

## WORKING PARTY ON 'DISESTABLISHMENT' REPORT

### 1. BACKGROUND

The working party was set up in 1991, and has met on a number of occasions since then at various venues.<sup>1</sup> It became clear that because of other commitments its members felt unable to make a thorough study of the subject, and it was decided to produce a working paper which would set out the points which would need to be addressed if a Bill to disestablish the Church of England was ever introduced. The working party is now dissolved, though there is still need for another group to forward the discussion at a time when the concept of 're-establishment' is gaining favour. The members of this working party, it should be stressed, were themselves divided about the need, or otherwise, of disestablishment. Equally, members of the working party were drawn from the established Church of England and the disestablished Church in Wales. We also had some input from members living abroad.

There are a large number of views about 'establishment', many of them held by different members of this working party. If there were some who saw 'establishment' as meaning that the State should uphold Christian theology, morality, and ethics, others saw it as a recognition of the nation as a Christian nation, and as giving some sort of protection to Christian life and witness. On the other hand there were some members who felt that 'the crown rights of the Redeemer' (to use a nonconformist phrase) meant that any involvement by the State in the affairs of the Church was a diminution of Christ's rule and authority over his Church, while others believed that an established Church 'is a good place to fish in' in an evangelistic sense. Those who belonged to disestablished Churches felt that the benefits of freedom outweighed the cultural and social benefits of 'establishment', while others again felt that the position of the Church of Scotland, established in theory but reasonably free in practice, was one to aim for. Indeed, some argued that we were almost at that position already, with the Church able to shortlist the bishops appointed by the Crown, though still subject to parliamentary scrutiny of its Measures. As a consequence of such differing views it would be impossible for your working party to put forward any 'model' Bill, as 'disestablishment' could consist of allowing the Church more freedom on the one hand, yet retaining some State connection on the other, or of total independence. It might be accompanied by a measure of religious pluralism, based on the Prince of Wales's preference that he should be the 'defender of faiths' rather than of one. The question of disendowment was not entered into, though one of the members of this working party, Roger Brown, has published a paper in the *Ecclesiastical Law Journal* arguing, from the position of disestablishment in Wales, that it is not a necessary sequel to any measure of disestablishment.<sup>2</sup>

We also felt that it was not in our remit to provide an historical position of establishment or to clarify its precise meaning today or in the past. This has already been done by others more competent than ourselves.<sup>3</sup>

<sup>1</sup> The members of the working party (some of whom contributed papers) consisted of: Peter Boulton, John Camp, Norman Doe, David Griffiths, Hughie Jones, Rhidian Jones, Benjamin Nicholls, Eric Owen, Augur Pearce, Stephen Pix, Julian Rivers, George Spafford, Ingrid Slaughter, Stephen Trott.

<sup>2</sup> Roger L Brown, 'The Disestablishment of the Church in Wales', 5 *Ecc LJ* 252-64.

<sup>3</sup> See, for example, the Chadwick Report, and the books mentioned in the bibliography, especially those by Hastings and Moses.

It is important that we should distinguish between what might be termed cultural establishment from institutional establishment. By cultural establishment we mean those aspects of society which derive from the traditional cultural dominance of Christianity in general, and which relate to all the different Christian denominations in the United Kingdom. Such matters as the restriction placed on Sunday trading and the influence of the Christian ethic in legislation and the law, the provision of chaplains in the armed forces or in hospitals and prisons, religious services to mark civic or national occasions, and the requirement of religious education in schools, may be cited as examples.<sup>4</sup> We appreciate it could be argued that some of these features may be dependent upon the continuation of an established Church, noting, of course, that some priority is given to the provision of Anglican chaplains in the prison and health services. Nevertheless it could be argued that some of these features are to be found in countries where there is no such establishment, such as the United States of America.

As Julian Rivers puts it (in a private communication), 'When we talk about the disestablishment of the Church of England, we are concerned with organisational, or institutional, establishment; laws which grant the Church of England a unique place in public life, or which impose on the Church of England unique obligations... The process of disestablishing the Church of England is a process of altering the legal relationship between state and church until it resembles the relationship between the state and any other church'. This is a similar position to that of the Chadwick Report which defines 'establishment' as meaning the laws which apply to the Church of England and not to other Churches.<sup>5</sup> We thus need to ask how is the Church of England treated differently from any other Church, and taking each particular area of interest, further ask how this might be regulated in a disestablished Church?

All the different Christian Churches in Great Britain, and, it may be added, religions, are under the rule of law, though there may be formal differences as regards the procedures by which these laws are upheld. These areas may be cited as health and safety provisions, charity law, employment issues, and the ecclesiastical exemption (provided they can produce a satisfactory system of their own). Equally, all Churches are subject to parliamentary control regarding their property holding, which might involve the citation of doctrinal formularies. No Church can be fully 'disestablished' so that it is outside the control of Parliament.

We need to ask, therefore, how is the Church of England treated differently from other Churches because it is an established Church, and how might these differences be regulated in a disestablished Church? It is a lengthy list, and, as was stated above, any measure of disestablishment might involve all the areas cited, or only a selection.

## 2. THE CHURCH AS AN INSTITUTION

(a) The requirement for parliamentary approval of the Measures passed by Synod is a feature of establishment and would obviously be changed in any legislation regarding disestablishment.

(b) At present the property of the Church is in the possession of numerous corporations sole, whereas the property of most of the denominations is held by a central trust body. While previous precedents, such as Wales and Ireland, ended these cor-

<sup>4</sup> The Prison Act 1952, s 7, requires every prison to have a Church of England chaplain, and the Education Act 1996 ss 385, 386, provide for a daily collective service in schools of a 'broadly Christian' nature. There appears to be no statutory requirement for chaplains to be provided by the National Health Service.

<sup>5</sup> *Church and State* (The Chadwick Report, 1970, with 1984 preface), paragraphs 1–7.

porations sole and placed the property into a common trust, this was possibly more due to the implications of disendowment than the needs of disestablishment. It might be argued that a property trust could be formed via the Archbishops' Council, but on the other hand it will be argued that local autonomy and ownership ought to be respected. Might the law of franchise offer some way forward in this respect?

(c) The central bodies of the Church are already under the effective control of the Archbishops' Council, which is 'accountable to synod but not subordinate to it',<sup>6</sup> so that much is already in place. However, we would argue that in the climate of today there are few who would venture to associate a measure of disendowment with that of disestablishment, particularly so when the church is responsible for the care of so many historic buildings and is a vital factor in the tourism industry, and at a time when it is already hard-pressed to fulfil its responsibilities to its clergy and its pensioners.

(d) The judicial functions of the Church of England are recognised in law as part of the legal system of this country, unlike those of other Churches, whose 'courts' are seen as little more than committees and whose enactments are treated in law as rules binding on members rather than as issuing from an enforceable judicial process. Should the Church be disestablished then this privilege would surely cease. In its place some contractual obligation should be required of each member, which, if required, could be enforced in the secular courts. Tribunals, properly constituted, might form a much better way of proceeding than that of the existing structures.

(e) The Prince of Wales's pertinent comment about the coronation oath has already been noted, and there is probably considerable public support for a change in the coronation oath whether the Church remains established or not. Fr. Ombres, O.P. addressed a meeting of our working group about this question, and asked why such an offensive discrimination as the refusal to permit the sovereign or his or her heirs to marry a Roman Catholic continues, where there is no restriction were he to marry a Muslim or a Methodist. The monarch's position and the coronation ceremony would clearly be changed in any disestablished Church, although there is no reason why the monarch could not be offered an honorary figurehead position.

(f) It is argued continually that if the Church of England was disestablished then it would constitute no more than a 'sect'. This is hardly true of either the Church of Ireland or the Church in Wales, both of which are disestablished Churches. It may be argued that there can be no 'nonconformity' without an established Church, but basically all denominations would be placed on a similar level in law, thus allowing far better ease of co-operation and taking away some of the pressures against unity. The Churches Main Committee is a good example of this co-operation in practice.

(g) We have deliberately excluded the various parochial, ruridecanal and archidiaconal structures of the Church, such as parochial church councils, deanery synods, &c, assuming that this is a well organised system and could continue without any restrictions within a disestablished Church. Nevertheless, the recent judgment in the Court of Appeal in the case of *Wallbank v PCC of Aston Cantlow*<sup>7</sup> held that a parochial church council was a public authority. Consequently the legal powers vested in this, and possibly other bodies, will need to be re-assessed with the requirements of the Human Rights Act 1998 much in mind.

### 3. MEMBERSHIP

(a) Nonconformist Churches may be said to possess a well-defined and strict membership. By contrast the Church of England has an open membership, accepting that

<sup>6</sup> See M Hill, *Ecclesiastical Law* (2nd edition, Oxford, 2001), paragraph 2.10, n. 29.

<sup>7</sup> [2001] 3 All ER 393, CA; 6 Ecc LJ 172; *The Times*, 15 June 2001.

every parishioner has some rights within the parochial structure irrespective of whether or not they are baptised, confirmed, or on the electoral roll of the parish. We would argue that a defined membership based on the current electoral roll would be required in any disestablished Church, especially for office holders, thus allowing for a contractual obligation between members of the Church. This concept of the 'deemed contract' is operative in the Church in Wales for office holders and for disciplinary cases, although Philip Jones, in his *Governance of the Church in Wales*, is highly critical of any form of restricted membership.<sup>8</sup>

(b) The guaranteed legal rights of parishioners to have their children baptised and themselves married in the parish church, their bodies buried in the parish churchyard (provided it has room), and to take part in the appointment of a churchwarden, whether they are 'members' of the parish church or not, is clearly a relic of establishment. If the Church is disestablished, should it be allowed to choose whom it admits into membership, and thereby disenfranchise those who do not fulfil some particular criteria? Whether this would be consistent with an evangelical view of the Church as a missionary body is another matter.

(c) The privilege of the Church with respect to matrimonial law is an area which has been marginalised in recent years with new legislation permitting marriages at secular locations. It might be thought more consistent for a disestablished Church to be on a par with nonconformist Churches, and for each particular parish to receive a specific licence from the Registrar General to enable its clergy to act as registrars. Each parochial church council could then decide which marriages it would allow to take place, i.e., as to one party being on the electoral roll of that parish, or whether it would permit the marriage of divorcees &c.

#### 4. LEADERSHIP

(a) Nonconformity appoints its own leaders, whereas within the Church of England a system has been devised whereby in an episcopal election two persons are selected by a vacancy-in-see committee, and one of these is chosen by the prime minister for nomination to the Queen for the appointment. While disestablishment must involve the removal of political patronage, this system could be adapted in some way by a disestablished Church (especially if the monarch continues in a 'figurehead' role). All the evidence submitted to us about the election of bishops by electoral colleges seems to indicate that unless a diocese is united in its choice, two strong candidates will rule themselves out, and an unsatisfactory compromise candidate be introduced.

(b) The right of bishops to sit in the House of Lords is under review by the Wakeham Commission, which has proposed a reduction in their number, but the addition of religious leaders from other traditions. If the Church was disestablished one would expect an equal representation from all the religious traditions, without any preference being given to the Church of England.

(c) In most nonconformist Churches local leaders are chosen by the Church itself, either independently or in association with its national conference, whereas within the Church of England the system of patronage is much more complicated. Nevertheless, the patron of a living is required to consult with the parochial church council, so the system is not so autocratic as it once was. The system of patronage as inherited is clearly obsolete, especially as many rural parishes are being united, while other parishes are being staffed by priests-in-charge rather than incumbents. It is arguable that the system may be described as unfair to parishioners who, through their quota, are effectively paying for a clergyman appointed by someone else. It

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\* Philip Jones, *The Governance of the Church in Wales* (Cardiff, 2000), pp. 149–153.

would be far better for patronage as such to be abolished, and with it the responsibility for chancels which some patrons bear if they are also lay rectors (though the Court of Appeal has probably pre-empted this matter), and for a system to be introduced which links together both parish and diocese in the selection process. In any case, disestablishment would surely end the *ex officio* patronage exercised by ministers of the Crown.

(*d*) With regard to the appointment of suffragan bishops, deans, archdeacons and canons, the suggestion might be made that these are diocesan appointments and subject to the same sort of procedures as mentioned above, linking together in some way the diocese and the wider Church—possibly at provincial level for appointments to suffragan bishoprics and deaneries.

(*e*) Equally, the freehold is an obsolete concept, especially in a contractual Church, and in view of the fact that it appears that clerics will be given employment status in the near future, thus ensuring their protection in law, we would suggest its abolition in any disestablished Church.

## 5. OTHER MATTERS

(*a*) The position of Church schools is not an issue of disestablishment as other denominations, especially the Roman Catholics, possess their own.

(*b*) There is no need for the existing faculty procedure to be replaced, although the method of enforcement would need to be changed to reflect a contractual relationship.

(*c*) The position of cathedrals and royal peculiars would need to be examined.

(*d*) So far as the great public occasions in which the Church is involved a growing tendency is noted to allow leaders of other denominations to take an active part in these services. Such services should be ecumenical, but in all probability the churches and cathedrals of the Church of England would continue to be used as they alone have the space available for ceremonial and the accommodation of a large congregation.

(*e*) Government involvement in the selection of Church Commissioners would be ended in a disestablished Church.

## 6. THE WAY AHEAD

This section concerns the actual ways and means of disestablishing the Church of England. It is worth noting, however, that since this working group was set up a very large number of issues we have tackled have been revised or are in the process of revision. Marriage has been secularised by permitting authorised secular places to be licensed for marriage ceremonies, and there has been a move to establish a formal naming ceremony to replace baptism. The Archbishops' Council has been formed to exercise supreme administrative authority within the Church. The role of the bishops in the House of Lords is under review, as is the restriction on clerics standing for Parliament. Equally, there are calls to review the position of the monarchy in so far as it impinges upon the established Church. The freehold is under threat, while it appears that recent legislation may allow clerics to be regarded as employees of the Church.

These matters might suggest that if this trend continues, then the Church of England might resemble the Church of Scotland in being established yet free of most restraints. This might well satisfy many of those who would prefer more freedom but without losing a privileged position which might be seen to offer both responsibilities and opportunities for its mission. Equally there are those who would fear that any act of

disestablishment might suggest that the nation was withdrawing itself from any sense of Christian commitment or witness.

For those who would want more, then a Bill would need to be drafted to address the issues mentioned above. If trustee status is sought then there may well need to be a definition of doctrine as well. But it may be remarked that the Welsh Church Act 1914, under which the four dioceses in Wales were dismembered from the Province of Canterbury, disestablished and disendowed, managed to cover the whole issue of disestablishment in under a third of its 34 pages together with the extinction of corporations sole, the remainder covering the provisions of disendowment. In some respects the Act permitted the disestablished Church to make its own arrangements about its constitution and bureaucracy, though it may be argued that these matters are now in place for the Church of England. In addition the position of the monarchy would need to be addressed and also the role of bishops in the House of Lords. Those who suggest that the matters of disestablishment might occupy a whole legislative session may not be that realistic. The way forward may be an Act which readjusts the relationship between Church and State, and brings the Church of England into line with other Christian denominations.<sup>9</sup> The position of the succession to the Crown and the role of the sovereign are more complicated matters and might need to be addressed separately.

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<sup>9</sup> It is worth noting that the terms of the Act of Union 1707 makes the 'establishment' of the Church of England a fundamental condition of the union with Scotland.