Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
The Constitutional and Legislative Affairs Committee

Dydd Llun, 11 Mawrth 2013
Monday, 11 March 2013

Cynnwys
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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd.

The proceedings are reported in the language in which they were spoken in the committee. In addition, a transcription of the simultaneous interpretation is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
Vaughan Gething	Llafur (yn dirprwyo ar ran Julie James) Labour (substitute for Julie James)
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
Eluned Parrott	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Simon Thomas	Plaid Cymru The Party of Wales

Eraill yn bresennol
Others in attendance

Yr Athro/Professor Norman Doe	Ysgol y Gyfraith Caerdydd, Prifysgol Caerdydd Cardiff Law School, Cardiff University
Yr Athro/Professor Thomas Glyn Watkin	Ysgol y Gyfraith Bangor, Prifysgol Bangor Bangor Law School, Bangor University

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Owain Roberts	Y Gwasanaeth Ymchwil Research Service
Francesca Rowley	Dirprwy Glerc Deputy Clerk
Lisa Salkeld	Cynghorydd Cyfrieithiol Legal Adviser
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 2.40 p.m.
The meeting began at 2.40 p.m.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datganiadau o Fuddiant
Introduction, Apologies, Substitutions and Declarations of Interest

[1] **David Melding:** Good afternoon, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. We have received apologies from Julie James and Suzy

Davies, and we are expecting Vaughan Gething to substitute for Julie. I will make the usual housekeeping announcements. We do not expect a routine fire drill, so, if we hear the bell, please follow the instructions of the ushers, who will help us to leave safely. Please switch off all electronic equipment, as, even on silent, they will interfere with our broadcasting equipment. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there is a translation available on channel 1, and channel 0 will amplify our proceedings.

2.41 p.m.

Offerynnau nad ydynt yn Cynnwys Unrhyw Faterion i'w Codi o dan Reolau Sefydlog Rhif 21.2 neu 21.3
Instruments that Raise no Reporting Issues under Standing Order Nos. 21.2 or 21.3

[2] **David Melding:** I understand that, on at least one, Gwyn wants to give us a short briefing on why there are two regulations instead of one. Is there anything else on item 2 before I ask Gwyn to clarify the situation on the Coleg Cambria further education corporation regulations? I see that there is not.

[3] **Mr Griffiths:** Cyfeiriaf yn fyr iawn at ddau offeryn—CLA218 a CLA219. Fel y gwelwch, mae rheoliadau yn ymwneud â llywodraethu a Gorchymyn yn ymwneud â chorffori. Hoffwn esbonio i'r pwyllgor pam mae dau offeryn. Y rheswm yn bennaf yw mai dyna sydd yn y ddeddfwriaeth sy'n caniatáu gwneud yr offerynnau hyn, ond y rheswm y tu ôl i hynny yw'r traddodiad mai Gorchymyn sy'n briodol pan fo rhywbeth yn digwydd unwaith a dyna ddiwedd ar y peth, fel y corffori, tra bo'r rheoliadau yn ymwneud â phroses sydd yn barhaol, fel y modd y mae'r coleg yn mynd i gael ei lywodraethu yn ystod y blynyddoedd sydd i ddod. Dyna'r rhesymeg y tu ôl i'r peth. A yw'n rhesymol bod deddfwriaeth yn mynnu dau offeryn statudol lle gellid cynnwys y cwbl o fewn un? Mae hwnnw'n gwestiwn arall ac efallai y gallai'r pwyllgor ystyried hynny rywbryd yn y dyfodol.

Mr Griffiths: I will refer very briefly to two instruments—CLA218 and CLA219. As you will see, there are regulations relating to government and an Order relating to incorporation. I want to explain to the committee why there are two instruments. The main reason is that that is what is contained within the permitting legislation for these instruments, but the reason behind that is that tradition dictates that an Order is appropriate where something is a one-off, such as incorporation, while regulations relate to a process that is ongoing, such as the governance of the college over the coming years. That is the rationale behind it. Is it rational that legislation would require two statutory instruments when one would do? That is another question that the committee might want to consider at some point in the future.

[4] **David Melding:** Okay. Are there any further points? If there is nothing else under this item, we will move on.

2.43 p.m.

Offerynnau sy'n Cynnwys Materion i Gyflwyno Adroddiad arnynt i'r Cynulliad o dan Reolau Sefydlog Rhif 21.2 neu 21.3
Instruments that Raise Issues to be Reported to the Assembly under Standing Order Nos. 21.2 or 21.3

[5] **David Melding:** There is one item here, namely on the natural resources body for Wales. I think that this is the second Order to come into force. Before I ask whether Members

have any issues, I know that Lisa wants to talk about the question of intra vires and whether that has now been resolved, as that is indicated in the draft report.

[6] **Ms Salkeld:** This is the revised draft that the Minister has laid. There are several reporting points, which are mainly typographical errors that would be suitable to be corrected on publication, but the main reporting point is that the Government is awaiting the consent of the Secretary of State and of Ministers before the Order can proceed. It has not been obtained as yet, although I understand that discussions are still ongoing. It would need to be in place before the Assembly votes on it in Plenary. There is also a merits point, which is that no impact assessment has been carried out within the explanatory memorandum, but the Government explains its reasons for this on page 6.

[7] **David Melding:** Are there any other points to clarify? Are we content with the report? I see that we are.

[8] We now have a choice: we can either adjourn for 15 minutes before Professor Doe joins us, or we can go into private session and start on the local government report. I am in your hands. Shall we go into private session and do some of that work? We will not necessarily finish it, because we will want to conduct the evidence session in public.

2.45 p.m.

Cynnig o dan Reol Sefydlog Rhif 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order No. 17.42 to Resolve to Exclude the Public from the Meeting

[9] **David Melding:** I move that

the committee resolves to exclude the public for 15 minutes in accordance with Standing Order No. 17.42(vi).

[10] I see that there are no objections.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 2.45 p.m.
The public part of the meeting ended at 2.45 p.m.

Ailymgynullodd y pwyllgor yn gyhoeddus am 3.02 p.m.
The committee reconvened in public at 3.02 p.m.

Tystiolaeth Ynghylch yr Ymchwiliad i Ddeddfu a'r Eglwys yng Nghymru
Evidence in Relation to the Inquiry on Law Making and the Church in Wales

[11] **David Melding:** This meeting of the Constitutional and Legislative Affairs Committee is now back in public session. I am delighted to welcome Professor Norman Doe from Cardiff Law School to this afternoon's meeting. We are grateful to you, Professor, for giving of your time,

[12] **Professor Doe:** It is my pleasure.

[13] **David Melding:** We are also grateful for your helpful note, which I know everyone

will have read. I will, therefore, not ask some background questions about the Welsh Church Act 1914 necessarily, although issues of deeper historical interest may come up as we tease out some of the questions. These proceedings will be conducted in Welsh and English. When Welsh is spoken, you may need to use the headphones, if you are not a Welsh speaker. The translation is on channel 1. Should you need to amplify proceedings, that is on channel 0.

[14] **Professor Doe:** Do you suggest that I put them on now, in readiness?

[15] **David Melding:** What I usually do—because I need the translation myself—is that, when a Member speaks Welsh, I put them on then. I believe that you will find that our translators will give you every opportunity to get ready.

[16] I will start with the first question. In your paper, you use this interesting phrase, 'vestiges of establishment'. I am sure that all of us who have a keen interest in Welsh politics and history see that the great church disestablishment, and the whole sort of controversy that it caused for a generation, has been a fixed thing, and that it was then achieved. However, there are vestiges there, particularly around the duty to solemnise marriages of parishioners. Therefore, could you give us an indication of why that remains relevant, 90 years later?

[17] **Professor Doe:** Why do the vestiges remain relevant? It is because they have been imposed on the church by the state. The church still labours under them, and the state has not removed them. Why is that relevant? You would have to consult the intent of the makers of the legislation that arranged that. As you say, that is an historical inquiry, and it is difficult to unravel in many ways. However, the vestiges issue is the exception to the rule. Incidentally, I believe that that phrase was first used by the great Thomas Watkin.

[18] **David Melding:** He is our next witness this morning.

[19] **Professor Doe:** Is he really? We are both Porth county grammar school boys, you see, and I think that we have sewn up this little niche area. [*Laughter*.]

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

[21] **David Melding:** It may be a stated position, but it hardly causes the church to be overanxious in a functional sense, does it?

[22] **Professor Doe:** As I say, in the work that I have done with the church over the years, the church has not analysed this stuff theologically, but it is very much a kind of unsophisticated assumption that these duties are good, because that is what the church is there for. Other churches that do not have any features of establishment share those duties; for example, under the code of canon law, Catholic priests have a ministry to everyone, as much as clergy of the Church in Wales. It ties in nicely with the pastoral functions that the Church in Wales seems to have for itself, but by and large, they are impositions of the state. However, when the shop that is the state provides this thing, the church itself uses it as a commodity and retrospectively theologises about it and justifies it on the basis of a ministry to all. Does that make sense?

[23] **David Melding:** It does. It seems to have been a mutually convenient way of dealing with what was a sort of quasi-disestablishment.

[24] **Professor Doe:** It is full disestablishment.

[25] **David Melding:** So, it can still be full disestablishment even if there are vestiges—is that so?

[26] **Professor Doe:** Yes; it is.

[27] **Eluned Parrott:** Professor Doe, in your paper, you talk about the domestic law of the Church in Wales as being enforceable in the civil courts. However, you also say that it is sometimes enforceable as a species of public law when approved by the Assembly. Can you give us an idea of the circumstances in which the domestic law of the Church in Wales might have been approved by the National Assembly?

[28] **Professor Doe:** I think that the simple answer to that is that in the areas that are within the jurisdiction of the Assembly—either its legislative or administrative competence—the Church in Wales will be bound by those exercises of power by the Assembly in those areas, insofar as they touch on the activities of the Church in Wales directly or indirectly. To complicate things, if, as has happened, the Westminster Parliament creates a piece of law saying, for instance, that schools must provide a daily act of collective worship and must provide religious education—matters that are of direct interest to the Church in Wales—I presume that the Assembly, although I would not be able to quote chapter and verse, is stuck with that legal obligation to provide religious education or a daily act of collective worship. However, the Assembly has a jurisdiction and an authority to implement those duties arising under Westminster statute, and I presume that it could create rules—it probably has—about the administration of those legal duties flowing from UK legislation, or English and Welsh legislation. There are, therefore, areas in which the Assembly has competence in which the church, indirectly, has an interest, such as provision of religious education. The Assembly, while not being able to change the fundamental duty on the provision of religious education, will have the competence to deal with its administration.

[29] A more direct example would be church schools. The Assembly has competence over those. They will be governed by instruments that may contain elements of the polity of the Church in Wales and, insofar as they are tacitly consented to by the Assembly or the Welsh Government to function under the terms of the rules of the Assembly or Government, they will be indirectly operative on the basis of that element of public law.

[30] **Eluned Parrott:** The relationship is an indirect one and not a direct one; there is not a circumstance by which the National Assembly could impose a new duty on what is a disestablished church.

[31] **Professor Doe:** That is a very good question. It could. If a field that has relevance to any religious organisation, let alone the Church in Wales, is within the competence of the Assembly, the Assembly has the power to make rules about it. For example, the passing of the ecclesiastical exemption and the heritage material from Whitehall to Cardiff is just that: the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, which is a thing of the Whitehall system, passed under the Government of Wales Act, to the Assembly. The Assembly has authority over the administration of that thing in Wales today. It has so happened that the Assembly has allowed that 1994 Order to continue as part of its polity, and so, the Church in Wales, the Methodist Church, the Roman Catholic Church and the Baptist Church, because they run buildings that are part of the Welsh heritage, are subject to this Order that has been adopted by the Assembly. If the Church in Wales wants to do some work

on a medieval church building, this Order exempts it from the system of listed building control and it has its own system, or faculty jurisdiction, to process those sorts of cases. The Assembly is responsible for that Order, which has been adopted from 1984, and the Church in Wales, in order to administer its faculty jurisdiction by, for example, approving petitions for permission to do work on churches, must satisfy the terms of the adopted 1994 Order.

[32] In England, the 1994 Order has been changed. It has been repealed and replaced with another Order of 2010—the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010. The 1994 Order, for example, fetters the Church, because it has to have in place a system that deals with objects in a church that are not fixed to the fabric of the church. The Church of England did not like that, so the 2010 Order has altered that rule so that the Church of England is now freer and the ecclesiastical exemption applies only in relation to things that are fixed to the church. The Assembly would be competent to update the 1994 Order, if it wished, along the same lines as the 2010 Order for England. If the Church in Wales was unhappy with the 1994 Order and wanted it changed along the lines of the 2010 Order, the Assembly would be the body to change that Order. That would result in an instrument that would give greater freedom to the Church in Wales, such as that which the Church of England enjoys under the 2010 Order, and would alter the more restrictive position of the Church in Wales under the 1994 Order. That is an example of a potential piece of Assembly legislation that would apply directly to the Church in Wales.

[33] **Eluned Parrott:** Thank you. That is fascinating. I have never considered that as a possibility.

[34] **Professor Doe:** However, that would not be an example of a vestige of establishment, because the Methodist Church, the Catholic Church and the Baptist Church, which are part of the heritage, are subject to that regime. So, the Church in Wales is in no different position to any other religious organisation. That is not a feature of establishment.

[35] **Eluned Parrott:** It is a function of their being the owner of the property.

[36] **Professor Doe:** Yes, and custodians of valuable heritage sites.

[37] **Eluned Parrott:** Thank you.

[38] **David Melding:** The state could make particular provision for other organisations, potentially, if it so wished.

[39] **Professor Doe:** Absolutely.

[40] **Simon Thomas:** The National Trust, for example.

[41] **Eluned Parrott:** Looking at ecclesiastical courts, I think that your paper says that they are forbidden to exercise coercive jurisdiction. Can you explain to us what the meaning of ‘coercive jurisdiction’ is?

3.15 p.m.

[42] **Professor Doe:** If I was disrespectful in this committee, you would have a coercive jurisdiction and would be able to exercise some sort of penalty on me for contempt of the committee’s function. It is just that. It is the power derived from an instrument of public law to force somebody to do something, whereas, before 1920, the courts of the Church of England enjoyed that coercive jurisdiction: they could compel people to pay money—**f**or example, with the faculties system, if any member of the public failed to discharge a duty that a church court had lawfully imposed on that individual, the church could impose a monetary

sanction. That continues in the Church of England today. The courts of the church, in property matters, for instance, exercise a coercive jurisdiction. If people fail to comply with a restoration order, for example—if they have taken something out of a church and they have failed to comply with the order—the court can force them to comply with it. So, that provision in the Welsh Church Act 1914 that says that the Church in Wales can continue to have a system of courts, but that it is a system that cannot exercise coercive jurisdiction, is just that: it does not have the backing of the public law to support any orders that it makes. However, the courts of the state have said, 'Well, the courts of the Church in Wales are merely voluntary entities, because the Church in Wales itself is a voluntary association, and, therefore, regarding any jurisdiction that they exercise over people, the people over whom they exercise that jurisdiction must submit to that jurisdiction voluntarily'. So, typically, the Church in Wales courts exercise jurisdiction over members of the Church in Wales who have voluntarily submitted to the constitution of the Church in Wales, and, therefore, submit voluntarily to its jurisdiction. The substantive difference between the two, however, is that, in law, it is, technically, not a coercive jurisdiction, but a consensual voluntary one. However, in substance, if I have signed up to the Church in Wales's constitution as a member, I am subject to its jurisdiction. It can do things against my will. In reality, it exercises a private law coercive jurisdiction, but not a public law coercive jurisdiction.

[43] **Simon Thomas:** As members of political parties, we do much the same. Therefore, we are very aware of how this might work. I wanted to be clear about one thing with regard to coercive jurisdiction. Examples come to mind in England of individuals buying property and, as a result, having a duty to provide funds for the upkeep of a parish church. That has been upheld in courts in England. With the disestablishment of the Church of England in Wales, that has come to an end in Wales. To be totally clear, that is an example of the sort of thing that the Church in Wales can no longer do as a result of disestablishment. Is that right?

[44] **Professor Doe:** What you are talking about is the chancel repair liability, and that is a vestige of the pre-reformation establishment, because the Catholic Church was, effectively, established then. In the case of the Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank and another, the House of Lords decided that it is permissible for the Church of England to enjoy the chancel repair liability and pursue that liability in the courts. It is not a tax. It is not in breach of the convention rights of peaceful enjoyment of property. That is a legitimate exercise of its common law rights under the common law.

[45] **Simon Thomas:** Is there a vestige of that left in Wales?

[46] **Professor Doe:** That is a very good question.

[47] **David Melding:** Is there a very good answer?

[48] **Professor Doe:** There is. For parishes that are territorially in the Church of England, but nevertheless come within the jurisdiction of the National Assembly for Wales, that may still be an issue. The Church in Wales has created rules on chancel repair liability. However, for practical purposes, they have gone. As you rightly say, they would be a good example of the non-existence of a coercive jurisdiction in that field.

[49] **David Melding:** I did not quite understand what you said previously. The Church in Wales covers the territory of Wales that is also the territory of the National Assembly.

[50] **Professor Doe:** There are several Church in Wales parishes in England.

[51] **David Melding:** I see.

[52] **Professor Doe:** Life is never easy, is it? At disestablishment, they were given, under the statutory scheme, an option to go for Wales or to go for England, and some went for Wales and some went for England.

[53] **David Melding:** There are bits of Hereford in Wales and bits of Monmouth in England.

[54] **Professor Doe:** I think that the Aston Cantlow case was a Herefordshire case, was it not? However, it was a Church of England parish in England.

[55] **David Melding:** This is getting medieval.

[56] **Eluned Parrott:** It is a little. Going back to the historical aspect, you talked about the difficulty of tracing the origin of the perceived right to marry in a parish church. You describe it as a powerful legal fiction. Can you give us an idea as to why you believe that to be the case?

[57] **Professor Doe:** That is the minority view, but it has made an appearance in various documents. I proposed that view in 1996 in a book on the Church of England produced by Oxford, and it has since been taken up by some people—one in particular has published about it. To round off, however, before I explain it, the view that it is 'merely' a fiction has been rejected by the legal advisory commission of the Church of England; it accepts the idea that it 'may' be a fiction, but, for practical purposes, it is treated as if it were law.

[58] On its origin, if you read the legal commentaries and official documents produced by the Church of England and the Church in Wales about the right to marry or, to be provocative, the so-called right to marry, you will see that they say that it originates in Lord Hardwicke's Marriage Act 1753. I spent six months of my life, sadly, looking at that, because of the marital rules of the Church in Wales, which I had to advise on. If you read that statute, you will see that there is no such right in it, although everyone traces it back to that statute. What you will actually find in that statute is the rule that anyone who is resident in a parish, except Quakers and Jews, if they want to get married, has to get married in the parish church. The politics behind that was that they were trying to eradicate clandestine marriages. So, they required any parishioner who wished to get married after the publication of banns to get married in the parish church.

[59] To explain the position of the commentators, the next thing that happened was the Argar v. Holdsworth case in the provincial court of Canterbury in 1758. All the commentaries refer to that case and say, 'The right to marry in the parish church', and cite, without any explanation, Argar v. Holdsworth. However, if you read Argar v. Holdsworth, you will see that it is not about the right to get married in the parish church. The entire case, determined by the Arches Court of Canterbury, was about marriage licences. It was not about marriage after banns. There is nothing in that case that explicitly says that every parishioner has the right to get married in the parish church.

[60] However, in the nineteenth century—in cases from 1841 and 1850, by blind reference to Argar v. Holdsworth—the courts of the state again said that there was a right to marry in the parish church. It also resurfaced in 1910 in another case, when the House of Lords said that there was a common law right for every parishioner to marry in the parish church. It cited, without any critical analysis, the two earlier events of the Argar case and the 1753 statute. The duty to be married in the parish church, under the 1753 statute, was lifted in 1836 with the introduction of civil registered marriages. So, everyone who lived in a parish was no longer under a statutory duty to be married in the parish church; they had a right to go to the civil registrar.

[61] However, even Parliament assumed that there was this right. For example, section 8 of the Matrimonial Causes Act 1965 says that no clergyman of the Church of England or the Church in Wales shall be compelled to solemnise the marriage of a divorcee, which assumes the existence of this right. So, to cut a long story short, you will search in vain for an explicit and clear statement of the beginning of this right. You will search in vain to find somebody or an institution, either Parliament or the courts, responsible for creating this right. Its existence has mainly been assumed in nineteenth and twentieth century case law and it is now understood as a right of common law. Parliament has just understood it as such in its explanatory notes for the Marriage (Same Sex Couples) Bill.

[62] I classify it as a fiction because the origin of this right cannot be identified. The cases that people refer to as the authority for the existence of this right have never been looked at critically. However, the courts and Parliament have assumed its existence. So, the orthodox learning today is that there is such a right. However, if you asked somebody to point to it, they could not.

[63] **David Melding:** We have now reached the issue of most interest for us, probably, which is the Marriage (Same Sex Couples) Bill. Vaughan will take us through this tricky territory.

[64] **Vaughan Gething:** Good afternoon, Professor Doe. I note that, in your paper, you point out the current position. We have moved from an initial starting point, where the Church of England and the Church in Wales were both banned from celebrating same-sex marriage, to now, where there is a procedure by which the Church in Wales could do so. This procedure involves the Lord Chancellor. A request has to be made by the Church in Wales for the Lord Chancellor to introduce an Order, which Parliament then has to endorse, to allow the Church in Wales to celebrate same-sex marriage. I am interested in why you think the Lord Chancellor has been considered the appropriate official and, equally, whether you think that he is not the appropriate official to undertake this form of duty.

[65] **Professor Doe:** I am very interested in your use of ‘ban’ there. I cannot see anything in the Bill or the explanatory notes that bans the Church in Wales to—

[66] **Vaughan Gething:** There was initially. The proposal was that there would a ban, but, when it came to the published Bill, the Government had moved its position.

[67] **Professor Doe:** People have talked about it as a ban, but there never was a ban. All we have is the common law duty to solemnise marriages.

[68] **Vaughan Gething:** I am talking about the statement made by the Secretary of State. The initial statement made by the Secretary of State was that the Church of England and the Church in Wales would not be able to celebrate same-sex marriage. Now, with the published Bill, we are in this position where, at present, that is not the position, but, if the Church in Wales wished to so do, it could make a request to the Lord Chancellor, and, if he or she is so minded, they can bring forward an Order that Parliament will have to vote on.

[69] **David Melding:** We have it on paper now.

[70] **Vaughan Gething:** Yes, it is an ability to opt in.

[71] **Professor Doe:** I am sorry to be a pain, but I would grumble about this ban thing. I do not think that that was the concept being used. There is a common law duty—

[72] **David Melding:** We can agree that there is now an opt-in and perhaps we should focus on that and how that would operate.

[73] **Professor Doe:** Right.

[74] **Vaughan Gething:** Do you think that the Lord Chancellor is the appropriate official to deal with the opt-in process? Could you look at the process first and then we will go back to more substantive issues about whether we should have it in the first place?

[75] **Professor Doe:** You have a statutory regime that says that there is a common law duty upon the Church in Wales to solemnise the marriage of people. You have the Bill that relieves, because the Bill defines marriage in the way that it does, Church in Wales clergy from that duty. So, that is all it does. We have models of that in many pieces of legislation. I have no view as to the appropriate authority to trigger this thing off by issuing an Order, the effect of which I am not entirely sure about. I presume that would reinstate the duty to marry same-sex couples. You called it an opt-in situation, and, currently, it is the Lord Chancellor who has that function. It could equally be the Assembly or the Welsh Government, and some might consider that to be a better thing to happen, given the location of the Church in Wales. If the Church in Wales is subject to the consent of the Assembly in relation to the creation of its burial rules, ecclesiastical exemption and the provision of spiritual care in hospitals, for example, and you regulate that, then that may very well be sensible. Any Minister could have been authorised to do it, but, I presume that, as the Minister for Justice—

[76] **Vaughan Gething:** Part of the process, though, is if a request is made—we presuppose that—the wording of the Bill is that:

[77] '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.'

[78] **Professor Doe:** There is something of a dissonance between the explanatory notes and the provisions of the Bill. The explanatory notes say that the Church in Wales can choose, but, patently, it cannot.

[79] **Vaughan Gething:** Do you have a view on the fact that the Lord Chancellor is under no duty to introduce the Order if a request is made?

[80] **Professor Doe:** The first point is that I do not think that that has entered the public debate as yet.

[81] **Vaughan Gething:** No, perhaps not until now, but I am sure that all the keen watchers of this committee will now be commenting on it.

[82] **Professor Doe:** That is very good. That raises issues about religious freedom. On the other hand, it makes sense that Westminster/Whitehall should address the Bill's lifting of this common law duty, if it is truly a duty of the common law, because then, that, I presume, would be a matter properly in the hands of the Minister for Justice, the Lord Chancellor. However, for me, the critical thing is that the Church in Wales is still not free to regulate, on the face of it, a matter of direct concern to its pastoral ministry to everyone in Wales.

3.30 p.m.

[83] **Vaughan Gething:** I want to be clear about your view on the process. I know that you said that you do not have a view on the appropriate Minister and you are very clear that, actually, as the Bill is drafted, there is no duty for the Lord Chancellor to introduce such an Order.

[84] **Professor Doe:** That is very important, yes.

[85] **Vaughan Gething:** I presuppose, then, that you do not think that it is an appropriate way for the Church in Wales to introduce same-sex marriage—by the route favoured. So, the Church in Wales has to resolve first that the wish is to celebrate same-sex marriage, or permit a celebration of same-sex marriage, on whatever basis that might be. You do not consider it appropriate to then have this additional hurdle for a disestablished church to have to go to the state to agree that it may do so. Is that a fair summary of where you are coming from? If not, then please say so; I am sure that you will.

[86] **Professor Doe:** Well, yes and no. Insofar as the duty to solemnise marriages is a common law duty, the state has an interest. To lift that duty, the church—according to the constitutional law of the state—is not free to do so unilaterally. So, to have a mechanism whereby you have somebody in the state—a state institution, the Lord Chancellor, the Assembly or the Welsh Government—with competence to lift that duty is important. With regard to the Order by which that duty would be reinstated, if the Church in Wales says, 'Right, we are going to allow the solemnisation of same-sex marriages in this church', the church, in resolving that, could create a rule as a caveat to that resolution that it is a matter of conscience for each cleric in the Church in Wales, whether or not that cleric, as a matter of their discretion, wishes to solemnise the marriage of a same-sex couple. The Church in Wales could do that and I would be very surprised, actually, if the Church in Wales ever introduced this thing, if it did not do that, because that is what it has done with the remarriage of divorcees, for example, and that is what applies with gender reassignment and there are other examples.

[87] Therefore, if the Church in Wales introduced this thing—I have no idea whether it will—there will be controversy, and the controversy will be such as will probably result in a conscience clause for Welsh clergy. So the Church in Wales has this little scheme, it goes to the Lord Chancellor and says, 'This is our scheme; we will marry these people subject to protecting the conscience of individuals and this is our juridical arrangement. Please put that in an Order'. The Lord Chancellor looks at it and he or she has to alter the common law in order to give effect to this, possibly—the Lord Chancellor has to draft an Order that will have the effect of meddling with the common law in some way, and the chancellor does not like it, so he or she refuses: end of Welsh church's initiative.

[88] **Vaughan Gething:** Does this really affect the common law? The common law, at present, does not recognise same-sex marriage; it does not. So, is this not—

[89] **Professor Doe:** The moment that a state court says that the statute does, it will.

[90] **Vaughan Gething:** Is this not really a state construct that we are talking about? I would be interested in your view just on this point. Regardless of the 'ifs' and 'buts' of what the Church in Wales might request, do you have a view on whether or not it should just be up to the Church in Wales to decide whether it wishes to celebrate same-sex marriage or not?

[91] **Professor Doe:** That depends on whether it wishes to celebrate same-sex marriage.

[92] **Vaughan Gething:** If it decided that it did, with whatever caveat, do you have a view on whether it should be subject to an additional process whereby the Lord Chancellor and/or Members of Parliament might decide that actually, they disagree and the church may not do so.

[93] **Professor Doe:** Given that the right to marry in a parish church is a feature of the common law, as currently understood, that is a matter for the state. The question is: should marriage within the Church in Wales be a matter for the state? That is the question.

[94] **Vaughan Gething:** Do you have a view?

[95] **Professor Doe:** Well, I will ask another question: should baptism be a matter for the Church in Wales or should that be a matter for the state? Should the burial of the dead be a matter for the church? Should admission to holy communion be a matter for the church or the state? You could pick any of these areas. It so happens that, historically, the Church of England in Wales, prior to disestablishment and subsequently, has wanted this ministry to individuals in parishes around marriage to be part of its national function. Now, the Church in Wales has, in its acquiescence in this state of affairs—it has never petitioned for a statute to alter this state of affairs. So, on the basis of that tacit acquiescence, you must say, 'The current thinking within the Church in Wales is that it wants to administer marriages to anyone'. If it then says, 'Well, we define marriage now as going beyond man and woman to same-sex couples', that movement, that initiative, would have to be seen in the light of this tacit acquiescence in the system. The Methodists and the Baptists have gone to Parliament and said, 'Right; create statutes for us to allow us to live our doctrinal lives as we want'. Parliament has done that; it has passed the Methodist Church Act 1976, the congregational and Baptist churches Act, the United Reformed Church Act 2000. Amendment of these is in the keeping of Parliament. The reality of life is that links are never severed because the state always has an interest. When the state creates statutes on specific churches, those churches are always entangled into the fabric of the state. There is no difference in that respect between Methodists, Baptists and the Church in Wales.

[96] So, yes, of course, the Church in Wales should be free to say, 'We are going to celebrate same-sex marriages'. That is its religious freedom, as protected by all sorts of instruments. It can do that. On the other question, as to whether it should be allowed to do that only if the state consents, I do not think that it is that simple. The state has to consent to so many things for religious organisations to be free to do the things that they want to do, but that is merely yet another example of where state consent is required for churches to do the things that they want to do. The law of the state applies to churches as it does to anyone. So, it is just another example.

[97] **David Melding:** I think that we need to move on. I will now ask Simon to do that.

[98] **Simon Thomas:** I am not sure whether it is a case of moving on completely. It just strikes me, Professor Doe, from the evidence that you have given so far, that we have been looking at this from one end. However, looking at it from the other end, you could argue that, since the church, both in England and in Wales, has been keen to maintain its established look, if not in reality, if the state then decides that marriage is now between people of the same sex as well as between men and women, why should the church think that it should be outwith that law? That is the reverse of the position that we have been talking about for the last 10 minutes, it strikes me. That is not a question of constitution, but it is a question of—

[99] **Vaughan Gething:** It is a constitutional issue.

[100] **Professor Doe:** Yes, it is a constitutional issue. Why should the church be exempt from the common law duty to marry everyone?

[101] **Simon Thomas:** You have made a very convincing case for saying that common law duty was a powerful legal fiction, nevertheless it is there and it is accepted. Therefore it exists. That is the way it is. Now that we are exempting the Church of England from that—and the Church in Wales has struck me as being rather more lukewarm about this, but is going along with it anyway, and says, and has said—the Archbishop has said—'Sometime in the future we might want to do this'. The point is that the way that it has to do it is convoluted and has a higher threshold, at least in theory. Do you agree that the steps that the Church in

Wales has to take in order to allow same-sex marriages to happen are of a higher degree of threshold than that, because the Church of England will have its own Measure that will go to the Houses of Parliament, and it is unlikely that a Measure proposed by the Church of England will be thrown out—although, in theory, it could, but it is unlikely—whereas the Church in Wales has to go through a rather strange and less transparent system? Is that correct?

[102] **Professor Doe:** I am no expert on the creation of Lord Chancellor's Orders, but I would say that, procedurally, it is probably an easier route than the Church of England route.

[103] **Simon Thomas:** Procedurally?

[104] **Professor Doe:** Absolutely.

[105] **Simon Thomas:** But is it as democratically transparent?

[106] **Professor Doe:** I do not know. I do not know the answer to that. However, if the General Synod wants to create a Measure, it has to get through the three readings in General Synod; it has to get to the—

[107] **Simon Thomas:** That is easy, is it not, the General Synod? [*Laughter*.]

[108] **Professor Doe:** It has to get through the ecclesiastical committee of Parliament, the Lords and Commons, Parliament and then get Royal Assent. So, it is not that bad. I think that the explanatory notes are actually wrong, however, when they say, 'Oh, the Church of England can create a Measure to change this', which is part of its internal law—a Measure is a Measure of the Church of England; it is not a statute, although it has the same authority as a statute—because, for example, in 2010 when the Church in Wales wanted to extend the right to marry in the parish church beyond parishioners to those with a qualifying connection—

[109] **Simon Thomas:** That was a private Member's Bill, was it not?

[110] **Professor Doe:** Absolutely. How difficult is it to get a private Member's Bill as compared with a Lord Chancellor's Order? The explanatory notes are actually wrong on this; it has been done before in this field of marriage through a private Member's Bill and not a Lord Chancellor's Order.

[111] **Simon Thomas:** The explanatory notes suggest that the Church in Wales can trigger this process. Again, it is not clear to me that this is a trigger, this is a much more intuitive—

[112] **Professor Doe:** I agree with your point about transparency and all the rest of it, but what is crucial for me is that there is no explanation in the explanatory notes of why it is going down the Lord Chancellor's Order route.

[113] **Simon Thomas:** What would be an alternative way forward?

[114] **Professor Doe:** The Assembly.

[115] **Simon Thomas:** Okay. Would it be for the Assembly to petition the Lord Chancellor, or whoever or would it be? Let me put it to you that another witness, Thomas Glyn Watkin, whom we have mentioned, says that the original intention behind the Welsh Church Act 1914, which was subsequently amended by the Welsh Church (Temporalities) Act 1919, was to completely take away the vestiges of establishment and to put the Church in Wales on the same level as Methodists, Baptists, Unitarians or whatever. Why do we not go to that?

[116] **Professor Doe:** May I respond to that by saying that the Welsh Church Bill of 1912 did not suggest that? It said that those who were members of the Church in Wales should retain their right to marry in the parish church as a matter of that statute—common law—provided that any person who was not a member of the Church in Wales should have no right to marry in the parish church. So, they were going to retain it in the original Bill for members, and not for non-members, but the 1914 Act, as you correctly said, said, 'Get rid of it completely', and it was only reinstated in 1919. I have forgotten your question, I am sorry.

[117] **Simon Thomas:** If that reinstatement has, in a sense, put us in this position now, should we not look back at the 1914 principles and say that that is the way forward for the Church in Wales? This is an opportunity to try to clear this up; that is what I am suggesting.

[118] **Professor Doe:** Absolutely, but I have no idea whether the Assembly has the competence to do that.

[119] **Simon Thomas:** I doubt it.

[120] **Professor Doe:** I am sure that a good case could be made out, because there is another little conundrum here, and that is—

[121] **Simon Thomas:** However, Bills can be amended in Parliament, of course.

[122] **Professor Doe:** Yes. There is another conundrum here and it is that the Welsh Church Act 1914—and we are probably in fairy-tale land here—in relation to all ecclesiastical law before the date of disestablishment, as a little convenient formula, says, 'Pre-1920 ecclesiastical law ceases to exist as law and we are assumed to agree to it all as the terms of a contract, but we can alter it as members of the Church in Wales.' The Welsh Church Act 1914 is a piece of ecclesiastical law. Therefore, it does not say, 'All ecclesiastical law pre-disestablishment shall cease to exist as law, with the exception of this statute'. It does not say that.

[123] **Simon Thomas:** So, are you saying that we are taking this as statute, but, actually, it is just a contract?

[124] **Professor Doe:** Possibly, for the purposes of the Church in Wales.

[125] **David Melding:** You are almost saying that the Act does not exist.

[126] **Professor Doe:** As law. It does exist, obviously, but not as law.

[127] **David Melding:** I see.

[128] **Professor Doe:** Ecclesiastical law, as defined, is that law that applies to the Church of England. The 1914 Act is a piece of ecclesiastical law. That law exists as the terms of a contract, not as law of the land—

[129] **Simon Thomas:** May I ask you a question? If the Church in Wales were tomorrow to marry two men, are you saying that that would not be unlawful? There might be many theological grounds for disagreeing with it, but would that be a lawful act by the church?

[130] **Professor Doe:** On the assumption that the governing body created a canon allowing that, it would be a ritual event, it would have no status in secular law and it would not be a marriage for the purposes of secular law. I would not go so far as to say that that would be unlawful, but it would acquire no status—we need to protect the parties—as a marriage recognised by civil law.

[131] **Simon Thomas:** In order for that to happen, we need something like this, albeit we are now discussing the details of it.

[132] **Professor Doe:** You are right. The wider debate is whether the Assembly, if it has competence, or the church, should seek the repeal of the Welsh Church Act 1914, in relation to burial, marriage and the other things.

3.45 p.m.

[133] **Simon Thomas:** Burial is interesting, because that applies for all parishioners as well, as I understand it, namely people who live in the parish, I assume. Just to go back to the final question from me on this, at the moment we have this same-sex marriage Bill going through Parliament with proposals for certain instruments to be put in place to allow the Church in Wales to enact such marriages. There is nothing, constitutionally or legally, to prevent the amendment of those to allow a role for the Assembly, is there? The Assembly can then work hand-in-hand with the Church in Wales to achieve that, if necessary.

[134] **Professor Doe:** The Assembly already has jurisdiction over several matters critical to the life of the church: ecclesiastical exemption, provision of spiritual care in hospitals, church schools, burials and other things. Why not this one?

[135] **David Melding:** It would be elegant, if the church has a relationship with the state, for that to be located in one state institution, and not two.

[136] **Professor Doe:** There are debates within the Church in Wales about setting up a permanent archiepiscopal see in Llandaff, and the idea is to have somebody here permanently to liaise with the Assembly. I do not think that that is a particularly popular idea, but that, too, would be a part of this case of bringing things from Westminster here. Was the Church in Wales consulted, originally, on this proposal? It was not.

[137] **Vaughan Gething:** No, it was very clear that it was not. The archbishop was very clear that he had not been consulted.

[138] **Professor Doe:** That is very interesting, because as you probably know, for the Civil Partnerships Act 2004, Lord Sainsbury in the House of Lords enunciated a constitutional convention, analogous to the Sewel convention, that Parliament would not legislate for the Church of England without its consent. That has never been articulated by anyone, anywhere in relation to the Church in Wales, and that might be worth exploration, too.

[139] **David Melding:** You have left us with something further to ponder there. It was very useful. Thank you for your participation.

[140] **Professor Doe:** I am sorry if I got stuck on your ban issue at the beginning, but I just cannot see any vocabulary of prohibition in it, I am afraid.

[141] **Vaughan Gething:** It was just about language use in Parliament as opposed to the legislative proposals that are then published, and the ones that we are now dealing with.

[142] **David Melding:** I like encores, but time is against us. Thank you very much, Professor Doe. We hope that you find our inquiry and its report of interest when we conclude.

[143] **Professor Doe:** I shall indeed. Thank you very much for inviting me. It was very enjoyable.

[144] **David Melding:** I am delighted to welcome our second witness this afternoon, Professor Thomas Glyn Watkin of Bangor Law School, who has been a generous contributor to our work in the past. You are very welcome this afternoon, Professor Watkin. You have probably been following proceedings and have heard the evidence of Professor Doe; we feel that we are well into some of these issues. I thank you for your written evidence, which, again, was crisp and clear. I will not get too embroiled in some of the historical points, but perhaps you would like to start by outlining the significance of the ecclesiastical law of the Church of England neither extending nor applying to Wales, that being the position.

[145] **Professor Watkin:** This is, I think, a slightly difficult issue, because the Welsh Church Act 1914 makes a clear statement in section 3 to the effect that the ecclesiastical law of the church, by which it means the Church of England, ceases to exist as law in Wales. That seems to be going further than saying that that law ceases to apply in Wales; it seems to be saying that it does not extend to Wales. I have to say that I was somewhat surprised in preparing the evidence, because I took a look at the Marriage Act 1949 and found that, as I knew, there were some sections that related solely to the Church of England and not to Wales, and they were listed in a Schedule to that Act, which equally said quite clearly:

[146] 'Provisions of Act which do not extend to Wales'.

[147] Now, this is in stark contrast to what has become virtually a dogma with regard to the Assembly and the Acts of the National Assembly, insofar as even though they only apply in Wales, they are taken to extend to England and Wales, and this is said to be essential insofar as this means that the unity of the legal system of England and Wales is preserved. Yet, it is perfectly clear that when one looks at ecclesiastical Measures of the Church of England, they state clearly that they extend only to the provinces of Canterbury and York, which is an area virtually coterminous with England. So, it appears that the Church of England can make law and can change areas that, if they do not actually trespass on the close of civil law, come very close to doing so—I think that they actually do go as far as to amend the civil law. And yet, not only do they not apply in Wales, they do not extend to Wales.

[148] The problem that I think one is left with in relation to the Church in Wales is that when the Church of England amends law, and that law is for England only, it means that Wales is left in a sort of vacuum, because it has no means by which it can make a similar change for this country. It is unlike the situation, I suppose, in which, if Parliament legislates for England alone, the Assembly can legislate for Wales if it chooses to in a devolved area. However, in the area where the Church of England operates, it can amend the law in England, but there is no mechanism for doing the same in Wales.

[149] **David Melding:** As I understand it, ecclesiastical law could still apply in Wales as a sort of contract. It is not a legal structure anymore; it is a contractual state of affairs. Moreover, it was assumed that that is exactly what happened, in that the Church in Wales inherited all ecclesiastical law, unless it then, through this very difficult process, sought to amend it.

[150] **Professor Watkin:** At disestablishment in 1920, the ecclesiastical law as it then was—for England and Wales, with Wales being part of the province of Canterbury at that time—under the terms of the Welsh Church Act 1914, ceased to be law in Wales, in the sense of being part of the law of the land, and was relegated, if you like, to be in terms of an agreement that was implied among the members of the Church in Wales, as though they had agreed. Thereafter, the clergy who have since been admitted to office in the Church in Wales and the lay persons whose names have been entered on electoral rolls in parishes in Wales have actually consented to be bound by the terms of that mutual contract. So, it is no longer implied; it is now an actual agreement, as would be the case with any other club that you become a member of. In the eyes of the law of the land, that is what the Church in Wales is: it

is an unincorporated association, the members of which are bound together by this agreement. They agree to abide by the rules when they become members. However, that is no longer law in the sense of being part of the law of the land. The courts would not take judicial notice of the terms of that agreement as being part of the law of the land; they would require it to be proved in the same way as any other contract.

[151] **David Melding:** When we get to marriage, what are the particular consequences of this situation? Is marriage ecclesiastical law and civil law, or am I getting hopelessly confused? Can it be changed as law in England but not in Wales, or can it be changed in Wales by a different, extra-church procedure? Where are we in this?

[152] **Professor Watkin:** I would have the greatest sympathy for anyone who became greatly confused on the question of where the law relating to church marriages stands. I think that one could struggle and make sense of it, but I think that one would be making sense of it rather than it making sense.

[153] The Welsh Church Act 1914 states, as I said earlier, that ecclesiastical law ceased to exist in Wales at disestablishment. Section 23 of that Act then states that, from the date of disestablishment, the Church in Wales would no longer be bound by the law of marriage relating to the Church of England within Wales. It would move to be treated like any other denomination—the Methodist, the Baptist, or the Roman Catholic churches. In effect, it would be governed by the law relating to civil marriages. To my mind, what is being said there, in effect, is that ecclesiastical law is being treated in section 3 and the law of marriage is being treated in section 23 as something separate. Therefore, the law of marriage should be regarded as something that is separate from ecclesiastical law.

[154] That provision in section 23 never became law; it was repealed before disestablishment by section 6 of the Church in Wales (Temporalities) Act 1919, which stated that nothing in the 1914 Act should affect the law with respect to marriages in Wales. Nothing is said about, in any way, taking away from the cessation of ecclesiastical law in Wales. So, once again, to my mind, that suggests that the law of marriage is being treated as a separate entity from ecclesiastical law. The problem is that, in subsequent legislation, one has the Marriage Act 1949, which has a section about marriages according to the rites of the church and sections about civil marriages and register offices. One Act covers the two, so, once again, in my mind, that seems to be regarding it as part of private civil law. However, into that, the Church of England's power to make Measures has been used to make amendments—they are not textual amendments, but substantive amendments by reference—to what is contained in that 1949 Act. So, the Church of England is using its power to make Measures to amend law that would seem to be part of the civil law of the land rather than part of the ecclesiastical law.

[155] Insofar as the Church of England Measures are endorsed by Parliament, there can be no objection. It is within the powers that it has been given and it has been affirmed by Parliament. As far as England is concerned, it does not really matter whether it is ecclesiastical law or civil law, it is part of the law of the land. However, for us in Wales, it does matter where that border lies, even though the border is of little, if any, importance in England. We suffer as a result, because, as I said, I think that the ecclesiastical Measures have trespassed on the close of what is private civil law for England and Wales, but only made law for England, leaving Wales in a sort of vacuum, having to play catch up if and when parliamentary time is available and with no mechanism by which that catch up can be effected smoothly.

[156] **Simon Thomas:** Diolch am eich tystiolaeth, Athro Watkin. Er mwyn bod yn glir, rydych yn dweud y gallai'r sefyllfa hon

Simon Thomas: Thank you for your evidence, Professor Watkin. In order to be clear, you have said that the situation could

gael ei gweld fel gadael Cymru mewn gwactod. Un o'r rhesymau am hynny yw nad oes corff nawr yn cael ei gydnabod yng Nghymru a all greu Mesurau o dan gyfraith eglwysig, hyd yn oed petai Mesur o'r fath yn dod i'r Cynulliad. Felly, ai'r darn hwnnw sydd ar goll?

be seen as leaving Wales in a vacuum. One of the reasons for that is that there is not a body that has been recognised in Wales that can create a Measure under ecclesiastical law, even if that Measure came to the Assembly. Therefore, is that the piece that is missing?

[157] **Yr Athro Watkin:** Y darn sydd ar goll yw nad oes bellach gyfraith eglwysig yng Nghymru. Nid oes modd i'r Eglwys yng Nghymru gadw i fyny gyda'r hyn y mae Eglwys Lloegr yn ei wneud pan fo Eglwys Lloegr yn effeithio ar y gyfraith sifil ynglŷn â phriodasau. Hefyd, fel y dywedoch, mae'r ffaith nad yw'r gyfraith hon wedi cael ei datganoli yn golygu nad oes hawliau gan y Cynulliad i helpu mas ychwaith.

Professor Watkin: The piece that is missing is that there is no ecclesiastical law in Wales. There is no way for the Church in Wales to keep up with what the Church of England is doing when the Church of England impacts upon civil law on marriages. Also, as you said, the fact that this law has not been devolved means that the Assembly has no rights to help out either.

4.00 p.m.

[158] **Simon Thomas:** I droi at rywbeth yn eich tystiolaeth, rydych yn sôn am yr hyn sy'n digwydd yn Eglwys Lloegr ar hyn o bryd. Mae'n gallu creu Mesur sy'n cael ei adrodd i'r Senedd ac mae'n mynd i'r cydbwyllgor eglwysig. Pan mae'n cael ei drafod gan y cydbwyllgor hwn, rydych yn dweud yn eich tystiolaeth mai dyna efallai'r unig dro y mae materion sy'n effeithio ar Gymru hefyd yn gallu cael eu trafod. Fodd bynnag, rydym yn trafod cyfraith eglwysig Lloegr yn unig, a'r unig adeg lle mae cwestiynau ynglŷn â Chymru yn cael eu codi yn y cyd-destun hwnnw. Rydych yn awgrymu bod hynny yn amhriodol. A allwch ddweud ychydig mwy am sut mae'n amhriodol, a beth all gymryd ei le? Ym mha ffordd arall y gallwn sicrhau bod y materion hyn yn cael eu trafod, gan nad yw'n fater sydd wedi ei ddatganoli?

Simon Thomas: Turning to something in your evidence, you talk about what is currently happening in the Church of England. It can create a Measure that is reported to Parliament and is referred to the ecclesiastical joint committee. When it is discussed in that committee, you say in your evidence that this may be the only time at which matters that affect Wales can be discussed. However, we are talking about ecclesiastical law applicable in England only, and that is the only time when questions in relation to Wales can arise in that context. You suggest that that is inappropriate. Can you tell us more about how it is inappropriate, and what could take its place? In what other way can we ensure that these matters are discussed, as it is a non-devolved matter?

[159] **Yr Athro Watkin:** Pan mae Mesur arfaethedig yn mynd o Eglwys Lloegr at y Senedd, mae'r cydbwyllgor yn craffu ar y Mesur, ac mae'n rhaid gofyn pam. Mae'r cydbwyllgor yn edrych i weld a yw'n iawn i newid y gyfraith yn y modd mae'r eglwys yn ei gynnig. Fodd bynnag, wrth edrych ar aelodaeth y cydbwyllgor, mae'n amlwg bod yr aelodaeth bron i gyd yn dod o Loegr. Os ydych yn edrych ar drafodaeth y cydbwyllgor, rydych yn gweld hefyd bod y drafodaeth ynghylch beth sydd yn addas i'w wneud gan Eglwys Lloegr, ac nid beth sy'n

Professor Watkin: When a proposed Measure goes from the Church of England to Parliament, the joint committee scrutinises that Measure, and we have to ask why. The joint committee is trying to identify whether it is proper to change the law in the way proposed by the church. However, in looking at the membership of the joint committee, it is apparent that the membership virtually all comes from England. If you look at the joint committee's proceedings, you will see that the discussions relate to what would be appropriately done by the Church of England,

addas o ran cyfraith Cymru a Lloegr.

and not what is appropriate in terms of the law of England and Wales.

[160] **Simon Thomas:** Mae aelodaeth y cydbwyllgor hefyd yn adlewyrchu comisiynwyr yr eglwys—mae cyswllt cryf gydag Eglwys Lloegr.

Simon Thomas: The joint committee's membership reflects the church's commissioners—there is a strong link with the Church of England.

[161] **Yr Athro Watkin:** Mae'n cynnwys Aelodau Tŷ'r Arglwyddi ac Aelodau Tŷ'r Cyffredin a byddech yn gobeithio bod rhyw elfen, nid drwy hap, i sicrhau bod yr effaith ar Gymru yn cael ei egluro. Edrychais ar adroddiad y cydbwyllgor ynglŷn â Mesurau 2008 a 2012—nid wyf wedi ei ddarllen i gyd, felly ni allaf roi fy llaw ar fy nghalon a dweud fy mod yn hollol iawn—a gwneuthum ymchwil am eiriau. Nid yw'r gair 'Cymru' yn digwydd o gwbl yn yr adroddiad, felly mae'r ffaith bod y gyfraith yn cael ei newid mewn modd sydd yn creu gwahaniaeth rhwng y sefyllfa yn Lloegr ynglŷn â hawliau i briodi yn mynd yn bellach na threfnu'r eglwys—mae'r rhain yn hawliau dinasyddion y ddwy wlad. Mae'r ffaith bod hyn yn creu gwahaniaeth rhwng Cymru a Lloegr yn rhywbeth a ddylai fod yn glir, a dylai bod modd sicrhau bod o leiaf yr Eglwys yng Nghymru yn cael cyfle i ddweud ei barn ar hyn. Fodd bynnag, i ryw raddau, nid yr eglwys yn unig ddylai roi barn oherwydd mae'n effeithio ar hawliau dinasyddion ynglŷn â phriodi.

Professor Watkin: It includes Members of the House of Lords and Members of the House of Commons and you would hope that there would be some element, not by chance, to ensure that the impact upon Wales would be explained. I looked at the report of the joint committee on the 2008 and 2012 Measures—I have not read it in its entirety, so I cannot put my hand on my heart and say that I am entirely correct—and I undertook a search on certain words. The word 'Wales' does not arise once in the report, so the fact that the law is being amended in a way that creates a difference between the situation in England regarding the right to marry goes further than the organisation of the church—these are the rights of the citizens of the two countries. The fact that this creates a difference between England and Wales is something that should be clear, and there should be a means whereby the Church in Wales has at least an opportunity to express its view on this. However, to some extent, it is not just the church that should express an opinion because it impacts upon the rights of citizens with regard to marriage.

[162] **Simon Thomas:** Sonioch am ddeddfwriaeth 2010 a 2012, ac rydych hefyd yn eich tystiolaeth yn awgrymu, er mai Mesur preifat a gyflwynwyd er mwyn unioni'r sefyllfa yn dilyn deddfwriaeth 2008 a 2010, bod newid pellach gan Eglwys Lloegr wedi camunioni—os mai dyna'r gair—y sefyllfa unwaith eto. Felly, beth yw'r sefyllfa erbyn hyn? Ym mha ffordd y mae Eglwys Lloegr a'r Eglwys yng Nghymru yn cydnabod hawliau gwahanol o ran priodi yn awr?

Simon Thomas: You talk about the 2010 and 2012 legislation, and you also suggest in your evidence that, although it was a private Measure that was introduced to align the situation following the 2008 and 2010 legislation, a further amendment by the Church of England has changed the situation again so that it is not aligned. So, what is the current situation? In what way are the Church of England and the Church in Wales now acknowledging different rights in terms of marriage?

[163] **Yr Athro Watkin:** Os nad ydych yn byw mewn plwyf ac os nad ydych yn addoli yn yr eglwys, mae'n rhaid ichi ddangos yr hyn mae'r Mesur yn ei alw yn *qualifying connection* er mwyn cael yr hawl i briodi yn yr eglwys. Mae'r *qualifying connection* hwnnw yn gorfod bod gyda'r eglwys lle

Professor Watkin: If you do not live within a parish and do not worship in the church, you have to demonstrate what the Measure calls a 'qualifying connection' in order to marry in the Church. That qualifying connection has to be with the church where the banns are to be called and published, and

mae'r gostegion—y *banns*—wedi cael eu cyhoeddi, a hefyd gyda'r lle yr ydych eisiau priodi. Os cofiaf yn iawn, o dan adran 23 o Ddeddf 1949, roedd yn bosibl yn Lloegr, pan roeddech wedi grwpio plwyfi gyda'i gilydd, i gyhoeddi'r gostegion mewn un plwyf, ond priodi mewn eglwys arall yn y plwyf. Gwnaethom ddal i fyny gyda hynny yn Neddf 1986 yng Nghymru. Bellach, beth mae Mesur 2012 yn ei ddweud yw lle mae *qualifying connection* o dan Fesur 2008, gallwch nawr gael eich gostegion wedi'u galw mewn eglwys mewn un plwyf o fewn grŵp a phriodi mewn un arall, ond nid yw hynny yn bosibl yng Nghymru, oherwydd nid yw'r cysylltiad rhwng Deddf 1986 a Deddf 2010 ar gyfer yr Eglwys yng Nghymru wedi cael ei wneud. Mae Mesur 2012 yn gwneud y cysylltiad rhwng adran 23 o Ddeddf 1949 a Mesur 2008, ond nid yw'r cysylltiad hwnnw ar gael eto yng Nghymru.

also with the place where you wish to marry. If I remember correctly, under section 23 of the 1949 Act, it was possible in England, when you had grouped parishes together, to publish the banns in one parish, but marry in another church within the parish. We caught up with that in the 1986 Act in Wales. By now, what the 2012 Measure states is that where there is a qualifying connection under the 2008 Measure, you can now have the banns published in a church in one parish within a group and marry within another, but that is not possible in Wales, because the linkages between the 1986 Act and the 2010 Act for the Church in Wales have not been made. The 2012 Measure makes the connection between section 23 of the 1949 Act and the 2008 Measure, but that linkage is not available in Wales as of yet.

[164] **Simon Thomas:** Felly, yn eich tyb chi, byddai hynny yn enghraifft o le mae'r hawliau sifil—rwy'n pryderu am ddefnyddio'r gair 'hawliau' ond mae'n hawl mewn ffordd—a'r ffordd rydych yn gallu priodi yng Nghymru yn wahanol i beth sydd gyda chi yn Lloegr, yn syml iawn oherwydd y drefn sydd yn cael ei defnyddio i ddeddfu yn y ddwy wlad yn hytrach nag unrhyw benderfyniad gwleidyddol neu unrhyw benderfyniad arall.

Simon Thomas: So, in your opinion, that would be an example of where the civil rights—I do not want to use the word 'rights' but it is a right in a way—and the way that you can marry in Wales is different to what you have in England, very simply because of the arrangement that is used to legislate in both countries rather than any political decision or any other decision.

[165] **Yr Athro Watkin:** Ar eich pwynt olaf yn gyntaf, mae'n amlwg o adroddiadau'r cydbwyllgor a'r dystiolaeth y mae Eglwys Lloegr wedi ei roi iddo ynglŷn â'r Mesurau hyn ei bod wedi edrych ar y posibiliadau o sut i wneud hyn ac wedi dewis yr opsiwn y mae ei eisiau. Yr oll y mae Cymru yn ei wneud yw dal i fyny gyda'r opsiwn yna. Dylai'r Eglwys yng Nghymru gael y cyfle i wneud rhywbeth sy'n ymateb i'r sefyllfa hon. I weld beth yw'r effaith, os cymrwch deulu sy'n byw rhywle ar y ffin efallai, os oes un aelod o'r teulu am briodi yn Lloegr a'r un arall yng Nghymru, yna byddant yn darganfod nad oes ganddynt yr un hawliau; mae gwahaniaeth. Pam? Mae hynny oherwydd bod un ar un ochr o'r ffin a'r llall ar y llall. Gallwn ddweud, 'Iawn, dyna y gall datganoli ei wneud', ond o leiaf o dan ddatganoli, mae cyfle gyda chi—

Professor Watkin: On your final point first, it is clear from the reports of the joint committee and the evidence presented to it by the Church of England in relation to these Measures that it has looked at the possibilities of how this could be done and has chosen its preferred option. All Wales does is catch up with that option. The Church in Wales should have an opportunity to respond to this situation. If you want to see the impact, take a family living on the Welsh border perhaps, and if one member wishes to marry in England and the other in Wales, they discover that they do not have the same rights; there is a difference. Why? It is because one is on one side of the border and the other is on the other. You can say, 'Fine, that is what devolution can do', but at least under devolution, you have an opportunity—

[166] **Simon Thomas:** Ac mae penderfyniad i fod yn wahanol.

Simon Thomas: And there is a decision to be different.

[167] **Yr Athro Watkin:** Mae penderfyniad yna, ac nid ydych yn cael eich gadael ar ôl.

Professor Watkin: There is a decision there, and you are not being left behind.

[168] **Simon Thomas:** Diolch am hynny. Trown at enghraifft arall lle y gall hwn efallai godi, sef yn y Bil arfaethedig ynglŷn â phriodasau o'r un rhyw. Mae'r Bil hwnnw'n gosod dwy gyfundrefn wahanol gyda'i gilydd o ran sut y gall Eglwys Lloegr a'r Eglwys yng Nghymru gytuno, ar hyn o bryd, nad ydynt yn bwriadu priodi pobl o'r un rhyw, ond gallant wneud hynny drwy fabwysiadu dau ddull gwahanol. Rydych yn dweud yn eich tystiolaeth ei fod yn *slightly bizarre* bod eglwys sydd wedi ei datgysylltu yn gorfod mynd drwy'r Arglwydd Ganghellor er mwyn deddfu rhywbeth y byddai unrhyw enwad arall yn gallu penderfynu ei hunan drwy ei weithdrefnau mewnol ei hunan. Deallaf pam eich bod yn dweud *bizarre*—efallai mai *comic* y byddem yn ei ddweud yng Ngheredigion—ond a fyddech yn gallu ymhelaethu tipyn am y newydd-deb hwn? Nid wyf yn ymwybodol o unrhyw beth fel hyn wedi cael ei gynnig o'r blaen ers datgysylltu.

Simon Thomas: Thank you for that. We will turn to another example where this could arise, namely in the proposed Bill on same-sex marriage. That Bill sets out two different arrangements together in terms of how the Church of England and the Church in Wales can agree, at present, not to marry people of the same sex, but they could do that by adopting two different methods. You say in your evidence that it is 'slightly bizarre' that a disestablished church should have to involve the Lord Chancellor to legislate on something that any other denomination can do for itself through its own internal procedures. I understand why you say 'bizarre'—perhaps we would say 'comic' in Ceredigion—but could you expand a little on this innovation? I am not aware of anything like this being proposed since disestablishment.

[169] **Yr Athro Watkin:** Credaf eich bod yn iawn; nid wyf yn cofio am unrhyw beth sydd wedi cael ei wneud yn y modd hwn. Gallwn roi i un ochr Ddeddf 1945 ynglŷn â chladdfeydd, lle'r oedd hawl gan Ysgrifennydd Gwladol i ganiatáu i'r eglwys wneud newidiadau, fel arfer ynglŷn â ffioedd, ond hefyd weithiau ynghylch yr hawl i gladdu mewn mynwent eglwys yng Nghymru. Roedd rheswm da am hynny, sef bod yr Ysgrifennydd Gwladol yn gorfod caniatáu i'r eglwys wneud hynny gan ei fod yn effeithio ar hawliau pobl nad oeddynt yn aelodau o'r eglwys ac nid oedd llais ganddynt yn y newidiadau oedd yn cael eu gwneud gan yr eglwys. Beth rydym yn ei weld yma yw'r Arglwydd Ganghellor fel Gweinidog sy'n gyfrifol am y gyfraith yng Nghymru a Lloegr yn caniatáu i'r Eglwys yng Nghymru wneud beth mae'n ei weld sydd yn addas yn y sefyllfa newydd a fydd yn codi o dan y Ddeddf.

Professor Watkin: I think you are right; I cannot recall anything else being done in this way. We can put to one side the 1945 Act on burial grounds, where the Secretary of State had a right to allow the church to make changes, usually about fees, but also sometimes on the right to bury in Welsh churchyards. There was a good reason for that, namely that the Secretary of State had to allow the church to do that because it impacted on the rights of people who were not members of the church and who had no voice in the changes being proposed by the church. What we are seeing here is the Lord Chancellor as a Minister responsible for the law in England and Wales permitting the Church in Wales to act in the manner that it sees as appropriate in the new situation that will arise under the Act.

[170] Rwy'n meddwl ei fod braidd yn

I think it is 'slightly bizarre' because if you

bizarre achos os meddyliwch am unrhyw aelod o'r Cabinet, sy'n dangos hanes cyfansoddiad Prydain, y swydd sy'n mynd yn ôl ymhellach na swydd y Prif Weinidog—ac yn mynd yn ôl ymhellach na'r Senedd—hynny yw swydd yr Arglwydd Ganghellor. Mae'n od, felly, bod eglwys sydd wedi cael ei datgysylltu yn troi at y person sydd, fwy neu lai, yn ymgorffori'r syniad o fod yn rhan o'r sefydliad er mwyn cael caniatâd i wneud yr hyn y mae eisiau ei wneud.

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

[171] **Simon Thomas:** Oni bai bod y cynnig hwn wedi cael ei wneud, y drefn arall fyddai gorfodi—i bob pwrpas—yr Eglwys yng Nghymru i ddod o hyd i Aelod Seneddol i hyrwyddo Bil Aelod preifat. A yw hynny'n gywir?

Simon Thomas: If this proposal had not been made, the other avenue would have been to compel—in a sense—the Church in Wales to find a Member of Parliament to promote a private Member's Bill. Is that correct?

[172] **Yr Athro Watkin:** Ydyw.

Professor Watkin: Yes.

[173] **Simon Thomas:** Dyna'r unig ffordd arall—fel y mae pethau ar hyn o bryd—i wneud hynny.

Simon Thomas: That would be the only other way—as things currently stand—to do that.

[174] **Yr Athro Watkin:** Ie.

Professor Watkin: Yes.

[175] **Simon Thomas:** Clywsoch, efallai, yr Athro Doe yn awgrymu—

Simon Thomas: You may have heard Professor Doe suggesting—

[176] **Yr Athro Watkin:** Naddo, mae'n ddrwg gen i.

Professor Watkin: No, I am afraid that I did not.

[177] **Simon Thomas:** Dywedodd yr Athro Doe fod rôl, o bosibl, i'r Cynulliad yn hyn o beth. Nid yw'r pwerau dros briodas ac ati wedi eu datganoli, ond efallai bod rôl i'r Cynulliad fel lladmerydd ar ran yr Eglwys yng Nghymru yn San Steffan. A oes gennych farn ynglŷn â hynny? A gredwch fod modd gwneud hynny o gwbl?

Simon Thomas: Professor Doe said that, potentially, there would be a role for the Assembly in this regard. Powers over marriage and so on have not been devolved, but there may be a role for the Assembly as an advocate for the Church in Wales in Westminster. Do you have an opinion on that? Do you believe that it is at all possible to do that?

[178] **Yr Athro Watkin:** Mae hynny'n dibynnu. Mae'r swyddogaeth i newid y gyfraith wedi cael ei rhoi i'r Arglwydd Ganghellor. Fel yr wyf yn ei ddeall, o dan y Bil, nid yw'n bosibl i'r swyddogaeth honno gael ei throsglwyddo—mae'n un o'r swyddogaethau na ellir eu trosglwyddo o dan y Ddeddf Diwygio Cyfansoddiadol 2005. Os ydych chi'n gofyn pam mae angen i'r Arglwydd Ganghellor benderfynu a yw'n briodol i wneud y newid, mae'n ymddangos mai'r rheswm yw er mwyn sicrhau bod y

Professor Watkin: That depends. The function of changing the law has been handed to the Lord Chancellor. As I understand it, under the Bill, it is not possible for that function to be transferred—it is one of the functions that cannot be transferred under the Constitutional Reform Act 2005. If you are asking why the Lord Chancellor needs to decide whether it is appropriate to make the change, it appears that the reason is to ensure that the change is made to the law in the appropriate way, rather than to protect

newid yn cael ei wneud i'r gyfraith mewn modd addas, yn hytrach nag er mwyn amddiffyn hawliau pobl. Yr unig hawl yn y fan hon yw hawl yr eglwys i ddewis, fwy neu lai. Mae'r Ddeddf yn rhoi'r hawl i bobl briodi; hawl yr eglwys i ddewis yw'r cwestiwn.

people's rights. The only right here is the church's right to choose, more or less. The Act gives people the right to marry; the question is about the church's right to choose.

[179] Nid wyf yn siŵr a fydd yr Arglwydd Ganghellor yn penderfynu dilyn yr hyn y mae'r eglwys ei eisiau, ai peidio. Os dywedwch mai'r hyn sydd ei angen yw rhywun i roi caniatâd, gan fod hyn yn effeithio ar bobl yng Nghymru, credaf y buasai'n iawn i Weinidogion Cymru, neu'r Cynulliad, wneud y penderfyniad. Fodd bynnag, ar hyn o bryd, mae'n glir nad yw hwn yn fater sydd wedi cael ei ddatganoli. Credaf fod y Bil yn edrych ar hyn fel rhywbeth sy'n ymwneud â'r gyfraith, yn hytrach nag yn ymwneud â hawliau dinasyddion, ac felly mae wedi rhoi'r pŵer hwnnw i'r Arglwydd Ganghellor, fel y Gweinidog priodol yn San Steffan.

I am not sure whether the Lord Chancellor will decide to follow the church's preference, or not. If you are saying that what is needed is someone to give permission, as this affects people in Wales, I believe that it would be appropriate for Welsh Ministers, or the Assembly, to take that decision. However, at present, it is clear that this is a non-devolved issue. I believe that the Bill looks at this as an issue that is related to the law, rather than being related to citizens' rights, and therefore the power has been handed to the Lord Chancellor, as the appropriate Minister in Westminster.

[180] **Simon Thomas:** Ar wahân i'r gyfraith yn ymwneud â phriodasau, a oes unrhyw oblygiadau i'r bwriad hwn—os y caiff ei weithredu—i gael yr Arglwydd Ganghellor fel y person sy'n cymryd argymhelliad gan yr Eglwys yng Nghymru ac yn gwneud Gorchymyn i gael ei basio gan y Senedd yn San Steffan? A oes unrhyw oblygiadau i'r pethau eraill y byddech chi wedi eu disgrifio fel y '*vestiges of establishment*'? A oes pethau eraill y gellid eu heffeithio gan y penderfyniad hwn? Rydym yn sôn am osod cynsail, mewn ffordd, onid ydym?

Simon Thomas: Apart from the legislation on marriage, are there any implications in this intention—if it is implemented—to have the Lord Chancellor as the person who takes the recommendation from the Church in Wales and makes an Order to be passed by the Westminster Parliament? Are there any implications for the other things that you would have described as being 'vestiges of establishment'? Are there any other things that could be affected by this decision? We are talking about setting a precedent, in a way, are we not?

[181] **Yr Athro Watkin:** Mae cynsail i roi'r hawl i'r Ysgrifennydd Gwladol pan effeithir ar hawliau pobl yng Nghymru. Mae'n siŵr mai'r Ysgrifennydd Cartref a oedd yn gyfrifol yn y lle cyntaf—yn 1945—ac wedyn Ysgrifennydd Gwladol Cymru, ar ôl 1964, neu pryd bynnag y trosglwyddwyd y swyddogaeth.

Professor Watkin: There is a precedent in terms of giving the right to the Secretary of State when the rights of people in Wales are affected. I suppose that the Home Secretary would have originally been responsible—in 1945—and then the Secretary of State for Wales, after 1964, or whenever the function was transferred.

[182] **Simon Thomas:** A ydych yn sôn am fynwentydd?

Simon Thomas: Are you talking about cemeteries?

[183] **Yr Athro Watkin:** Ydw. Credaf mai dyna'r cynsail gorau, oherwydd, os yw'n effeithio ar hawliau pobl yng Nghymru, a

Professor Watkin: Yes. I believe that that is the best precedent, because, if it impacts on the rights of people in Wales, and the

dyletswyddau'r eglwys at bobl Cymru, credaf mai yma yn awr yw'r lle y dylai hyn gael ei benderfynu.

responsibilities of the church to the people of Wales, I believe that this is now the place where this should be decided.

[184] **Simon Thomas:** Felly, byddech yn dweud bod honno'n esiampl, efallai, nad yw wedi cael ei hystyried yn hynny o beth.

Simon Thomas: Therefore, you would say that that was an example, perhaps, that has not been considered in this regard.

[185] **Yr Athro Watkin:** Ni fyddwn am fynd mor bell â hynny. Mae modd edrych ar hwn a dweud mai'r Cynulliad, neu Weinidogion Cymru, yw'r awdurdod pan rydych yn delio â rhywbeth sydd wedi ei ddatganoli. Wrth gwrs, mae'r gyfraith ynglŷn â chladdu ac amlosgu wedi ei datganoli, a hynny oherwydd bod y swyddogaeth wedi ei rhoi i Ysgrifennydd Gwladol Cymru—dyna'r rheswm.

Professor Watkin: I would not want to go as far as that. It is possible to look at this and say that the Assembly is, or Welsh Ministers are, the authority when you are dealing with a devolved issue. Of course, the law regarding burials and cremation has been devolved, and that because the function had been given to the Secretary of State for Wales—that is the reason.

4.15 p.m.

[186] **Simon Thomas:** A ydych yn sôn am ddatganoli gweinyddol?

Simon Thomas: Are you talking about administrative devolution?

[187] **Yr Athro Watkin:** Ydw. Fodd bynnag, ar hyn o bryd, oherwydd nad yw'r swyddogaeth ynglŷn â phriodasau wedi ei throsglwyddo, rwy'n credu mai yn San Steffan y mae'r pŵer hwnnw yn mynd i aros.

Professor Watkin: Yes. However, at present, because the function in relation to marriage has not been transferred, I believe that that power will remain in Westminster.

[188] **Eluned Parrott:** In your paper, you talk about two of the main problems that the Church in Wales faces. One is that, other than by private Bill, it cannot make changes and the other is that, because the Church of England has a mechanism by which it can change the law of marriage in England, the Church in Wales may find itself governed by marriage law that is no longer law in England; those are the two main challenges that you outline. I want to look at some of the solutions that you propose. In the first, you suggest that it would make most sense to revert to the original intention of the Welsh Church Act 1914 and cut the connection with the marriage law of the Church of England, effectively meaning that the Church in Wales is in the same position as other kinds of churches. Why do you think that that is the most sensible route at this point in time?

[189] **Professor Watkin:** It was the original choice of Parliament in 1914, and it makes a clean cut. It basically says that, for the future, the Church in Wales, like any other Christian denomination or other faith in Wales, would have the right to determine its marriage policy for itself. The only duties that it would have would be to ensure that buildings where marriages take place are registered and that persons who conduct marriage ceremonies, or at least those who complete the registers in those places, are authorised to do so. That would, in effect, have—I do not know whether 'reduced' is the right word—placed the Church in Wales in exactly the same position as other denominations, which was the intention of the disestablishment legislation. Once you do that, you effectively also give to the church freedom over its own marriage discipline.

[190] One thing that flows from the establishment is that the church is locked into the state, to a certain extent, with regard to its marriage discipline. Exceptions always have to be made, as it were; for example, so that clergy cannot be compelled to marry divorcees or people who

have been too closely connected by affinity. The current Marriage (Same Sex Couples) Bill is another example of this. If you place the Church in Wales in the same position as other denominations, all of that is gone, and the problems that we are discussing now, about an inequality or imbalance between the two nations because of the different powers of their respective churches to change the law, all vanish. You put the whole problem behind you in a manner in which Parliament thought was the right way to do so almost a century ago.

[191] **Eluned Parrott:** So, if it makes such obvious sense, how easy would it be to achieve this through legislation now?

[192] **Professor Watkin:** The Welsh Church Act 1914 intended to accomplish it with one section. You would have to scope the whole change again but, nevertheless, the change is basically the same. What one would do—what the Welsh Church Act 1914 does—is basically say that the civil law of marriage should, in future, apply to the Church in Wales. Churches that are currently licensed by diocesan bishops for the publication of banns and the solemnisation of holy matrimony will automatically become registered buildings and, for the future, any churches will have to be registered in the same way as chapels. Clergy of the Church in Wales who are currently in a position to complete the marriage registers following the blessings of marriage in their churches would have to apply to become authorised persons. Once that is done, you are there.

[193] **Eluned Parrott:** It seems very straightforward.

[194] **Professor Watkin:** As I say, the Welsh Church Act 1914 does it in one section.

[195] **Eluned Parrott:** In which case, is it your view that an amendment to the Welsh Church Act 1914, or something along those lines, could be made through the Marriage (Same Sex Couples) Bill? Could that be used to as a vehicle to affect this kind of change?

[196] **Professor Watkin:** I would have thought not, because I would have thought that the change that you are now suggesting goes a long way beyond the purpose of that particular item of legislation. It is not a marriage Bill; it is the Marriage (Same Sex Couples) Bill. I do not have the long title before me to look at what the proposed scope is, but I would have thought that it goes way beyond the purpose of that current statute. It would not be right, I do not think, to smuggle it in as an extra piece of legislation under the cover of it. That is a controversial piece of legislation in itself and I think that it deserves to pass as a piece of legislation in itself. This is something that is rather different and has an importance that goes beyond the marriage of same-sex couples. I would suspect that the changes that have been made over the last decade or so by the Church of England would have affected far more couples than will be affected by the same-sex couples Bill.

[197] **Eluned Parrott:** The second solution that you proposed was the mechanism, which has been introduced into the Marriage (Same Sex Couples) Bill, of a more general application. However, you go on to say that that would appear to fly in the face of disestablishment. Can you explain that to me?

[198] **Professor Watkin:** The mechanism that I discussed with Simon Thomas earlier was that, where the Church of England has legislated for England, and cannot legislate for Wales, in a manner that has changed the law relating to marriage between England and Wales, and Wales having no way of making a similar adjustment, one could introduce the same sort of procedure. In that way, if the governing body of the Church in Wales resolved that it wanted a similar or identical change, there would be a Government Minister or a body authorised to consider that resolution and to order its implementation by means of an Order placed before both Houses of Parliament, as is contemplated in the Bill currently before Parliament. I say that it flies in the face of disestablishment because it is the Church in Wales returning to the

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

[199] The other point that I made to Simon Thomas earlier is also valid here. What the Church in Wales is being allowed to do in these circumstances—in a way, that is fair enough in this particular Bill, because it is a one-issue matter—is to request, by a resolution of its governing body, that the same thing be done for Wales as is happening, currently, in other areas. It loses the opportunity of thinking how it would wish to address this issue. That, of course, is what the Church of England has been able to do in relation to the 2008 and 2012 Measures. It can consider the options and make an informed choice. The Church in Wales would have to request that it has the same choice as the Church of England. That would, obviously, unify the law between the two countries, but it does not cure the imbalance that is the result of the link, because, in effect, a disestablished church is not able to freely develop its policy in relation to marriage and the solemnisation of marriage in the same way as, for instance, other churches in the Anglican communion. The Scottish Episcopal Church and the Anglican church in Northern Ireland would have greater freedom, but the Church in Wales would be still locked, as it were. The umbilical cord would not have been cut with the mother church in England.

[200] **Simon Thomas:** Mae gennyf un cwestiwn, er mwyn imi ddeall rhywbeth a ddigwyddodd ganrif yn ôl. Pam na fwriwyd ymlaen â'r amcan gwreiddiol yn 1914 o ddatgysylltu'n llawn? Yr awgrym gan yr Athro Doe oedd bod yr Eglwys yng Nghymru yn dawel fach yn hoffi cadw'r safle o fod wedi datgysylltu'n gyfreithiol ond gan barhau i fod yn brif eglwys yn y gymdeithas. Ai dyna beth sy'n egluro hyn? Rydym yn dal i ymdrin â'r sefyllfa honno yn awr onid ydym, ganrif yn ddiweddarach?

Simon Thomas: I have one question, so that I understand something that happened a century ago. Why did the originial intention of full disestablishment in 1914 not go ahead? The suggestion from Professor Doe was that the Church in Wales quietly liked maintaining its position of legal separation while still being the main church in society. Would that explain it? We are still dealing with that situation, a century later, are we not?

[201] **Yr Athro Watkin:** Nid wyf yn gwybod yr ateb. Rwy'n credu bod yr eglwys yn edrych ar briodi yn yr eglwys fel rhywbeth traddodiadol ac nid oedd am golli'r traddodiad hwnnw o briodi ar ôl cyhoeddi'r gostegion yn yr eglwys heb angen cael tystysgrif gan y cofrestrydd ac yn y blaen. Felly, cadw rhyw elfen o'r traddodiad, yn hytrach nag elfen o'r safle, a oedd yn bwysig. Roedd canlyniadau, wrth gwrs, i'r eglwys hefyd. Os edrychwch ar y gwasanaeth glân briodas yn y llyfr gweddi a oedd yn bodoli adeg y datgysylltu, mae'r gwasanaeth hwnnw yn dechrau drwy ddweud bod yn rhaid dechrau drwy gyhoeddi gostegion. Felly, byddai angen newid y drefn honno hefyd. Nid oedd hynny wedi'i wneud gan y ddeddfwriaeth. Felly, rydych yn osgoi'r canlyniadau hynny hefyd.

Professor Watkin: I do not know the answer. I believe that the church saw marriage in church as something traditional and that it did not want to lose the tradition of marriage following the reading of the banns in church without the need for a certificate from the registrar and so forth. Therefore, it was keeping some element of tradition, rather than an element of position, that was important. There were also repercussions, of course, for the church. If you look at the marriage service in the prayer book that existed at the time of disestablishment, that service starts by saying that you have to start by publishing banns. So, there would need to be a change to that, too. That had not been done by the legislation. So, you avoid those repercussions, too.

[202] Y bwriad cyntaf yn y Bil a ddaeth gerbron y Senedd cyn y rhyfel byd cyntaf oedd cadw'r drefn o briodas ar ôl gostegion

The original intention of the Bil that came before Parliament prior to the first world war was to retain the tradition of marriage

yn yr Eglwys yng Nghymru a'r gyfraith ynglŷn â hynny, ond diddymu unrhyw hawl gan berson nad oedd yn aelod o'r eglwys i briodi yn yr eglwys. Felly, rydych yn cadw'r drefn ond dim ond ar gyfer aelodau a phobl eraill y mae'r eglwys eisiau eu priodi.

following banns in the Church in Wales and the law related to that, but to abolish any right of a person who was not a member of the church to marry within the church. So, you are retaining the tradition but only for members and those people who the church wants to marry.

[203] **Simon Thomas:** Felly, byddai hynny wedi bod yn ddatgysylltiad hefyd, oni fyddai?

Simon Thomas: So, that would have been disestablishemnt too, would it not?

[204] **Yr Athro Watkin:** Byddai, byddai hynny wedi bod yn ddatgysylltiad. Aethant gam ymhellach cyn i'r Bil gael ei basio yn y Senedd a symud at adran 23, fel y cafodd y Bil ei basio, sef symud yr eglwys i'r un lefel â phob eglwys arall yng Nghymru. Wedyn, yr oedd ailfeddwl a mynd nôl ymhellach na'r hyn a oedd yn y Bil. Mae'n amlwg bod tipyn o drafod wedi bod, er, fel rwy'n deall, cafodd y Ddeddf (Eiddo Bydol) Eglwys Cymru 1919 ei drafftio yn gyflym iawn, yn ôl yr hanes dros benwythnos. Yn ôl yr Athro Kenneth Morgan yn ei lyfr ar hanes Cymru yn y cyfnod, nid oedd y Gweinidog a ddaeth â'r Bil o flaen y Senedd yn sicr beth oedd ei gynnwys.

Professor Watkin: Yes, that would have been disestablishment. They went a step further before the passing of the Bill in Parliament and moved to section 23, as it was enacted, which meant moving the church to the same level as every other church in Wales. Then, they reconsidered and went back further than what was contained originally in the Bill. It is obvious that there had been much discussion, although, as I understand it, the Welsh Church (Temporalities) Act 1919 was drafted very swiftly, over the course of a weekend apparently. According to Professor Kenneth Morgan in his book on the history of Wales in this period, the Minister who brought the Bill before Parliament was not entirely sure what the Bill the contained.

[205] **Simon Thomas:** Nid yw hynny byth yn digwydd nawr. [*Chwerthin.*]

Simon Thomas: That would never happen now. [*Laughter.*]

[206] **Yr Athro Watkin:** Chi ddywedodd hynny. [*Chwerthin.*] Mae'n amlwg ei fod wedi cael ei wneud yn gyflym iawn. Y teimlad oedd, ar ôl y rhyfel byd cyntaf, bod y datgysylltu wedi mynd yn rhy bell.

Professor Watkin: You said that. [*Laughter.*] It is clear that it was done very swiftly. The feeling, following the first world war, was that disestablishment had gone too far.

[207] **Simon Thomas:** Roedd pobl eisiau cadw rhyw fath o draddodiad o hyd.

Simon Thomas: People wanted to retain some tradition.

[208] **Yr Athro Watkin:** Prif fwriad yr ail Ddeddf oedd rhoi arian yn ôl i'r eglwys mewn modd a oedd yn sicrhau'r dyfodol.

Professor Watkin: Yes, and the main aim of the second Act was to provide funds to the church in a way that would secure its future.

[209] **Simon Thomas:** Roedd hynny'n help i esbonio'r sefyllfa yr ydym ynddi. Diolch.

Simon Thomas: That was a help to explain the situation in which we find ourselves. Thank you.

[210] **David Melding:** Can we move to a conclusion now by quickly reflecting on two other options? The options are that a duty is placed on the Church of England to consult the Church in Wales on any proposed legislation, and also a mechanism for the Church in Wales to obtain changes by Order if so desired. Would such an approach require primary legislation

by Westminster to impose this duty of the Church of England, in essence?

[211] **Professor Watkin:** Any statutory duty to consult would require legislation. It is odd when one looks at the reports of the joint ecclesiastical committee that one reads that the Church of England has consulted widely within its own dioceses as with regard to the changes and the methods by which they could be done, but there is no mention of Wales even though Wales is clearly going to feel the impact in not being part of the change.

[212] The only thing that would emerge would be whether the Church in Wales wanted a similar provision made for itself. There would be no mechanism by which the Church of England Measure could do that, because the Church of England Measure could only extend to the provinces of Canterbury and York and could not extend to Wales. There are provisions in the Measures for allowing them to be extended to the Isle of Man and the Channel Islands and so on, but it would be more than just flying in the face of disestablishment if you were going beyond what Measures can do to allow them to be extended into Wales. There would still be no opportunity for the Church in Wales to have legislation, as it were, that was bespoke to its own needs by doing that.

[213] **David Melding:** It is a slight amelioration that Wales gets affected by what happens in terms of the Church of England and its relation to the state, but it does not really affect the fundamentals. That mechanism just would not be able to resolve issues where there were differences of approach.

4.30 p.m.

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

[215] **David Melding:** The final option would be to allow a mechanism whereby changes could be made to marriage in Wales. But, to change the civil authority or bring one in that is actually not Parliament—the Assembly is what Professor Doe suggested—this kind of brings back establishment again, does it not? It is just that your established institution is repatriated, I suppose, which most of us would regard as some advance. Presumably, you would just rather there not to be cut and not have any form of establishment.

[216] **Professor Watkin:** If what one wants is a truly or completely disestablished church, I think that to give the Assembly a role in relation to the Church in Wales creates a new version of establishment, which goes against the equality among the churches, which is what the 1914 Act really aimed to achieve. Indeed, the framers of the 1914 Act were probably looking at much more than that: they were looking to the church withering and allowing Wales to remain a nonconformist nation. That is not what has happened as a consequence, but the playing field would not be even if the Assembly had that role in relation to the Church in Wales and not other denominations. So, my own preference, as it is clear from the paper, is that one should go back to what was originally intended in the 1914 Act and go back to the level playing field. That would create in Wales a situation that might be the best situation more widely, and that would be to have a system whereby the civil rules of marriage governed the manner in which marriages are contracted.

[217] **David Melding:** Should that principle be extended to cover all relations of the state,

because the Church in Wales still has a relation in terms of burials and certain obligations to provide chaplaincy services? Should those be covered by a relationship that is equal with other Christian and faith denominations: that is, whatever laws of burial are determined, they should apply to all that have burial grounds and, likewise with chaplaincies, they could be provided by a variety of faith groups?

[218] **Professor Watkin:** In relation to chaplaincies, I think that it is very much a matter for the institutions to which the chaplains are provided how they are organised, and what their choice is. I certainly know, in relation to hospitals, for example, that it has become very common to have chaplains from more than one denomination, whereas in the past it may just have been the Anglican chaplain who acted in that way.

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

[220] **David Melding:** That concludes the questions that we want to put you. Thank you, Professor Watkin, for your generosity in helping us with our work, and I hope that you will find our report on this important matter, when it is published, of interest. We have all enjoyed dealing with the loose ends of Edwardian statutes, if I can put it that way.

[221] **Professor Watkin:** May I thank the committee and the officials for allowing me to come a little later than originally intended, so that I could attend a funeral?

[222] **David Melding:** It was the least that we could do to accommodate your request as we have impinged so much on your expertise. Thank you.

4.36 p.m.

Papurau i'w Nodi
Papers to Note

[223] **David Melding:** We have a paper to note, which is a letter from Leighton Andrews in response to some of the issues on Welsh language schemes that we had cause to write to him about, which has been somewhat overtaken by his decision not to adopt the Welsh Language Commissioner's standards. May we note that? I see that you are happy to do so.

Cynnig o dan Reol Sefydlog Rhif 17.42(vi) i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order No. 17.42(vi) to Resolve to Exclude the Public from the Meeting

[224] **David Melding:** I move that.

the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Orders No. 17.42(vi).

[225] I see that no Member objects.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 4.37 p.m.
The public part of the meeting ended at 4.37 p.m.