Pecyn dogfennau cyhoeddus

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Lleoliad:
Ystafell Bwyllgora 2 - y Senedd

Dyddiad:
Dydd Llun, 11 Mawrth 2013

Amser:
14:30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

I gael rhagor o wybodaeth, cysylltwch a:

Gareth Williams
Clerc y Pwyllgor
029 2089 8008/8019
PwyllgorMCD@cymru.gov.uk

Agenda

1. Cyflwyniad, ymddiheuriadau, dirprwyon a datganiadau o fuddiant

1. Offerynnau nad ydynt yn cynnwys unrhyw faterion i'w codi o dan Reol Sefydlog 21.2 neu 21.3
2.

Offerynnau'r Weithdrefn Penderfyniad Negyddol

CLA217 - Gorchymyn Ardrethu Annomestig (Rhyddhad Ardrethi i Fusnesau Bach) (Cymru) (Diwygio) 2013
Y weithdrefn negyddol. Fe'i gwnaed ar 19 Chwefror 2013. Fe'i gosodwyd ar 21 Chwefor 2013. Yn dod i rym ar 16 Mawrth 2013

CLA218 - Rheoliadau Corfforaeth Addysg Bellach Coleg Cambria (Llywodraethu) 2013
Y weithdrefn negyddol. Fe'u gwnaed ar 20 Chwefror. Fe'u gosodwyd ar 22 Chwefror 2013. Yn dod i rym ar 26 Mawrth 2013

CLA219 - Gorchymyn Coleg Cambria (Corffori) 2013
Y weithdrefn negyddol. Fe'i gwnaed ar 20 Chwefror 2013. Fe'i gosodwyd ar 22 Chwefror 2013. Yn dod i rym ar 26 Mawrth 2013

CLA220 – Rheoliadau Cyrsiau Adsefydlu (Troseddau Yfed Perthnasol) (Cymru) 2013
Y weithdrefn negyddol. Fe'u gwnaed ar 19 Chwefror 2013. Fe'u gosodwyd ar 22 Chwefror. Yn dod i rym ar 15 Mawrth 2013

CLA221 – Rheoliadau Semen Buchol (Cymru) (Diwygio) 2013

Y weithdrefn negyddol. Fe'u gwnaed ar 21 Chwefror 2013. Fe'u gosodwyd ar 25 Chwefor 2013. Yn dod i rym ar 18 Mawrth 2013

CLA223 – Gorchymyn Trwyddedu Morol (Dirprwyo Swyddogaethau) (Cymru) 2013
Y weithdrefn negyddol. Fe'i gwnaed ar 26 Chwefror 2013. Fe'i gosodwyd ar 26 Chwefror 2013. Yn dod i rym ar 1 Ebrill 2013

3. Offerynnau sy'n cynnwys materion i gyflwyno adroddiad arnynt i'r Cynulliad o dan Reol Sefydlog 21.2 neu 21.3

Offerynnau'r Weithdrefn Penderfyniad Cadarnhaol

CLA222 – Gorchymyn Corff Adnoddau Naturiol Cymru (Swyddogaethau) 2013 (Tudalennau 1 – 3)
Y weithdrefn gadarnhaol. Ni nodwyd y dyddiad y'i gwnaed. Ni nodwyd y dyddiad y'i gosodwyd. Yn dod i rym ar 1 Ebrill 2013

CLA(4)-08-13(p1) – Adroddiad Cynghorwyr Cyfreithiol

CLA(4)-05-13(p2) – CLA189 – Gorchymyn Corff Adnoddau Naturiol Cymru (Swyddogaethau) 2012 (Adroddiad Blaenorol) (Tudalennau 4 – 21)

4. Tystiolaeth ynghylch yr Ymchwiliad i Ddeddfu a'r Eglwys yng Nghymru (Tudalennau 22 – 41)

15:00 – CLA(4)-08-13(p3) – Yr Athro Norman Doe, Ysgol y Gyfraith Caerdydd, Prifysgol Caerdydd

15:45 – CLA(4)-08-13(p4) – Yr Athro Thomas Glyn Watkin, Ysgol y Gyfraith Caerdydd, Prifysgol Caerdydd

5. Papurau i'w nodi (Tudalennau 42 – 43)
CLA(4)-08-13 Papur 5 – Llythyr gan Leighton Andrews AC, y Gweinidog Addysg a Sgiliau, at Gadeirydd y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

6. Cynnig o dan Reol Sefydlog 17.42 i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer yr eitemau o fusnes a ganlyn:

Caiff pwyllgor benderfynu gwahardd y cyhoedd o gyfarfod neu unrhyw ran o gyfarfod:

(vi) lle mae'r pwyllgor yn cyd-drafod cynnwys, casgliadau neu argymhellion adroddiad y mae'n bwriadu ei gyhoeddi; neu'n ymbaratoi i gael tystiolaeth gan unrhyw berson.

7. Ystyried yr Adroddiad Drafft ar y Bil Llywodraeth Leol (Democratiaeth) (Cymru) (Tudalennau 44 - 68)

CLA(4)-08-13 Papur 6 – Adroddiad Drafft ar y Bil Llywodraeth Leol (Democratiaeth) (Cymru)

8. Ystyried yr Adroddiad Drafft ar y Bil Trawsblannu Dynol (Cymru) (Tudalennau 69 - 95)

CLA(4)-08-13 Papur 7 – Adroddiad Drafft ar y Bil Trawsblannu Dynol (Cymru)

Dyddiad y cyfarfod nesaf

Dydd Llun 18 Mawrth 2013

Trawsgrifiad

Gweld trawsgrifiad o'r cyfarfod.

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 technicalties 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 deleted otherwise this becomes "the appropriate forestry authority" means the appropriate forestry authority.

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

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Adroddiad: CLA(4)-05-13 (Adroddiad 2): 4 Chwefror 2013

Mae'r Pwyllgor yn cyflwyno'r adroddiad a ganlyn i'r Cynulliad:

CLA 189: Gorchymyn Corff Adnoddau Naturiol Cymru (Swyddogaethau) 2012

Holodd y Pwyllgor John Griffiths AC, Gweinidog yr Amgylchedd a Datblygu Cynaliadwy, am y Gorchymyn drafft.

Roedd y sesiwn graffu hon yn dilyn gwaith cychwynnol y Pwyllgor o drafod y Gorchymyn drafft ar 21 Ionawr 2013. Mae'r darn perthnasol o adroddiad y Pwyllgor ar gyfer y dyddiad hwnnw, gan gynnwys cyngor cynghorwyr cyfreithiol y Pwyllgor, i'w weld yn Atodiad 1.

Cyn y cyfarfod, ysgrifennodd y Gweinidog at y Pwyllgor i ymdrin â'r pwyntiau adrodd a amlinellwyd yn y cyfarfod ar 21 Ionawr 2013. Mae'r llythyr i'w weld yn Atodiad 2.

Holodd y Pwyllgor y Gweinidog am y dull o gyflawni'r amcanion polisi a gynhwysir yn y Gorchymyn drafft, ac yn benodol pam nad oedd modd nodi swyddogaethau'r corff newydd yn glir mewn un testun deddfwriaethol wedi'i gydgrynhoi, yn hytrach na diwygio deddfwriaeth sy'n bodoli eisoes.

Ymatebodd y Gweinidog gan egluro bod natur y Gorchymyn drafft yn peri mai diwygio deddfwriaeth sy'n bodoli eisoes yn y modd a wnaed oedd y dull mwyaf amserol, ymarferol a phragmatig.

Cadarnhaodd y Gweinidog y bydd yn diwygio'r Gorchymyn drafft mewn ymateb i'r dystiolaeth a gafodd y Pwyllgor gan RSPB Cymru, Cyswllt Amgylchedd Cymru ac Ymddiriedolaethau Natur Cymru ynghylch geiriad y ddyletswydd gwarchod natur yn y Gorchymyn drafft. Nododd hefyd ei fod yn fodlon y cydymffurfiwyd â phob dyletswydd o ran yr UE.

Rhoddodd y Gweinidog sicrwydd pellach i'r Pwyllgor y byddai'r Gorchymyn drafft yn cael ei ddiwygio fel bod Asiantaeth yr Amgylchedd yn parhau i fod yn ddarostyngedig i'r gofyniad i lunio cynllun iaith Gymraeg, ac i gydymffurfio yn y dyfodol â'r safonau iaith Gymraeg o dan Fesur y Gymraeg (Cymru) 2011.

Mae'r memorandwm esboniadol sy'n cyd-fynd â'r Gorchymyn drafft yn egluro y bydd y Gorchymyn yn cael ei wneud dim ond os ceir cydsyniad yr Ysgrifennydd Gwladol. Cytunodd y Gweinidog i ysgrifennu at y Pwyllgor i amlinellu'r darpariaethau yn y Gorchymyn drafft y gwneir cais am gydsyniad yn eu cylch, a phan fydd y cydsyniad hwn wedi'i sicrhau.

Hoffai'r Pwyllgor ddwyn y materion a ganlyn i sylw'r Cynulliad:

- mae'r Pwyllgor yn croesawu bwriad y Gweinidog i fynd i'r afael â'r pwyntiau y mae nifer o sefydliadau amgylcheddol wedi'u crybwyll ynghylch geiriad y ddyletswydd gwarchod natur yn y Gorchymyn drafft.

- mae'r Pwyllgor yn croesawu eglurhad y Gweinidog y bydd y Gorchymyn drafft yn cael ei ddiwygio i sicrhau bod Asiantaeth yr Amgylchedd yn parhau i fod yn ddarostyngedig i'r gofyniad i lunio cynllun iaith Gymraeg ac y bydd safonau iaith Gymraeg yn gymwys yn y dyfodol.

- mae'r Pwyllgor o'r farn, er y byddai Bil wedi bod yn ddull deddfwriaethol gwell o gyflawni amcanion polisi Llywodraeth Cymru, fod defnyddio Gorchymyn yn ddull amgen rhesymol ar yr achlysur hwn;

- mae'r Pwyllgor yn nodi barn y Gweinidog nad oedd yn ymarferol drafftio Gorchymyn sy'n nodi swyddogaethau'r corff amgylcheddol newydd yn y dull y mae'r Cwnsler Cyffredinol yn ei ffafrio o ran drafftio deddfwriaeth newydd, sef mewn modd sy'n symleiddio'r llyfr statud drwy gydgrynhoi deddfwriaeth Cymru a'i gwahanu oddi wrth ddeddfwriaeth sydd hefyd yn gymwys yn Lloegr[1].

Bydd trawsgrifiad o'r cyfarfod ar gael ar wefan y Cynulliad: http://www.senedd.cynulliadcymru.org/mgIssueHistoryHome.aspx?IId=1242

David Melding AC
Cadeirydd y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
4 Chwefror 2013

[1]Cynulliad Cenedlaethol Cymru, y Cyfarfod Llawn, *Cofnod y Trafodion: Datganiad: Hygyrchedd i Gyfreithiau Cymru a Datblygu Llyfr Statud i Gymru – Y Wybodaeth Ddiweddaraf*, 26 Mehefin 2012

Atodiad 1

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Darn a gymerwyd o Adroddiad CLA(4)-03-13: 21 Ionawr 2013

Cyflwynir y rhannau perthnasol o'r adroddiad fel a ganlyn:

1. CLA 189: Y nodyn a'r camau gweithredu a oedd yn codi o'r cyfarfod.
2. CLA 189: Y pwyntiau adrodd a atodwyd ar gyfer y Gorchymyn.
3. CLA 189: Atodiad A, y cyfeirir ato yn y pwyntiau adrodd.

1. CLA189 – Gorchymyn Corff Adnoddau Naturiol Cymru (Swyddogaethau) 2012
Y Weithdrefn Uwchgadarnhaol.
Yn dod i rym ar: 1 Ebrill 2013

Nododd y Pwyllgor y pwyntiau i gyflwyno adroddiad arnynt ar gyfer y Gorchymyn hwn (yn atodedig isod) a'r dystiolaeth a gyflwynwyd gan RSPB Cymru, Cyswllt Amgylchedd Cymru ac Ymddiriedolaeth Natur Cymru.

Cam gweithredu: Cytunodd y Pwyllgor i wahodd Gweinidog yr Amgylchedd a Datblygu Cynaliadwy i'w gyfarfod ar 4 Chwefror 2013 er mwyn cynnal sesiwn graffu arall.

2. CLA 189 – Atodiad yn cynnwys pwyntiau adrodd

Adroddiad drafft y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Teitl: Gorchymyn Corff Adnoddau Naturiol Cymru (Swyddogaethau) 2012

Sefydlodd Gorchymyn Corff Adnoddau Naturiol Cymru (Sefydlu) 2012 gorff statudol newydd, Corff Adnoddau Naturiol Cymru gan ddarparu ar gyfer diben, aelodaeth, gweithdrefn, llywodraethiant ariannol a

swyddogaethau cychwynnol y Corff. Mae'r Gorchymyn hwn yn gwneud darpariaeth bellach ynglŷn â'r Corff, gan gynnwys darpariaeth ynglŷn ag addasu a throsglwyddo swyddogaethau amgylcheddol iddo.

Gweithdrefn: Y Weithdrefn Gadarnhaol Ddyrchafedig

Mae'r weithdrefn gadarnhaol ddyrchafedig yn:-

- Ymestyn y cyfnod o'r dyddiad y gosodir Gorchymyn drafft o 40 i 60 diwrnod
- Ei gwneud yn ofynnol i Weinidogion Cymru ystyried unrhyw sylwadau, a phenderfyniad gan Gynulliad Cenedlaethol Cymru ac unrhyw argymhellion pwyllgor sydd â chyfrifoldeb dros gyflwyno adroddiad ar y Gorchymyn drafft a wnaed yn ystod y cyfnod 60 diwrnod
- Ei gwneud yn ofynnol bod y Gorchymyn drafft yn cael ei ailosod gerbron y Cynulliad gyda datganiad yn crynhoi'r newidiadau, os gwneir unrhyw newidiadau sylweddol.

Unwaith y gosodir y Gorchymyn drafft diwygiedig, bydd yn ddarostyngedig i'r weithdrefn gadarnhaol arferol.

Materion technegol: craffu

O dan Reol Sefydlog 21.2, gwahoddir y Cynulliad i roi sylw arbennig i'r offeryn a ganlyn:

<u>21.2 (i) – ei bod yn ymddangos bod amheuaeth a yw 'intra vires'</u>

Rhaglith

Ni chafwyd eto gydsyniad yr Ysgrifennydd Gwladol a'r Gweinidog, sy'n ofynnol o dan Adran 17 o Ddeddf Cyrff Cyhoeddus 2011[2].

Mae Adran 17 yn darparu bod:-

[2] Mae tudalen 3 o'r Memorandwm Esboniadol yn nodi na wneir y Gorchymyn heb gael y cydsyniad angenrheidiol.

(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.

<u>21.2 (v) Bod angen eglurhad pellach ynglŷn â'i ffurf neu ei ystyr am unrhyw reswm penodol</u>

<u>Erthyglau 5, 6 a 7</u>

Ni ddiffinnir "deddfiad lleol" a allai arwain at ansicrwydd gan fod yr Erthyglau hyn, i bob pwrpas, yn tacluso deddfwriaeth arall na chyfeirir ati'n benodol yn unrhyw un o'r Atodlenni.

<u>Atodlen 3</u>

Mesur y Gymraeg (Cymru) 2011

<u>Paragraff 4 (2)</u> – Gan fod Asiantaeth yr Amgylchedd yn dal i arfer swyddogaethau mewn cysylltiad â Chymru, dylai barhau i fod yn ddarostyngedig i Fesur y Gymraeg (Cymru) 2011. Effaith y diwygiad fyddai cael gwared â'r gofyniad ar Asiantaeth yr Amgylchedd i gydymffurfio â safonau'r Gymraeg.

Atodlen 4

Rheoliadau Ffioedd Draenio Cyffredinol (Cyniferydd Perthnasol) 1993

Paragraff 31 (3) – Mae'r cyfeiriad at Reoliadau Rheoli Perygl Llifogydd ac Erydu Arfordirol (Ardollau) (Cymru a Lloegr) 2011 yn cyfeirio at Reoliadau Asiantaeth yr Amgylchedd (Ardollau) (Cymru a Lloegr) 2011 a ailenwir yn ddiweddarach yn y Gorchymyn hwn. Mae hyn yn ddryslyd i'r darllenwr ac felly byddai ôl-nodyn addas o gymorth.

21.2 (vi) ei bod yn ymddangos bod gwaith drafftio'r offeryn neu'r drafft yn ddiffygiol neu ei fod yn methu â bodloni gofynion statudol

Atodlen 2

Deddf Coedwigaeth 1967

Paragraff 42 (3) – Mae'r cyfeiriad at isadran 4 (a) yn anghywir a dylai gyfeirio at isadran (4).

Deddf Priffyrdd 1980

Paragraff 102 (3) – Nid yw'n glir a yw'r cyfeiriad at "organisation" yn ymwneud â'r tro cyntaf neu'r ail dro pan fo'n digwydd.

Deddf Adnoddau Dŵr 1991

Paragraff 198 (2) – Nid oes cyfeiriad at Asiantaeth yr Amgylchedd yn adran 118(b).

Deddf Aer Glân 1993

Paragraff 256 – Dylai'r cyfeiriad at 'appropriate authority' gyfeirio at 'appropriate agency'.

Atodlen 3

Rheoliadau Rheoli Plaleiddiaid 1986

Paragraff 20 (2)

Dylai hwn gyfeirio at '(if the area in which the intended aerial application is to take place in Wales)'.

Gorchymyn Iechyd Planhigion (Tystysgrifau Allforio) (Coedwigaeth) (Prydain Fawr) 2004

Paragraff 158 (3) (b) a (5) – ni ellir ond newid y dyddiad gan fod Gorchymyn 2005 yn cyfeirio at Orchymyn Iechyd Planhigion (Coedwigaeth) 2005, yn hytrach na Gorchymyn Iechyd Planhigion (Coedwigaeth **(Prydain Fawr)** 1993.

Gorchymyn Cynlluniau Iaith Gymraeg (Cyrff Cyhoeddus) 1996

Paragraff 72 – Gan fod Asiantaeth yr Amgylchedd yn dal i arfer swyddogaethau mewn cysylltiad â Chymru, dylai barhau i fod yn ddarostyngedig i'r Gorchymyn. Effaith y diwygiad yw cael gwared â'r gofyniad ar Asiantaeth yr Amgylchedd i baratoi cynllun iaith Gymraeg o dan Ddeddf yr Iaith Gymraeg 1993.

Rheoliadau Dyfroedd Ymdrochi 2008

Paragraff 232 – Mae paragraff 231 yn newid pob cyfeiriad at Asiantaeth ('Agency') heb eithrio rheoliad 2, nid oes diffiniad i hepgor ac felly nid yw'r diffiniad yn gwneud synnwyr.

Paragraff 233 – Mae'r cyfeiriad at 'Agency' yn hytrach nag 'Environment Agency'

Rheoliadau Cynllunio Seilwaith (Ymgynghori ar Ddatganiad Polisi Cenedlaethol) 2009

Paragraff 260 (2) (a) – dylai'r cofnod gyfeirio at 'forests and woodlands' yn hytrach na 'forests or woodlands'.

Rheoliadau Pwyllgorau Rhanbarthol Llifogydd ac Arfordir (Cymru a Lloegr) 2011

Paragraff 317 (2) – Nid yw'r cyfeiriad at 'geiriau agoriadol' yn y paragraff hwn yn gwneud synnwyr.

Rheoliadau Gwastraff (Cymru a Lloegr) 2011

Paragraff 325 – Nid oes unrhyw gyfeiriad at Asiantaeth yr Amgylchedd na'r Asiantaeth yn rheoliad 3.

Rheoliadau'r Cynllun Masnachu Allyriadau Nwyon Tŷ Gwydr 2012

Paragraff 334– mae'r cyfeiriad at reoliad 21 yn anghywir a dylai gyfeirio at reoliad 20.

Paragraff 335 – mae'r cyfeiriad at reoliad 28 yn anghywir a dylai gyfeirio at reoliad 27.

Paragraff 336 – mae'r cyfeiriad at reoliad 48 (5) yn anghywir a dylai gyfeirio at reoliad 45 (5).

Paragraff 337 – mae'r cyfeiriad at reoliad 87 yn anghywir a dylai gyfeirio at reoliad 86.

Paragraff 338 – mae'r cyfeiriad at reoliad 89 yn anghywir a dylai gyfeirio at reoliad 87.

Paragraff 339 – nid yw'r cyfeiriad yn gwneud synnwyr.

Atodlen 5

Rheoliadau Bywyd Gwyllt a Chefn Gwlad (Safleoedd o Ddiddordeb Gwyddonol Arbennig, Apelau) (Cymru) 2002

Paragraff 6– mae "Cyngor Cefn Gwlad Cymru" ond yn ymddangos unwaith.

Rhinweddau: craffu

O dan Reol Sefydlog 21.3, gwahoddir y Cynulliad i roi sylw arbennig i'r offeryn a ganlyn:-

Cyflwynir y Gorchymyn hwn o dan y pwerau a gynhwysir yn Adrannau 13 i 15 o Ddeddf Cyrff Cyhoeddus 2011.

Mae'r nodyn briffio cyfreithiol dyddiedig Tachwedd 2012 (yn Atodiad A) yn rhoi rhagor o wybodaeth gefndirol am y Gorchymyn.

Mae'r Pwyllgor wedi cael gohebiaeth sydd, ymysg materion eraill, yn amlinellu materion o ran a yw amryw ddarpariaethau'r Gorchymyn a gyflwynir gan Atodlen 1 yn 'ultra vires', oherwydd nid ydynt yn cwrdd â'r prawf o dan Adran 16 o Ddeddf Cyrff Cyhoeddus 2011 o ran eu bod yn cael gwared ar ddiogelwch angenrheidiol.

Y prawf o dan y Ddeddf yw a yw **Gweinidogion Cymru yn ystyried**:

(a) nad yw'r Gorchymyn yn cael gwared ar unrhyw ddiogelwch angenrheidiol, a
(b) nad yw'r Gorchymyn yn atal unrhyw berson rhag parhau i arfer unrhyw hawl neu ryddid y gallai'r person hwnnw ddisgwyl yn rhesymol i barhau i'w arfer.

O fewn y rhaglith i'r Gorchymyn, ac wrth gyfeirio at y Gorchymyn mae Gweinidogion Cymru yn nodi eu bod o'r farn

nad yw'n dileu unrhyw ddiogelwch angenrheidiol nac yn atal neb rhag parhau i arfer unrhyw hawl neu ryddid y gallai'r person hwnnw ddisgwyl yn rhesymol barhau i'w harfer neu i'w arfer.

Mae tudalen 11 y Memorandwm Esboniadol yn nodi:-

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.

Byddai'n anodd i'r Pwyllgor ragweld effaith ymarferol darpariaethau penodol o fewn y Gorchymyn. Fodd bynnag, pe byddai'r Pwyllgor yn dymuno, gellid cael tystiolaeth gan Weinidog yr Amgylchedd a Datblygu Cynaliadwy o ran y datganiad a wnaed o fewn y rhaglith, cyn gosod y Gorchymyn terfynol.

Cynghorwyr Cyfreithiol
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Ionawr 2013

3. CLA 189 - Atodiad A, y cyfeirir ato yn y pwyntiau adrodd

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Gorchymyn Corff Adnoddau Naturiol Cymru (Swyddogaethau) 2012

Nodyn Briffio Cyfreithiol

1. Cefndir

1.1 Ar 15 Tachwedd 2012, gosododd John Griffiths AC, Gweinidog yr Amgylchedd a Datblygu Cynaliadwy, ddrafft o *Orchymyn Corff Adnoddau Naturiol Cymru (Swyddogaethau) 2012*.

1.2 Bydd y Gorchymyn yn cael ei wneud yn unol â'r pwerau a roddwyd gan adrannau 13, 14, 15 a 35 o *Ddeddf Cyrff Cyhoeddus 2011* ("Deddf 2011").

1.3 Hwn yw'r ail Orchymyn sy'n ymwneud â Chorff Adnoddau Naturiol Cymru ('y Corff'), a sefydlwyd ar 19 Gorffennaf 2012 gan *Orchymyn Corff Adnoddau Naturiol Cymru (Sefydlu) 2012 Rhif 1903 (Cy.230).*

1.4 Mae'r Gorchymyn yn ddarostyngedig i fath o weithdrefn gadarnhaol a gaiff ei egluro ar dudalen 2 o'r Memorandwm Esboniadol sy'n cyd-fynd â'r Gorchymyn drafft. Mae'r weithdrefn a nodir yn Adran 19 o Ddeddf Cyrff Cyhoeddus 2011 yn ei gwneud yn ofynnol gosod Gorchymyn drafft am 40 diwrnod, ond yn nodi y gall y Cynulliad benderfynu, neu y gall pwyllgor sy'n gyfrifol am gyflwyno adroddiad ar y Gorchymyn

drafft argymell – a hynny cyn pen 30 diwrnod ar ôl gosod y Gorchymyn drafft – y dylai'r weithdrefn gadarnhaol ddyrchafedig a nodir yn Adran 19 (6) – (9) fod yn gymwys.

Os na wneir penderfyniad o'r fath, neu os caiff argymhelliad y mae'r pwyllgor yn ei wneud ei ddirymu gan benderfyniad gan y Cynulliad, ar ôl 40 diwrnod gellir gwneud cynnig i gymeradwyo'r Gorchymyn drafft.

Mae'r weithdrefn gadarnhaol ddyrchafedig yn:

- ymestyn y cyfnod o'r dyddiad pan osodwyd y gorchymyn drafft i 60 diwrnod;
- ei gwneud yn ofynnol i Weinidogion Cymru ystyried unrhyw sylwadau, a phenderfyniad gan Gynulliad Cenedlaethol Cymru ac unrhyw argymhellion pwyllgor sydd â chyfrifoldeb dros gyflwyno adroddiad ar y Gorchymyn drafft a wnaed yn ystod y cyfnod 60 diwrnod;
- ei gwneud yn ofynnol bod y Gorchymyn drafft yn cael ei ailosod gerbron y Cynulliad gyda datganiad yn crynhoi'r newidiadau, os gwneir unrhyw newidiadau sylweddol.

Yna byddai'r Gorchymyn drafft diwygiedig yn ddarostyngedig i'r weithdrefn gadarnhaol arferol.

1.5 Argymhellodd y Pwyllgor yn yr adroddiad a osododd ar 23 Tachwedd 2012 y dylai'r weithdrefn gadarnhaol ddyrchafedig fod yn gymwys yn achos y Gorchymyn. Os na fydd y Cynulliad, erbyn 11 Ionawr 2013, yn penderfynu dirymu hyn (y dyddiad olaf y gellid ystyried hyn yn y Cyfarfod Llawn yw 9 Ionawr 2013), bydd gan y Pwyllgor tan 10 Chwefror 2013 i gyflwyno adroddiad ar y Gorchymyn.

2. Gofynion Deddf Cyrff Cyhoeddus 2011

2.1 Mae Adran 13 o'r Ddeddf yn rhoi pwerau i Weinidogion Cymru newid neu drosglwyddo swyddogaethau Cyngor Cefn Gwlad Cymru a swyddogaethau datganoledig Asiantaeth yr Amgylchedd neu'r Comisiwn Coedwigaeth, swyddogaethau Pwyllgor Llifogydd ac Arfordir

Cymru neu unrhyw swyddogaethau datganoledig sydd gan unrhyw unigolyn yng nghyswllt amgylchedd Cymru i:

- Weinidogion Cymru;
- i un o'r sefydliadau sy'n bodoli eisoes; neu
- i gorff newydd.

2.2 Mae Adran 16 (1) o'r Ddeddf yn datgan y gellir gwneud Gorchymyn o dan Adran 13 dim ond at ddibenion gwella'r dull o weithredu swyddogaethau cyhoeddus, gan roi sylw i effeithlonrwydd, effeithiolrwydd, a sicrhau atebolrwydd i Weinidogion Cymru. Mae Adran 16(2) yn datgan y gellir gwneud Gorchymyn dim ond os na fydd yn dileu unrhyw ddiogelwch angenrheidiol neu os nad yw'n tresmasu ar y gallu i weithredu unrhyw hawliau sydd gan unigolion eisoes.

2.3 Mae Adran 17 yn ei gwneud yn ofynnol cael cydsyniad yr Ysgrifennydd Gwladol ar gyfer Gorchymyn sy'n trosglwyddo swyddogaeth neu'n rhoi swyddogaeth i Asiantaeth yr Amgylchedd, y Comisiwn Coedwigaeth neu unrhyw weithredwr trawsffiniol arall, neu os yw'n newid swyddogaeth nad yw wedi'i datganoli sydd gan un o'r cyrff a enwir uchod. Mae'n ofynnol cael cydsyniad Gweinidog ar gyfer gorchymyn sy'n trosglwyddo swyddogaeth i Weinidog, neu sy'n newid ei swyddogaethau.

2.4 Mae Adran 18 (1) o'r Ddeddf yn datgan bod yn rhaid i Weinidogion Cymru, wrth wneud Gorchymyn o dan Adran 13, ymgynghori ag unrhyw sefydliad neu unigolyn sy'n gweithredu swyddogaethau cyhoeddus y mae'r cynigion yn berthnasol iddynt, pobl eraill y bydd y cynigion yn cael effaith sylweddol ar eu buddion, ac unrhyw unigolyn arall y bernir ei bod yn addas ymgynghori â hwy.

2.5 Mae Adran 18 (2) o'r Ddeddf yn datgan, os bydd Gweinidogion Cymru, ar ôl cynnal ymgynghoriad o dan Adran 18 (1), yn ystyried ei bod yn briodol newid y cynnig i gyd neu ran o'r cynnig, rhaid iddynt ymgynghori ymhellach ar y newidiadau i'r graddau sy'n ymddangos yn addas.

2.6 Mae Adrannau 21 i 23 o Ddeddf Cyrff Cyhoeddus 2011 yn cynnwys cyfyngiadau ar allu Gweinidogion Cymru i greu swyddogaethau, i drosglwyddo a dirprwyo swyddogaethau, ac i greu troseddau.

2.7 Mae Llywodraeth Cymru yn nodi yn y Memorandwm Esboniadol sut y mae wedi cydymffurfio â phob un o'r gofynion hyn.

2.8 Mae'n bwysig nodi y gwneir y Gorchymyn dim ond os ceir cydsyniad o flaen llaw gan yr Ysgrifennydd Gwladol ac unrhyw Weinidog o dan adran 17 o Ddeddf Cyrff Cyhoeddus 2011, ac er bod y rhaglith i'r Gorchymyn drafft yn datgan bod y cydsyniad hwn wedi'i sicrhau, bydd yn rhaid bodloni hyn cyn y gall Gweinidogion Cymru wneud y Gorchymyn.

3. Y Gorchymyn

3.1 Diben y Gorchymyn yw trosglwyddo swyddogaethau i'r Corff o Gyngor Cefn Gwlad Cymru, Asiantaeth yr Amgylchedd a'r Comisiwn Coedwigaeth, ac i sicrhau bod swyddogaethau cyffredinol y Corff yn addas ar gyfer yr ystod y swyddogaethau y bydd yn eu gweithredu.

3.2 Mae'r Gorchymyn yn trosglwyddo holl swyddogaethau Comisiwn Coedwigaeth Cymru i'r Corff (ar wahân i swyddogaethau sy'n cael eu dileu fel nad ydynt yn cael eu dyblygu). Mae hefyd yn trosglwyddo nifer o swyddogaethau sydd gan Weinidogion Cymru o ran trwyddedu yng nghyswllt bywyd gwyllt i'r Corff.

3.3 Mae'r Gorchymyn yn trosglwyddo mwyafrif swyddogaethau'r Comisiwn Coedwigaeth mewn perthynas â Chymru i'r Corff, gan gynnwys ei swyddogaethau rheoli coedwigaeth. Caiff pwerau'r Comisiwn Coedwigaeth i wneud is-ddeddfwriaeth mewn perthynas â Chymru a'i swyddogaethau mewn perthynas ag iechyd planhigion eu trosglwyddo i Weinidogion Cymru.

3.4 Yn gyffredinol, caiff swyddogaethau Asiantaeth yr Amgylchedd eu trosglwyddo i'r Corff yng nghyswllt Cymru (ac Asiantaeth yr Amgylchedd sy'n parhau i allu eu gweithredu mewn perthynas â Lloegr). Fodd bynnag, caiff rhai swyddogaethau sy'n ymwneud ag

adnoddau dŵr a rheoli'r perygl llifogydd eu gwahanu mewn dull gwahanol, e.e. daw swyddogaethau sy'n ymwneud â rheoleiddio a rheoli afonydd trawsffiniol at ddibenion y Gyfarwyddeb Fframwaith Dŵr yn rhai a gaiff eu gweithredu ar y cyd gan Asiantaeth yr Amgylchedd a'r Corff. Hefyd, ni chaiff Mordwyo Gwy ei gynnwys na nifer fach o swyddogaethau y bydd Asiantaeth yr Amgylchedd yn parhau i'w gweithredu ar lefel y DU.

3.4 Mae'r Gorchymyn hefyd yn darparu ar gyfer diddymu Cyngor Cefn Gwlad Cymru a Phwyllgor Ymgynghorol Gwarchod Amgylchedd Cymru a Phwyllgor Ymgynghorol Asiantaeth yr Amgylchedd yng nghyswllt Pysgodfeydd Rhanbarthol a Lleol.

3.5 Caiff y manylion ynghylch swyddogaethau'r corff eu cynnwys yn yr Atodlenni i'r Gorchymyn.

4. Camau i'r Pwyllgor eu cymryd

4.1 Bydd Cynghorwyr Cyfreithiol y Pwyllgor yn llunio adroddiad drafft yn unol â Rheol Sefydlog 21, ynghyd â chyngor manwl, i'r Pwyllgor eu hystyried.

Y Gwasanaethau Cyfreithiol
Tachwedd 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
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English Enquiry Line 0845 010 3300
Llinell Ymholiadau Cymraeg 0845 010 4400
Correspondence.John.Griffiths@wales.gsi.gov.uk

- 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,Par agraph 6 – Wildlife and Countryside (Sites of Special Scientific Interest, Appeals) (Wales) Regulations 2002

Best wishes,

John

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'.[1] 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).[2]

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'.[3] 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).[4] 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).

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[1] *Re Clergy Corporation Trusts* [1933] 1 Ch 267.
[2] See N. Doe, *The Law of the Church in Wales* (University of Wales Press, Cardiff, 2002), Ch. 1.
[3] *Mackonochie v Lord Penzance* (1881) 6 App Cas 424 at 446.
[4] *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'.

The1914 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'.[5] 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.[6]

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'.[7] Secondly, the Church in Wales is sometimes classified as a 'disestablished church',[8] but, technically, it was the Church of England that was disestablished in 1920, not the new institutional

[5] Book of Common Prayer 1984, 692.
[6] See N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1996) Ch. 1.
[7] *Re Barnes, Simpson v Barnes* [1930] 2 Ch 80.
[8] *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.[9] 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'.[10] 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 that the contract implied by their mutuality'.[11] 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',[12] namely, organised 'as a matter of agreement between the persons who are members of that body'.[13] 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).[14] Finally, the church is also a 'religious organisation' enjoying religious freedom under the European Convention on Human Rights.[15]

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;[16] secondary legislation;[17] the common law (judicial decisions); and European Union law.[18] 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

[9] *Re MacManaway* [1951] AC 161 at 165 (*arguendo*).
[10] *Powell v Representative Body of the Church in Wales* [1957] 1 All ER 400 at 403.
[11] *R v Dean and Chapter of St Paul's Cathedral and Church in Wales, ex parte Williamson* (1998) 5 EccLJ 129.
[12] *R v Provincial Court of the Church in Wales, ex parte Revd. Clifford Williams* (1999) 5 EccLJ 217.
[13] *Re Clergy Orphan Corporation Trusts* [1933] 1 Ch 267.
[14] 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.
[15] The Human Rights Act 1998 itself employs the category 'religious organisation' (s. 13).
[16] 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?
[17] E.g. Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994 (now the responsibility of the National Assembly for Wales).
[18] 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.[19] In the exercise of such functions the Assembly and Government cannot violate religious freedom.[20]

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),[21] as post- 1920 'enacted ecclesiastical law' prevails over pre-1920 'received ecclesiastical law';[22] 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;[23] judicial decisions of the ecclesiastical and secular court;[24] the Canons Ecclesiastical 1603/4; and pre-Reformation Roman canon law;[25] (3) extra-constitutional legislation;[26] 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.[27] 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'.[28]

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,

[19] Hill, Sandberg, and Doe, *Religion and Law in the United Kingdom* (Kluwer, 2011) par. 167-172.
[20] Government of Wales Act 1998, s. 107; Government of Wales Act 2006, ss. 81 and 94(6).
[21] 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'.
[22] N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 17.
[23] E.g. Sacrament Act 1547.
[24] E.g. *R v Dibdin* [1910] P 57: on admission to Holy Communion.
[25] 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.
[26] 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.
[27] 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).
[28] 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'.[29] 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'.[30] 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'.[31]

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).[32] 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'.[33] 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'.[34] 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.[35] 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'.[36] However, if a State court entertained a challenge to the domestic law of the church,[37] the court must have particular regard to the importance of the right of freedom of religion.[38] Indeed, it would be unlawful for

[29] 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'.
[30] 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'.
[31] *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'.
[32] 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.
[33] 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'.
[34] *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323 at 329.
[35] See e.g. *Buckley v Cahal Daly* [1990] NIJB 8; *Forbes v Eden* (1867) LR 1 Sc & Div 568.
[36] 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'.
[37] *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*.
[38] 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.[39]

The Church in Wales may establish its own ecclesiastical courts, but these are forbidden to exercise coercive jurisdiction.[40] Submission to them is voluntary, and compliance with their decisions is effected by means of declarations made by prescribed classes.[41] 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'.[42] It has been held that in disciplinary cases the High Court lacks jurisdiction over the consensual jurisdiction of the church courts.[43]

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.[44] 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.[45]

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.

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[39] Human Rights Act 1998, s. 6.
[40] WCA 1914, s.3(3).
[41] 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'.
[42] Const. I.5: no definition of 'the English Courts' is given.
[43] *R v Provincial Court of the Church in Wales, ex p Reverend Clifford Williams* (1998) CO/2880/98.
[44] 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.
[45] 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'.[46] 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'),[47] as does the current general marriage law of the State.[48] The right to marry in the parish church has been recognised by Parliament,[49] the secular courts,[50] and pre-1920 decisions of the ecclesiastical courts.[51] The origin of the right is difficult to ascertain but the right may be conceived as a powerful legal fiction.[52] The Marriage (Wales) Act 2010 extends the right to marry in church to those with a 'qualifying connection' to the parish.[53] The duty to solemnise also extends to the marriages of un-baptised persons.[54]

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,[55] provided all civil and ecclesiastical conditions are satisfied.[56] There is no right to a licence: the grant is discretionary.[57] 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.[58] The archbishop's power is regulated by civil law,[59] and by English ecclesiastical and canon law.

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[46] 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').
[47] 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.
[48] 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'.
[49] 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.
[50] *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'.
[51] *Argar v Holdsworth* (1758) 2 Lee 515.
[52] See N. Doe, *The Legal Framework of the Church of England* (1996) 357-362.
[53] 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.
[54] N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 257.
[55] 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).
[56] BCP (1984) 737, 2; see also Marriage Act 1949, s. 16(4). For fees, see RODC, Sched. of Fees.
[57] *Prince Capua v Count de Ludolf* (1836) 30 LJPM & A 71n.
[58] BCP (1984) 737, 2.
[59] 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'.[60] 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).[61] 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.[62]

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.[63] Also, no minister or organization will be compelled to solemnize, consent to, be present at, or otherwise participate in a same-sex marriage.[64] 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,[65] and the Church in Wales,[66] in view of their common law duty to solemnize marriages.[67] The effect of this is to lift 'the common law duty' with respect to marriage.[68] 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,[69] and by ministerial order (of the Lord Chancellor) for the Church

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[60] Matrimonial Causes Act 1965, s. 8(2).

[61] *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'.

[62] 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.

[63] Marriage (Same Sex Couples) Bill cl. 4 and 5.

[64] Marriage (Same Sex Couples) Bill cl. 2; the so-called 'quadruple lock': EMTGR, par. 4.19.

[65] 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.

[66] 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'.

[67] 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'.

[68] 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'.

[69] Church of England, Marriage (Same Sex Couples) Commons Second Reading Briefing, Q&A.

in Wales without the need for a further Act of Parliament.[70] The Lord Chancellor does not have a duty to agree to the request from the Church in Wales.[71] 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.[72]

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.[73] 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.[74]

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

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[70] 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"'.

[71] 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'.

[72] 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'.

[73] 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'.

[74] 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.[75] The right to burial in the parish burial ground,[76] if not closed by Order in Council,[77] is understood as a vestige of establishment.[78] 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.[79] 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.[80] Fees for interment are legally prescribed.[81]

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.[82] The Governing Body may legislate on church property.[83] Moreover, the domestic law of the church in relation to any property,[84] held on behalf of the church or its members, is enforceable in the courts of the State.[85] 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.[86] 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,[87] 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.[88] The Representative Body is also subject to the jurisdiction of State courts.[89] The

[75] 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.
[76] See N. Doe, *The Legal Framework of the Church of England* (Oxford, 1996) 386ff.
[77] *Re Kerr* [1894] P 284.
[78] 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.
[79] Welsh Church (Burial Grounds) Act 1945, s. 4.
[80] Welsh Church (Burial Grounds) Act 1945, s. 4(2): they must be approved by the National Assembly.
[81] BGR, r. 7; see Schedule 2: fees are payable for e.g. services rendered by a cleric.
[82] WCA 1914, s. 13(1).
[83] CW Const. II.
[84] WCA 1914, s. 38(1): '"property" includes all property, real and personal'.
[85] WCA 1914, s. 3(2): this includes pre-1920 ecclesiastical law.
[86] WCA 1914, s. 13.
[87] For WCA 1914, ss. 4 and 8.
[88] Const. III.1.
[89] 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.[90]

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.[91] The ecclesiastical exemption applies to buildings of the Church in Wales vested in the Representative Body,[92] and its continued enjoyment depends on the church having in place a satisfactory internal system of control.[93] This is achieved by the faculty system administered by each Diocesan Court.[94] 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.[95]

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,[96] are appointed after consultation with CADW;[97] an archaeological consultant is appointed to a cathedral after consulting CADW;[98] 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.[99]

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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.

[90] CYR, rr.1-2.

[91] 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.

[92] 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.

[93] 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).

[94] N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 91-104.

[95] N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 117, n. 239.

[96] CACCR, r. 2: the Commission is not subject to the direction or control of the RB.

[97] 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.

[98] CACCR, r. 40.

[99] 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[1]

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.

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[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 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.

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/019/13

David Melding AC
Cadeirydd - Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Tŷ Hywel
Bae Caerdydd
Caerdydd
CF99 1NA

25 Chwefror 2013

Annwyl David,

CLA200 – Gorchymyn Cynlluniau Iaith Gymraeg (Cyrff Cyhoeddus) 2012 a gweithredu Mesur y Gymraeg (Cymru) 2011

Diolch am eich llythyr dyddiedig 24 Ionawr ar ran y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol ynglŷn â'r amserlen ar gyfer creu safonau mewn perthynas â'r Gymraeg.

Heddiw, rwyf wedi cyflwyno Datganiad Ysgrifenedig i Aelodau'r Cynulliad sy'n esbonio fy mhenderfyniad ynglŷn â chynigion Comisiynydd y Gymraeg ynghylch safonau mewn perthynas â'r Gymraeg. Mae'r Datganiad yn esbonio fy mod wedi hysbysu Comisiynydd y Gymraeg nad wyf yn gallu cefnogi'r safonau na'r fethodoleg a gyflwynwyd ganddi yn ei hadroddiad. Rwyf wedi dod i'r penderfyniad hwn am nifer o resymau, fel yr wyf wedi esbonio yn y Datganiad Ysgrifenedig ac yn fy llythyr at y Comisiynydd, a gyhoeddwyd gyda'r Datganiad Ysgrifenedig.

Rwy'n bwriadu datblygu cyfres o safonau, yn seiliedig ar ymgynghoriad Comisiynydd y Gymraeg, a fydd yn bodloni'r nodau polisi a adlewyrchir ym Mesur y Gymraeg (Cymru) 2011 a'r ymrwymiadau a wnaed i Gynulliad Cenedlaethol Cymru, er mwyn cyflawni hawliau ieithyddol ar gyfer dinasyddion. Byddaf yn cadw mewn cysylltiad agos â'r Comisiynydd wrth wneud hyn.

Mae'r camau sydd angen eu cymryd er mwyn datblygu'r safonau yn cynnwys:

- datblygu cyfres ddiwygiedig o safonau ar gyfer ymgynghori;
- cynnal ymgynghoriad cynhwysfawr gyda'r cyhoedd a'r sefydliadau hynny yr effeithir arnynt gan y safonau;
- ar ôl ystyried canlyniadau'r ymgynghoriad, paratoi rheoliadau ar gyfer gwneud y safonau, ynghyd â rheoliadau fydd yn gwneud y safonau hynny'n benodol gymwys i bersonau, i'w cymeradwyo gan y Cynulliad;
- paratoi asesiad effaith rheoleiddiol i'w gyflwyno i'r Cynulliad ynghyd â'r rheoliadau.

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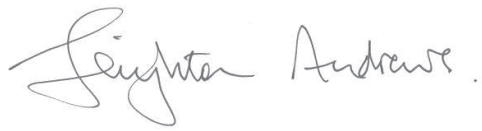
Rwy'n amcangyfrif y bydd modd gwneud y rheoliadau i wneud y safonau, ynghyd â'r rheoliadau i wneud y safonau'n benodol gymwys i bersonau, erbyn diwedd 2014.

Yn gywir,



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

Mae cyfyngiadau ar y ddogfen hon

Mae cyfyngiadau ar y ddogfen hon