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SOCIETY OF CONSERVATIVE LAWYERS



**The arguments for and
against disestablishment**

The Church and the State

FOREWORD

It has been possible to produce this pamphlet due to the work of Amy Woolfson who is the Society's second Lyell Scholar. The Lyell Scholarship is named after the later Right Honourable Lord Lyell of Markyate QC, who was Solicitor General between 1987 and 1992 and Attorney General between 1992 and 1997, becoming the longest continuously serving law officer for more than 100 years. Lord Lyell was chairman of the Society of Conservative Lawyers at the time of his death in 2010. The Scholarship is funded by the legacy left to the Society by the late Pamela Thomas OBE who was closely involved with the Society for many years and served as its secretary for more than twenty years.

The Church of England was created by Parliament with the Sovereign being accorded by Parliament the titles of both Supreme Governor of the Church of England and Defender of the Faith. However, over the years, like many parts of the United Kingdom's unwritten constitution, the relationship between 'Church' and 'State' has evolved.

For example, today Anglican Bishops are selected by the Anglican Church. No longer is the Archbishop of Canterbury chosen by the Prime Minister, as happened notably when Harold Macmillan was Prime Minister. Although both Houses of Parliament have to endorse Measures passed by the General Synod of the Church of England, it is difficult to conceive of circumstances where General Synod would find itself in the position of passing a Measure that would be unlikely to have Parliamentary endorsement.

So, although the relationship between 'Church' and 'State' evolves and is now increasingly light touch, a great value of the Church of England is that it is a national Church – a church for everyone, with duties in every parish to baptise, marry and bury all those living in the parish who ask for the Church's services.

As with so many parts of the United Kingdom's unwritten constitution, much of the strength of the relationship between 'Church' and 'State' is, as I discovered during my years as Second Church Estates commissioner, that it is a relationship which is continuously evolving.

Amy's pamphlet clearly articulates the history and importance of the relationship between 'Church' and 'State', including some of the key changes over recent years.

The Society of Conservative Lawyers is an association of lawyers who support or are sympathetic to the aims of the Conservative Party. Members hold a range of different views within those parameters and the views expressed in this paper are not necessarily held by all members of the Society or by the Conservative Party.

Foreword by the Rt Hon Sir Tony Baldry

Member of Parliament for Banbury 1983 – 2015

Second Church Estates Commissioner 2010 - 2015

The Church and the State

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August 2015

Introduction

This short paper seeks to survey the relationship between the established Church of England and the arms of the State. It sets out a very brief history of establishment and describes some of its key aspects. The position of the Church of England will be compared and contrasted with the Anglican Church in the other nations of the United Kingdom. Some of the arguments for and against disestablishment will be considered. Finally, the practical effects of disestablishment will be examined from the point of view of the governance of the United Kingdom, followers of the Church of England and the population as a whole. The paper is not intended to incorporate any recommendations but to stimulate debate on the relationship between the Church and the State and its place in the 21st Century.

What does establishment mean?

Put at its simplest, establishment means that the Church and the State are linked. The Monarch is the Supreme Governor of the Church and the Church performs a number of official functions.

The Church of England came into existence following Henry VIII's break with Rome. In 1534 Parliament passed the Act of Supremacy, which confirmed Henry as 'Supreme Head on Earth of the Church of England'. Queen Elizabeth I amended this to 'Supreme Governor of the Church of England', on the basis that 'Supreme Head...' represented a usurpation of divine authority..

Around this time, Parliament also passed a series of Acts which had the effect of dispossessing Rome of Church revenue and appropriating Church property to the Crown. A Court of Augmentations of the King's Revenue was established, which had the power to collect and dispose of monastic property in whatever way would be most beneficial to the Crown.

Members of both Houses of Parliament are required by law to take an oath of allegiance to the Crown on taking their seat in Parliament. Historically, the oath was worded in a way that effectively barred non-Anglicans from taking it. The current wording of the oath does not discriminate and those of no faith may affirm rather than swear.

Historically, the Church had special legal protection against blasphemy. This caused controversy when Salman Rushdie's *The Satanic Verses* was published. A complaint was brought that the book's references to Islam were blasphemous. This was rejected by the High Court in *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 All ER 306. The Court held that the common law offence of blasphemy only applied to Christianity. There has been some debate as to whether this meant Christianity, or just the Church of England. It seems likely that the offence of blasphemy applied to any form of Christianity, to the extent that its doctrine overlapped with the Church of England's. In 1996, the European Court of Human Rights ruled that United Kingdom blasphemy law was not incompatible with the European Convention of Human Rights¹ even though it only provided protection to Christianity.

In 2006, Parliament passed the Racial and Religious Hatred Act, which created the offence of inciting

¹ *Wingrove v UK* 17419/90

hated against a person on the grounds of their religion. The Criminal Justice and Immigration Act 2008 abolished the offence of blasphemy.

Individuals and the Church

Historically, the Church's ecclesiastical Courts had wide jurisdiction over a number of areas of public and private law. Over time, however, the Church's jurisdiction has been reduced. In 1857 Parliament passed the Matrimonial Causes Act and the Court of Probate Act. Together they transferred jurisdiction for marital and probate law from the ecclesiastical to the civil Courts. Maritime law also passed from the 'civilian' lawyers (the ecclesiastical lawyers whose Inn of Court was Doctors' Commons) into the jurisdiction of the Queen's Bench. Interestingly, whilst the Church no longer plays a role in private civil law in the United Kingdom, the Islamic Sharia Council of the United Kingdom and the London Beth Din do offer adjudication in disputes between members of their religion. It should be noted that neither Sharia nor Beth Din Court decisions are legally binding, save by separate agreement reached between the parties, as a process of mediation.

Nevertheless, individuals often still find that their lives are intertwined with the Church as a result of its established status. The Church is closely involved with rites of passage. Individuals have the right to be baptised, married and buried in their parish church, subject to certain rules. The state regulates the practice of these functions by the church. For example, burial fees are set by Statutory Instrument, the most recent fees being set out in the Parochial Fees Order 2014.

Broadly speaking, until the Marriage (Same Sex Couples) Act 2013 gained Royal Assent, any person who was entitled to enter into a civil marriage with another person was also entitled to enter into a Church of England marriage with that person, although some clergy would not marry divorced people. Now it is possible to enter a civil marriage with a person of the same sex. There is a specific exemption in the Act for the Church of England; no Church of England clergy may solemnise a same sex marriage. Other religious groups may solemnise same sex marriages, subject to certain conditions being met. Special provisions relate to the position of the Church in Wales and these are discussed later in this paper. It is only in respect of the Church of England that same sex marriage can be said to have been 'banned' outright.

Canon Law provides that people who have committed suicide should not receive the standard funeral service but a modified one. However, no modified service has ever been agreed. In practice, many people who commit suicide receive a standard funeral service but a proposal recently approved by the General Synod made it clear that all people should be entitled to a standard funeral service, regardless of whether they took their own life².

Another aspect of everyday life in which the Church plays a major role is education. Approximately one million children in the United Kingdom attend Church of England schools. The Church is particularly active in the primary sector, representing one in four primary schools. The Church is a major sponsor of Academy schools. Over 500 independent schools declare themselves to be Church of England schools. In total, the Church estimates that about 15 million people alive today went to a Church of England school³.

Individuals may also come into contact with the Church via its network of chaplains. Church of England chaplains are a mixture of lay and ordained ministers who conduct their ministry 'in social rather than church structures and focus... the vocation of the church to serve the mission of God in the

2 <http://www.bbc.co.uk/news/uk-england-gloucestershire-30767492>

3 <https://www.churchofengland.org/education/church-schools-academies.aspx>

world⁴. Chaplains are doubly accountable; to the organisation hosting them and to the Church at large. They can be found in a huge array of locations; the army, hospitals, prisons (where they are required by statute⁵), even the Channel Tunnel. In 2014, Todd Slater and Dunlop estimated that there were at least 1415 chaplains in the Church of England⁶. Whilst chaplains can be found in other religions, they do not appear to have anything like the coverage of the Church of England.

The Church of England's property portfolio is extensive, and its land ownership very diverse, including not only church buildings and parsonage houses but also commercial and residential property and agricultural land and forests. Some more high profile assets include the Hyde Park Estate in London and the Metrocentre in Gateshead. In total, the Church Commissioners manage a £6.1bn portfolio of investment assets of all types on behalf of the Church of England. The income is used to fund the ministry, mission and pension funding of the Church, including much of its work in poorer urban and rural areas of deprivation where the congregations cannot support its work through 'living giving' (though the majority of the Church's work is funded by its congregations).

In addition to its own substantial landholdings, parish churches have the right (inherited from the time of the dissolution) in a limited number of cases to raise money from relevant local landowners in order to repair the church chancel. The obligation primarily affects Oxbridge Colleges and other major landowners whose land was given or acquired cheaply or at no cost from the Crown when the monasteries were dissolved in Henry VIII's time. Historically, this right had been effected through the parish church taking an unregistered interest in the relevant land but the Land Registration Act 2002 started a ten year period in which all chancel repair liabilities had to be registered by parochial church councils or be lost when the property next changed ownership. The result is that since 14 October 2013 all purchasers, by inspecting the registered title of a property, are able to discover definitively whether it is affected by chancel repair liability.

As we have seen, the established nature of the Church means that individuals may come into contact with it in many different ways. It could be as part of a rite of passage, like birth, death or marriage, where individuals have clear entitlement to its ministry by virtue of their status as parishioners, or it could be outside a place of worship, such as in a Church of England school or via a chaplain. Or, the interaction may be almost entirely secular – the Church may be their landlord, or even have rights over their property.

The Church and the Monarch

The Sovereign is the titular head of the established church and holds the title 'Defender of the Faith and Supreme Governor of the Church of England'. Both the Church and Parliament play a fundamental role in the coronation process: the ceremony takes place at Westminster Abbey and is conducted by the Archbishop of Canterbury (the most senior clergy in the Church). The form of the Coronation Oath is set out in statute (the Bill of Rights 1688, amended by the Accession Declaration Act 1910 so as to make it less offensive to Catholics). As part of the Coronation ceremony, the Monarch must make a declaration to maintain the Anglican Protestant Church (Coronation Oath Act 1689). Statute requires that the Sovereign be a confirmed member of the Church of England. The Act of Settlement 1701 stated that anyone who 'shall profess the popish religion, or shall marry a papist' could not be monarch. This was repealed by the Succession to the Crown Act 2013 and royals may now be

4 Todd, Slater, Dunlop, 2014, *Report on Church of England chaplaincy*, p4

5 S.7 Prison Act 1952

6 Todd, Slater, Dunlop, 2014

Catholics without losing their succession rights.

On ordination and on taking any office in the Church at any level, clergy are required to make an oath of allegiance to the Crown (Clerical Subscription Act 1865). Bishops must attend upon the Queen, and do homage to her on taking up their own office.

The Church in Parliament

Whilst the Bishops' place in the House of Lords is one of the more visible (and perhaps political) elements of establishment, their origin predates establishment and can be traced back to the 14th Century. Even before parliament existed, religious leaders were regularly consulted by Saxon Kings.

The Bishopric of Manchester Act 1847 limited the number of Bishops that could sit in the Lords to 26. Places on the Bishops' Bench are reserved for the Archbishops of Canterbury and York, as well as the Bishops of Durham, London and Winchester. The Bishops Act 1878 provides that the remaining 21 places are allocated by seniority. When a Bishop retires, he gives up his seat in the Lords although many, such as former Archbishop of Canterbury Rowan Williams, are made life peers.

In November 2014, the Church of England adopted legislation allowing women to be ordained as Bishops. In December 2014 the Deputy Prime Minister introduced a Bill⁷ that will temporarily allow women bishops to enter the Lords sooner than they would under the Bishops Act 1878. The notes to the Bill, which has now been enacted, explain that: *for a period of 10 years, the most senior eligible female Bishop at any time would fill a vacant Lords Spiritual seat in preference to the most senior eligible male Bishop*. In January 2015 the Right Reverend Libby Lane was consecrated Bishop of Stockport and, more recently, the Venerable Rachel Treweek was elected as the first female diocesan Bishop of Gloucester.

Bishops have a central role in the Lords – they open the parliamentary day with prayers and, like other peers, speak in debates, vote on legislation and sit on committees. For example, the Archbishop of Canterbury sat on the Parliamentary Commission on Banking Standards. On 20 November 2014, the Bishop of Worcester led a debate on support for asylum seekers.

The Bishops, as 'Lords spiritual', have a special mention in legislation. The enacting formula for all legislation approved by the Lords (i.e. not Parliament Act legislation) contains the words: *be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—*

The Church of England is also represented in the House of Commons, via the office of the Second Church Estates Commissioner. The post of Second Church Estates Commissioner is by convention given to an MP from the governing party, who must also be a confirmed Anglican. The post was held by Sir Tony Baldry, MP for Banbury up to the General Election. It is now held by Mrs Caroline Spelman, MP for Meriden.

The Second Church Estates Commissioner is also responsible for guiding church related legislation through the Commons and for answering MPs questions on Church matters. In recent years the Second Church Estates Commissioner has answered questions about the Church's position on same-sex marriage, food banks, church buildings, women in the Church and the burial of Richard III.

The House of Commons has its own chaplain, who leads the commons in prayer at the start of each sitting day. The current chaplain is the Reverend Rose Hudson-Wilkin.

⁷ *Lords Spiritual (Women) Act 2015*

Church legislation

Ecclesiastical law and the ecclesiastical courts are part of the law and legal administration of the land. The Canons of the Church of England are summary rules (revised and republished in 1970), made by the Church's General Synod and signed by the Queen; its Measures are formulated by the General Synod following a process of committees and readings modelled on parliamentary procedure, and then laid before Parliament and subject to scrutiny by Parliament's Ecclesiastical Committee. They are finally signed by the Queen like any Act of Parliament, and have the same force and effect as parliamentary legislation.

The General Synod is the only body outside Parliament that has this power to legislate. In 1919 Parliament passed the Church of England Assembly (Powers) Act which is, essentially, an enabling Act, and provided that Canon law, approved by the General Synod was subject to scrutiny by the Ecclesiastical Committee. This shortens the legislative process, frees up parliamentary time and allows the Church greater self-government – though the Ecclesiastical Committee must recommend that its legislation is 'expedient' in the interests of the Crown's subjects.

The Second Church Estates Commissioner sits on Parliament's joint Ecclesiastical Committee. In the 2010-15 Parliament, the Committee is chaired by Lord Lloyd of Berwick, a crossbencher.

Policy towards the Church

Establishment cannot simply be measured by the Church's presence in Parliament and its symbiotic relationship with the Monarchy, important though these aspects are. It may also be viewed by considering the effects that Parliament and the Government have had on the Church in the past 350-odd years, and continue to have today.

The process for appointing Archbishops of Canterbury shows how the State maintains a role in shaping the Church. In the early 19th century, Parliament responded to the increases in urban population by establishing new churches, often referred to as Commissioners' Churches. The amount of public money committed to this project was substantial, over £1m. Between 1818 and 1856 the Church Building Commission built 600 new Anglican churches in England. Building churches was seen as a public duty, to address the issue described by Prime Minister Lord Liverpool as the 'vicious habits and corrupting influences dangerous to public security, as well as to private morality⁸' caused by the rise of industrial Britain. St George's in Hanover Square and St Peter's in Eaton Square, both famous London churches, are just two of the churches established through this programme.

The Archbishop of Canterbury is the most senior appointment in the worldwide Anglican Communion as well as the head of the Church of England. Like the Prime Minister, he is entitled to have regular audiences with the Sovereign. The Archbishop of Canterbury and Diocesan Bishops are chosen by a special commission, the Crown Nominations Commission (CNC). The Chair of the CNC (for Archbishop's appointments) is chosen by the Prime Minister and it is serviced by Appointments Secretaries representing both the Archbishops and the Prime Minister. For other diocesan bishops' appointments, the chairs are the two Archbishops, each presiding over the CNC in relation to appointment in his own Province of Canterbury or York. Other members are drawn from the senior clergy and laity, nationally and locally. The CNC submits the name of a preferred candidate and a second candidate to the Prime Minister, who then formally advises the Sovereign on the appointment. Since 2007 the Prime Minister has taken a reduced role in this process, serving largely as a conduit to pass details of the suggested appointment from the CNC to the Sovereign rather than to give advice on the merits of a particular appointee. The Prime Minister's role may have receded in recent years but it remains

8 *House of Lords Hansard, 18 May 1818, col. 710*

a key part of the process.

The Church in other parts of the United Kingdom

As the name implies, the Church of England is only the established Church in England. Here we will briefly survey the position of the Anglican church in other parts of the United Kingdom.

Wales

The Church in Wales was created by the Welsh Church Act 1914, which disestablished the Church in Wales and Monmouthshire. This was largely a response to the predominance of the Free Churches in Wales. Key provisions included vesting Church property in the newly created Welsh Commissioners, abolishing ecclesiastical Courts in Wales and preventing Welsh Bishops from sitting in the House of Lords. The boundaries of the Church in Wales largely correspond with the national border but there are some anomalies. For example, a number of parishes in Powys and Monmouthshire fall under the Diocese of Hereford⁹.

The Church in Wales has its own legislature, but unlike the Church of England, its jurisdiction is essentially internal, and its decisions are binding only on its membership and internal administration.

There was controversy in 2013 when, as part of the debate on same sex marriage, the Government proposed an exception for the Church in England and the Church in Wales. Clergy in Wales protested that they had not been consulted as to whether they would be prepared to marry same sex couples. As a compromise, s.8 Marriage (Same Sex Couples) Act 2013 gives the Lord Chancellor the power to allow the Church in Wales to conduct same sex marriages, once he is satisfied that it has resolved that it wishes to do so. Accordingly, in September 2014, the Church in Wales started a one-year consultation in to whether it should marry same sex couples.

The Queen has no role in the Church in Wales equivalent to her role as Supreme Governor of the Church of England.

Scotland

The Church of Scotland was established as a national church in 1560 and maintained its identity as a separate protestant church, despite the Act of Union 1707. It remains the established church in the sense that it is recognised in statute as the national Church of Scotland and has a responsibility to provide ministry to all the people of Scotland. However, unlike the Church of England, it does not have to rely on Parliament to legislate for it. The Church of Scotland does not have a single person as its head but is governed by its General Assembly. Nonetheless, the Sovereign does have a special place in the Church of Scotland and is represented at the Church's Annual Assembly by Her Commissioner.

Northern Ireland

The Church of Ireland includes Northern Ireland and the Republic of Ireland, although the latter has a predominantly Roman Catholic population. In 1537 the Irish Parliament declared Henry VIII head of the Church in Ireland. Because Catholicism remained strong in much of Ireland, particularly in rural areas, there was a tension between the official position of the established church and the reality,

9 http://www.hereford.anglican.org/visitors/about_the_diocese.aspx

where many people chose to worship elsewhere.

In 1869 Parliament passed the Irish Church Act, which disestablished the Church of Ireland and removed Irish Bishops from the House of Lords. The Church of Ireland legislates through its General Synod, which was established in 1890. It is an autonomous province of the Anglican Communion.

Disestablishment

As the preceding sections have demonstrated, the Church of England is very much embedded in our current constitutional settlement. This is not universally popular and establishment has been criticised both from inside the Church and out. Many argue that in a multi-cultural, multi-faith society like modern Britain, it is anachronistic to have an established Church. Many leaders of the other faith communities value the established role of the Church of England in the life of the nation: they argue that it secures a voice for discussion of religion generally in public affairs, and the Bishops frequently draw on their knowledge of and acquaintance with leaders of the other faith communities in their public statements. It also provides a platform for rational discussion and comment on religious affairs generally in our national life, rooted in the community and pastoral knowledge, and well-distanced from religious extremism.

The National Secular Society, argue that disestablishment would be beneficial for both the Church and the State. They argue that disestablishment would end the Church's 'privileged input into Government' but also that the 'Government could not involve itself in the running of the Church'¹⁰.

The former Deputy Prime Minister, Nick Clegg, has been a high profile voice in favour of disestablishment. In April 2014 he was quoted as saying: 'my personal view is that, in the long run... I actually think it would be better for the Church and better for people of faith and better for Anglicans, if the church and the State were, over time, to stand on their own two separate feet, so to speak'¹¹.

In 2008, Dr Rowan Williams, then Archbishop of Canterbury, said he 'recognised the case for disestablishment' – although he did not think the time was right for it¹².

Perhaps one of the most controversial aspects of establishment is the presence of Bishops in the House of Lords. Various groups campaign against their continued presence, including Unlock Democracy and the British Humanist Association, although they are careful to note that removal of the bishops would not inevitably lead to disestablishment, for which they are not advocating.

Supporters for establishment point to the enduring stability of the United Kingdom constitutional settlement, and the Church of England's role within that. Recent attempts to reform the House of Lords give an indication of the difficulties which any would-be disestablishment process might face.

Given the establishment's apparent stability and its deep-rooted, albeit not universal, support it seems more likely that disestablishment would happen as a result of some external event such as a new monarch feeling unable to take the coronation oath, rather than as part of a planned policy of disestablishment. Alternatively, as with the Churches in Wales and Ireland, the rise of more radical strands of Christianity (or indeed of other non-Christian faiths) could make the established nature of the Church of England politically untenable.

10 <http://www.secularism.org.uk/disestablishment.html>

11 <http://www.newstatesman.com/politics/2014/04/clegg-calls-disestablishment-church-england-and-hes-right>

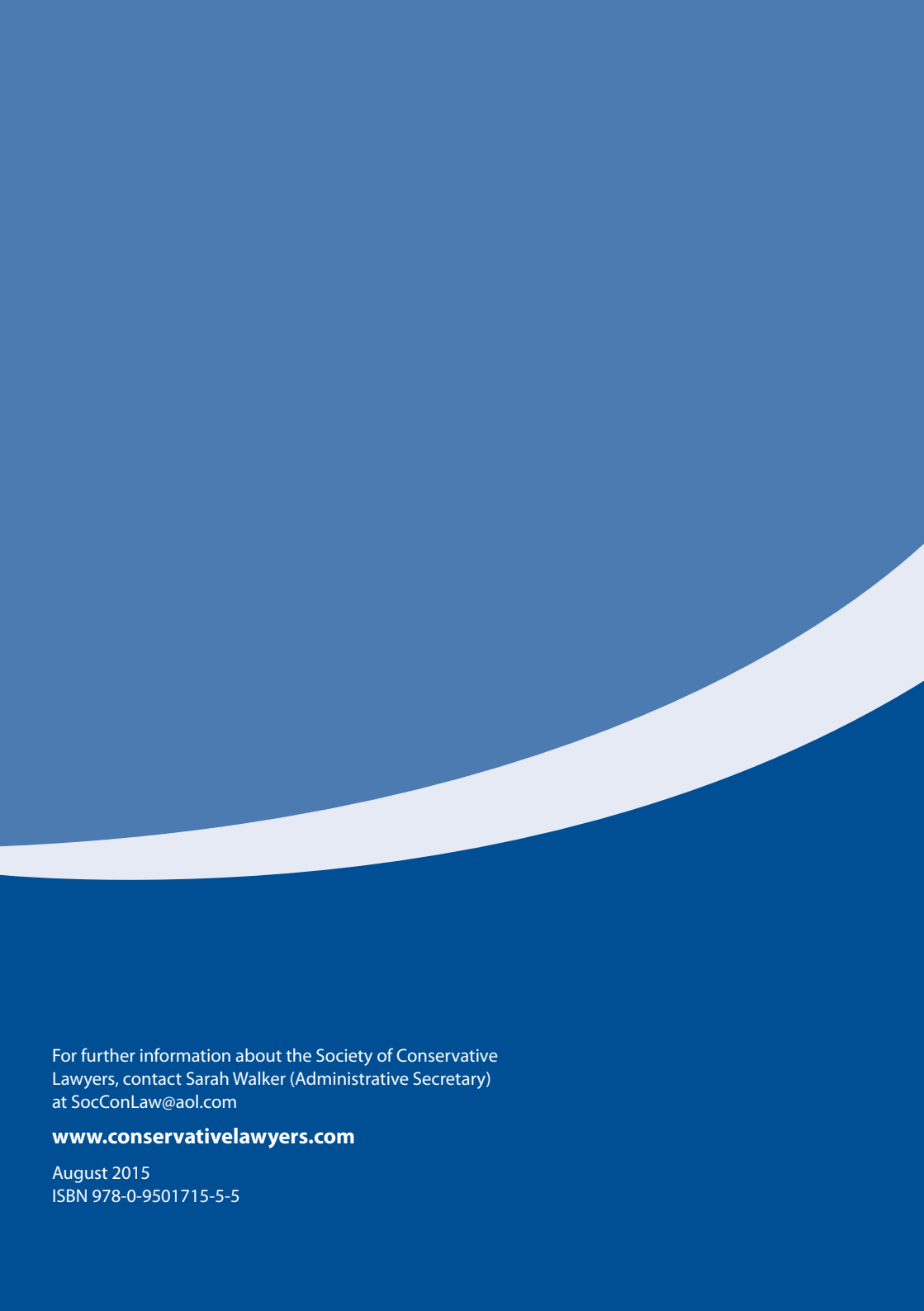
12 <http://www.newstatesman.com/religion/2008/12/williams-archbishop-lambeth>

Bibliography

www.parliament.uk/about/living-heritage/transformingsociety/private-lives/religion/overview/religionc19th-/

Hill, M and Sandberg, R (2009), Blasphemy and Human Rights: An English Experience in a European Context. *Derecho y Religion* IV, pp. 145-160

Walker, A and Wood, E (2000), *The Parliamentary Oath*, House of Commons Library RESEARCH PAPER 00/17



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August 2015
ISBN 978-0-9501715-5-5