁵ CLA Committee, *RoP [paragraph 41]*, 18 March 2013

²⁶ CLA Committee, *RoP [paragraph 43]*, 18 March 2013

²⁷ CLA Committee, *RoP [paragraph 43]*, 18 March 2013

²⁸ CLA Committee, *RoP [paragraph 56]*, 18 March 2013

its marriage laws so that it embraces same-sex unions, the Church in Wales would have to do that, even if it did not want to do it. However, to bar it from doing so would not give it any voice at all. We are in a different position from the Church of England because that church—because it is the established church—can change law by Measure. Therefore, the Church of England was in a different position. We therefore got in touch with the Department for Culture, Media and Sport, and with the Secretary of State, Maria Miller. I must say that, from that moment on, when they realised the problems that we faced, they have been nothing except accommodating.”²⁹

45. The Archbishop went on to explain the conversations that the Church in Wales had with the UK Government:

”We told them that we wanted to be protected in law from being prosecuted if we do not marry same-sex couples, because that is not the church’s current position. On the other hand, we do not want to be proscribed by an Act of Parliament from so doing if that is what we want to do eventually, because, in order to undo that, we shall have to have another Act of Parliament.”³⁰

46. The Archbishop indicated that clause 8 arose from these discussions and paid tribute to the accommodating way in which the UK Government had sought to resolve the problem having realised the position,³¹ adding:

“All that we asked the Government to do was to ensure that clergy are not prosecuted for not marrying same-sex couples. On the other hand, we do not want to be barred from doing so, so we asked officials whether they could find a way around that. They came up with the idea that we would have no duty to marry, but that if the Church in Wales changed its mind on the marriage of same-sex couples, it would be possible, by giving power to the Lord Chancellor, for it to be able to do so. I think that we are arguing about the words ‘may’ and ‘shall’, but there is a legal nicety as to whether you can actually compel the Lord

²⁹ CLA Committee, *RoP [paragraph 13]*, 18 March 2013

³⁰ CLA Committee, *RoP [paragraph 18]*, 18 March 2013

³¹ CLA Committee, *RoP [paragraphs 21-24]*, 18 March 2013

Chancellor to do something. However, the intention is that the Lord Chancellor would lay that legislation before Parliament if the Church in Wales wanted to preside at the unions of same-sex couples.”³²

47. In commenting on the fact that the Church in Wales had not originally been consulted, Professor Doe highlighted a way in which the issue could be addressed, though it would deal with the Church in Wales differently from other non-established churches, saying:

“... for the Civil Partnerships Act 2004, Lord Sainsbury in the House of Lords enunciated a constitutional convention, analogous to the Sewel convention, that Parliament would not legislate for the Church of England without its consent . That has never been articulated by anyone, anywhere in relation to the Church in Wales, and that might be worth exploration, too.”³³

The Marriage (Same Sex Couples) Bill – evidence

48. We explored whether the Lord Chancellor was the appropriate official to allow the Church in Wales an “opt-in” to marriage law.

49. Professor Doe said:

“You have a statutory regime that says that there is a common law duty upon the Church in Wales to solemnise the marriage of people. You have the Bill that relieves, because the Bill defines marriage in the way that it does, Church in Wales clergy from that duty. So, that is all it does ... I have no view as to the appropriate authority to trigger this thing off by issuing an Order, the effect of which I am not entirely sure about. I presume that would reinstate the duty to marry same-sex couples. You called it an opt-in situation, and, currently, it is the Lord Chancellor who has that function. It could equally be the Assembly or the Welsh Government, and some might consider that to be a better thing to happen, given the location of the Church in Wales. If the Church in Wales is subject to the consent of the Assembly in relation to the creation of its burial

³² CLA Committee, *RoP [paragraph 26]*, 18 March 2013

³³ CLA Committee, *RoP [paragraph 138]*, 11 March 2013

rules, ecclesiastical exemption and the provision of spiritual care in hospitals, for example, and you regulate that, then that may very well be sensible.”³⁴

50. Professor Doe noted that (in the Bill as originally introduced) there was no duty on the Lord Chancellor to introduce an Order³⁵ and illustrated this view by saying:

“... if the Church in Wales says, ‘Right, we are going to allow the solemnisation of same-sex marriages in this church’, the church, in resolving that, could create a rule as a caveat to that resolution that it is a matter of conscience for each cleric in the Church in Wales, whether or not that cleric, as a matter of their discretion, wishes to solemnise the marriage of a same-sex couple ...

“So the Church in Wales has this ... scheme, it goes to the Lord Chancellor and says, ‘This is our scheme; we will marry these people subject to protecting the conscience of individuals and this is our juridical arrangement. Please put that in an Order’. The Lord Chancellor looks at it and he or she has to alter the common law in order to give effect to this ... and the chancellor does not like it, so he or she refuses: end of Welsh church’s initiative.”³⁶

51. Professor Doe indicated that procedurally the use of a Lord Chancellor’s Order was “probably an easier route” than the law-making process for the Church of England³⁷, although he acknowledged a potential difference in democratic transparency.³⁸ He also compared the use of an Order with the difficulty of getting a Private Member’s Bill to amend primary legislation.³⁹

52. Commenting on clause 8 of the Bill, Professor Watkin said:

“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

³⁴ CLA Committee, *RoP [paragraph 75]*, 11 March 2013

³⁵ CLA Committee, *RoP [paragraphs 83 - 4]*, 11 March 2013

³⁶ CLA Committee, *RoP [paragraphs 86 - 87]*, 11 March 2013

³⁷ CLA Committee, *RoP [paragraph 102]*, 11 March 2013

³⁸ CLA Committee, *RoP [paragraphs 105-8 and 112]*, 11 March 2013

³⁹ CLA Committee, *RoP [paragraph 110]*, 11 March 2013

Church having to involve the Lord Chancellor in order to achieve something which all other denominations can do for themselves.”⁴⁰

53. When questioned he expanded on this view:

“I think it is ‘slightly bizarre’ because if you think of any member of the Cabinet, which shows the history of Britain’s constitution, the office that goes back further than that of the Prime Minister—and goes back further than Parliament—it is the role of the Lord Chancellor. It is strange, therefore, that a disestablished church turns to the person who embodies, more or less, the concept of being part of the establishment in order to seek permission to do what it wants to do.”⁴¹

Specific difficulties in law-making and possible solutions in relation to marriage – evidence

54. The publication of the Marriage (Same Sex Couples) Bill has highlighted the problems of law-making in relation to the Church in Wales as a consequence of the vestige of establishment that exists in relation to marriage.

55. Professor Doe felt that:

“... it makes sense that Westminster/Whitehall should address the Bill’s lifting of this common law duty, if it is truly a duty of the common law, because then, that, I presume, would be a matter properly in the hands of the Minister for Justice, the Lord Chancellor. However, for me, the critical thing is that the Church in Wales is still not free to regulate, on the face of it, a matter of direct concern to its pastoral ministry to everyone in Wales.”⁴²

56. Professor Watkin identified a twofold problem for the Church in Wales:

“first, other than by private bill, it cannot effect any changes to the law of marriage of England and Wales which applies to it;

⁴⁰ CIW 2

⁴¹ CLA Committee, *RoP [paragraph 170]*, 11 March 2013

⁴² CLA Committee, *RoP [paragraph 82]*, 11 March 2013

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.”⁴³

57. During questioning he explained that these problems in effect leave Wales:

“... in a sort of vacuum, having to play catch up if and when parliamentary time is available and with no mechanism by which that catch up can be effected smoothly.”⁴⁴

58. In relation to the first problem, the Archbishop of Wales highlighted the difficulties associated with a Private Member’s Bill:

“... the Marriage Act 1949 was amended in 2010 to catch up with the different kind of residence qualifications that the Church of England had introduced by Measure in 2008, I believe; that had to be done by an Act of Parliament. It was only because we managed to persuade somebody in the House of Lords and the House of Commons to work with us and for us, that we got that through in record time. However, there would be no guarantee that we could do it again. In any case, it means that the Government would have to give time for it to happen.”⁴⁵

59. Professor Watkin outlined four possible solutions for these problems, short of moving to a system of universal civil registration of marriages.

60. First, reverting to the original intention of the 1914 Act and cutting the connection with the marriage law of the Church of England, so converting the position of the Church in Wales to that which applies to other churches in Wales.⁴⁶ He felt this would be a “clean cut”,⁴⁷ giving the Church in Wales “the right to determine its marriage

⁴³ CIW 2

⁴⁴ CLA Committee, *RoP [paragraph 155]*, 11 March 2013

⁴⁵ CLA Committee, *RoP [paragraph 19]*, 18 March 2013

⁴⁶ CIW2

⁴⁷ CLA Committee, *RoP [paragraph 189]*, 11 March 2013

policy”⁴⁸ and should be achieved “as a piece of legislation in itself”.⁴⁹
This was his preferred solution.⁵⁰

61. The second approach would be to apply the mechanism in Clause 8 of the Marriage (Same Sex Couples) Bill more generally, so as to allow the Church in Wales to request such changes to marriage law from the UK Government. This would be enacted by an order brought forward by the Lord Chancellor. However, he thought this would “appear to fly in the face of disestablishment”⁵¹ because:

“... it is the Church in Wales returning to the UK Government and UK Parliament in order to be able to move forward. To my mind, that is almost putting the clock back. It is locking one further in to this vestige of establishment.”⁵²

62. He also highlighted the fact that this approach:

“... does not cure the imbalance that is the result of the link, because, in effect, a disestablished church is not able to freely develop its policy in relation to marriage and the solemnisation of marriage in the same way as, for instance, other churches in the Anglican communion. The Scottish Episcopal Church and the Anglican church in Northern Ireland would have greater freedom, but the Church in Wales would be still locked, as it were. The umbilical cord would not have been cut with the mother church in England.”⁵³

63. The third approach would be to place the Church of England under a statutory duty to consult the Church in Wales with regard to any proposed legislation which would cause marriage law to diverge between England and Wales, with a mechanism whereby the Church in Wales could, if it wished, obtain change for itself in Wales, by order.⁵⁴ Professor Watkin noted that “any statutory duty to consult would require legislation”⁵⁵ but that:

⁴⁸ CLA Committee, *RoP [paragraph 189]*, 11 March 2013

⁴⁹ CLA Committee, *RoP [paragraph 196]*, 11 March 2013

⁵⁰ CLA Committee, *RoP [paragraph 216]*, 11 March 2013

⁵¹ CIW 2

⁵² CLA Committee, *RoP [paragraph 198]*, 11 March 2013

⁵³ CLA Committee, *RoP [paragraph 199]*, 11 March 2013

⁵⁴ CIW 2

⁵⁵ CLA Committee, *RoP [paragraph 211]*, 11 March 2013

“The only thing that would emerge would be whether the Church in Wales wanted a similar provision made for itself. There would be no mechanism by which the Church of England Measure could do that, because the Church of England Measure could only extend to the provinces of Canterbury and York and could not extend to Wales.”⁵⁶

64. He added the following comments, highlighting the general problems that exist at the moment:

“It is virtually the same situation as if the UK Parliament chose to legislate for England on a non-devolved matter and did nothing for Wales. So, this Assembly could do nothing in order to advance the position; Wales would just be left behind. We know that, if the UK Parliament legislates in a devolved area, Wales can be left with what the previous legal position was in England and Wales. Of course, the Assembly is able, if it so wishes, to do something in that situation. The Church in Wales faces a situation that would be akin to the UK Parliament legislating in a non-devolved area, doing nothing for Wales and Wales not being able to do anything for itself.”⁵⁷

65. The fourth and final option would be to construct a solution along the lines of that employed with regard to burials, whereby the Church in Wales itself can amend certain rules subject to the approval of an appropriate civil authority,⁵⁸ for example, and as suggested by Professor Doe,⁵⁹ the Assembly.

66. Professor Watkin felt that this would mean that “the playing field would not be even” with regard to other denominations,⁶⁰ saying:

“If what one wants is a truly or completely disestablished church, I think that to give the Assembly a role in relation to the Church in Wales creates a new version of establishment, which goes against the equality among the churches, which is what the 1914 Act really aimed to achieve.”⁶¹

⁵⁶ CLA Committee, *RoP [paragraph 212]*, 11 March 2013

⁵⁷ CLA Committee, *RoP [paragraph 214]*, 11 March 2013

⁵⁸ CIW 2

⁵⁹ CLA Committee, *RoP [paragraph 134]*, 11 March 2013

⁶⁰ CLA Committee, *RoP [paragraph 216]*, 11 March 2013

⁶¹ *Ibid*

67. When questioned about Professor Watkin’s preferred approach (paragraph 60 above), the Archbishop said:

“If, for example, marriage and all the other issues were devolved to the National Assembly, as happens in Northern Ireland and Scotland, then I think that to preserve the vestiges of establishment to a disestablished church would not make any sense.”⁶²

68. We explored with the Archbishop his views on the use of Ministerial orders to effect legislative change (the second approach – see paragraph 61 above). In response, the Archbishop said:

“It depends entirely on how much of the law is devolved to the Assembly and the Welsh Government. If, for example, we were to move in Wales towards a Scottish model—that is, that everything would be devolved apart from retained issues—the situation would change, because it would not make much sense for this legislature to give a disestablished church like the Church in Wales a particular role.”⁶³

69. When questioned on his position regarding the legal issues surrounding marriage he said:

“I may have my personal opinion about it and I suspect that there are lots of people in the Church in Wales who disagree with what I have to say. But, it seems to me that if we are moving to a more devolved system of government in Wales, which I firmly believe in, and if marriage does become a devolved issue, it does not make sense to keep the position of one denomination within Wales and to single that out.”⁶⁴

Burial law – evidence

70. The Archbishop explained the situation regarding burials from the perspective of the Church in Wales:

“... we have a duty to bury anybody who lives within the parish. The anomaly that we face in Wales is that, again perhaps as a

⁶² CLA Committee, *RoP [paragraph 56]*, 18 March 2013

⁶³ CLA Committee, *RoP [paragraph 45]*, 18 March 2013

⁶⁴ CLA Committee, *RoP [paragraph 85]*, 18 March 2013

result of historical factors, fees for burials are set through the office of the First Minister, which seems a bit anomalous. The other difference between us and the Church of England is that closed churchyards in the Church of England can be handed over to local authorities, whereas that cannot happen in the Church in Wales. Therefore, that means that the Church in Wales has to be responsible for closed churchyards. There is no income coming in and a vast sum of money is going out to keep these closed churchyards in a good condition, which, again, we have a legal obligation to do.”⁶⁵

71. He also identified some specific concerns regarding capacity:

“We have no problem again in burying everyone, but we are fast running out of space. Churches are unwilling to buy fields in order to bury more people when there is no financial help to do so. When those become full, it is the Church in Wales and its living members who have to pay...”⁶⁶

72. He added:

“If burial is a totally devolved issue—and most of the burial Acts are—I think that there is an avenue for discussion there about providing more space for people who want to be buried. What do we do about closed churchyards? Is it right that the First Minister determines the fees for burial, because it does not happen in any other denomination?”⁶⁷

73. The Archbishop did not want to see burials and marriages having a link to law-making in the Assembly,⁶⁸ adding:

“.... it would make sense that, if you are going to have a devolved system of government, you cannot retain vestiges of establishment to one particular church. That would be my personal view, but I am quite sure that you would find people within the Church in Wales who would disagree with that viewpoint. I think that that would be an anomalous situation. In a way, the two things go together, because, if we are

⁶⁵ CLA Committee, *RoP [paragraph 79]*, 18 March 2013

⁶⁶ CLA Committee, *RoP [paragraph 81]*, 18 March 2013

⁶⁷ CLA Committee, *RoP [paragraph 83]*, 18 March 2013

⁶⁸ CLA Committee, *RoP [paragraph 115]*, 18 March 2013

complaining about the fact that we have to maintain closed churchyards and have a legal obligation to do so, and we would like to hand those back to whoever would like to have them, then I do not think that we can argue for a privileged position about marriage.”⁶⁹

74. Professor Watkin also explained the historical background to this issue and some of the problems that currently exist:

“The burial situation is slightly different because, before disestablishment, there was a statutory right of burial in church burial grounds because of the difficulties that had arisen in rural areas where there were no municipal cemeteries. It was the church burial ground or nowhere else, basically. The advent of cremation, I think, has altered that in some measure, but nevertheless it is the case that the vast majority of burial grounds that are not municipal cemeteries are churchyards. That, I think, is for the church itself to say, but it poses problems for the church because wherever there are major housing developments on greenfield sites, if no municipal cemetery is opened, it tends to mean that the local churchyard, within a generation, begins to fill up at a quite astonishing rate. One can see that happening in several rural parishes not 20 or 30 miles from Cardiff. It has that consequence, but, nevertheless, I think that the issues in relation to burial are rather different. My personal view is that what was worked out in the 1945 Act was a good solution to allow the church to govern its churchyards and to make changes to the rules and the fees, et cetera, in relation to burials, and to ensure that that was not to the disadvantage of people who were not members by having a public official give permission for the change to be made and for that official, the Minister, to be answerable and accountable for accommodating the change to the representatives of the people, originally in Parliament and now in the Assembly.”⁷⁰

⁶⁹ CLA Committee, *RoP [paragraph 115]*, 11 March 2013

⁷⁰ CLA Committee, *RoP [paragraph 219]*, 11 March 2013

Our view

75. As regards the UK Government's initial lack of consultation with the Church in Wales over its proposals for equal marriage, that is a matter of some concern to us and is perhaps a reflection of the confusion and uncertainty that exists as a consequence of the vestige of establishment relating to marriage.

76. While it is welcome and re-assuring that the UK Government has subsequently worked very closely with the Church in Wales and, in the words of the Archbishop of Wales, has "been nothing except accommodating", there does need to be a better mechanism for the UK Government to recognise when the Church in Wales is affected by legislative proposals and subsequently to communicate with it in a timely manner.

77. We note the constitutional convention referred to by Professor Doe in his evidence and consider that there would be merit in exploring a similar solution for the Church in Wales while vestiges of establishment relating to marriage remain.

78. In terms of clause 8 of the Marriage (Same Sex Couples) Bill, we believe that the mechanism to be used to allow the Church in Wales to "opt-in" to the provisions of that Bill is a better option than relying on a Private Member's Bill to effect the necessary legislative changes.

79. We consider this to be the case because, while the chosen mechanism is somewhat opaque, it is more achievable than using a Private Member's Bill, particularly given that there is no guarantee of a peer and an MP being in a position to take through a Bill, or that parliamentary time will be made available to do so. We welcome the fact that the UK Government has since reversed its previous position (as described in paragraphs 23 and 24) and tabled an amendment at the Report stage in the House of Commons that changed the wording in clause 8 from "may" to "must" so that the Lord Chancellor must act on the Church In Wales' wishes. Nevertheless, the Bill remains under consideration in Parliament, and we are therefore unable to comment on the Bill in its final form.

80. We believe that this mechanism should only be used as a temporary solution and should not be seen as a precedent or long term solution for dealing with the legislative problems arising from the vestiges of establishment.

81. In our view, full disestablishment of the Church in Wales, in line with the original intention of the 1914 Act, and as suggested by Professor Watkin, represents the most sensible solution to overcome the current difficulties with the uneven way in which law-making affects the Church in Wales.

82. Any long term solution will, of course, also need to take account of the work of the Silk Commission into the future powers of the National Assembly unless the issue is resolved promptly.

Recommendation 1: We recommend that the Church in Wales should be fully disestablished.

Recommendation 2: We recommend that recommendation 1 should be implemented by either:

- (i) a UK Government Bill; or**
- (ii) a Welsh Government Bill in the event of a reserved powers model being introduced in Wales and relevant subjects, including, marriage policy, being devolved as part of that process.**

Recommendation 3: Given that recommendations 1 and 2 are longer term solutions, as an interim measure, we recommend that the Church in Wales and the relevant UK Government departments explore the possibility of putting in place an appropriate constitutional convention such that the UK Parliament does not legislate in policy areas uniquely affecting the Church in Wales without its consent.

83. Legislative powers in relation to burials are devolved to Welsh Ministers and the National Assembly and any potential solution to overcome anomalies identified by the Archbishop of Wales, relating to burial fees and closed churchyards, therefore rests with the Welsh Government and the Assembly.

84. We agree with the Archbishop that the role of the Welsh Government in prescribing burial fees and the inability of the Church in Wales to hand over closed churchyards to local authorities, constitute anomalies that need to be addressed.

85. We believe that the Church in Wales should have full control over its day-to-day operational matters and that there should be no interference by the state.

Recommendation 4: In line with recommendation 1, we believe that the Welsh Government should introduce legislation to remove vestiges of establishment in respect of burial legislation. This would, for example, relate to the legal obligation under the *Welsh Church (Burials) Act 1945 Act* to bury all parishioners in Church in Wales burial grounds and the prescription of burial fees by Welsh Ministers. We also believe that there should be no legal bar to the Church in Wales transferring closed churchyards to local authorities. We do not believe that the legislation needed to effect these changes has to be a separate Bill; instead the legislation could be incorporated into a future Welsh Government Bill on a broadly related matter.

Annexe 1 - List of evidence

The following people provided written evidence to the Committee.

<i>Name / Organisation</i>	<i>Reference</i>
Professor Norman Doe	CIW 1
Professor Thomas Watkin	CIW 2
The Most Reverend Barry Morgan, Archbishop of Wales and Bishop of Llandaff	CIW 3

Professor Norman Doe and Professor Thomas Watkin gave oral evidence to the committee on 11 March 2013, while the Most Reverend Barry Morgan did so on 18 March.

All written and oral evidence can be viewed in full at:

<http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?Ild=5916>