

**IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK**

**RE: ALL SAINTS' CHURCH, SANDERSTEAD**

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**JUDGMENT**

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**Introduction**

1. This is a petition by the Vicar and Churchwardens for the removal of the two sets of communion rails in the church – one set in the main church, and one in the St Catherine's aisle.
2. As explained below, the rails have in fact already been removed by the authority of an Archdeacon's licence for a temporary re-ordering dated 12 May 2009 (so that the effect of the removal could be assessed by the congregation).
3. The certificate of publication returned to the Registrar states that a public notice was displayed (i) on a notice board inside the church; and (ii) on a notice board outside the church where it was readily visible to the public. The display was between 13 October 2010 and 14 November 2010.
4. No objections were received in the Registry in that period.
5. However Mrs Mair Rimmer had written to the Team Rector, the Revd Canon Simon Butler on 31 July 2010 objecting to the proposals, of which she had learned. Mrs Rimmer, who had formerly been a churchwarden at All Saints, now lives in the Wirral,

so I imagine that someone from the parish with whom she was in touch had told her about the proposals. The petitioners very properly brought Mrs Rimmer's letter to the attention of the DAC, who in turn copied it to me.

6. Canon Butler replied to Mrs Rimmer, explaining to her the justification for the removal of the rails. In due course he brought her concern to the attention of the DCC, the Standing Committee of which on 9 August 2010 decided that it would not alter its previous resolution to petition for the permanent removal of the rails<sup>1</sup>.
7. It seemed unlikely that Mrs Rimmer would see the publication of the petition, so I asked the Registrar to write to her to ask whether she wished to become a party opponent. She did not. Although her letter indicated that she considered the proposals would go ahead, she did not withdraw her objection. In directions which I gave on 1 November 2010 I said that I would take it into account. In those directions, I also raised a number of questions, which Canon Butler answered in a document sent by e mail on 15 November 2011. I also indicated that I would visit the church, which I did on 17 December 2010.
8. On 5 January 2011, the Registry received a letter from Miss Leonie Flowerday, objecting to the proposals, and arguing that the notice of the petition that had been given was not adequate. At this stage I will only set out her concerns about citation. She wrote:

*...traditionally at All Saints Church the faculty notice is pinned to the outside of the main church door where it is clearly visible. This therefore is*

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<sup>1</sup> See paragraph 27 below.

*where anyone wishing to read the notice would look for it. This has not been done for this faculty application.*

*My understanding of Canon Law regarding the posting of a faculty application notice is that they must be posted in a prominent position where it is clearly visible to all. This applies to neither position in which the notice was allegedly placed. All Saints Church is locked unless there is a service and therefore the notice which was placed on the notice board inside the porch could not have been viewed at other times when people may have been in a position to take note of your address to object. Also both notice boards inside and out are well above eye line for anyone in a wheelchair or who is below average height and the text on the notices is too small to read unless you are able to get reasonably close to it. I am both disabled and very short as a result of my disability and could not have read any notice on the outside or inside notice boards as they are simply too high for me to see. The word "prominent" implies that the notice should be clearly visible and that people should not have to scour every notice on every notice board in the area to find the application. As we have been waiting for the faculty application to be made for several months and were not informed when the application had finally been made we, the congregation, did not have any idea when to start scouring the notice boards for the application, although I had been keeping an eye open for it every time I went to church.*

*My understanding is that you have so far had no objections to the faculty application and yet I am well aware that a lot of people wrote to the DCC to object to the proposal before the application was applied for and who wished therefore to make further objection to you when the notice was posted. The fact you have had no objections at all begs the question in my mind as to whether or not they have seen the notice either and therefore have had no chance to object*

9. By a letter dated 6 January 2011, the Registrar, on my direction, wrote to Canon Butler as follows:

*I enclose a copy of a letter dated 3 January 2011 which we have received in the Registry. As you know, although there were no formal objections to this petition, in the light of the concern expressed by a former parishioner, the Chancellor visited the Church last month, and, as yet, a faculty has not issued.*

*The Chancellor will be grateful for any comments that you may have about the advertising of the petition (not, at this stage about the substance of Miss Flowerday's point).*

*However, subject to anything you may wish to say to him, he would suggest that, without prejudice to the question of whether the previous*

*advertisement was compliant with the regulations, notice of the petition is posted on the principal door of the church for a period of 28 days; and that notice is also given in the church magazine, with 28 days given to respond. If this be done, then it seems to the Chancellor that everyone with an interest in the matter will be aware of the application, and he will not have to go into the question of the adequacy of the advertising in the first place. Of course this will mean that he will end up taking into account an objection or objections which otherwise he would not have considered, but, subject to what you may say – and without in any way prejudging the outcome – it seems to the Chancellor that it is not a good idea to “shut out” at this stage those who may wish to express their objections to the proposal.*

10. Canon Butler replied by a letter dated 10 January 2011 as follows:

*The Chancellor asks that we comment upon the claims made by Miss Flowerday concerning the publication of the Public Notice.*

*I can confirm that the Public Notice was displayed in the following places for the required time period:*

- *On the notice board immediately adjacent to the inner oak door of the church;*
- *On the external church notice board immediately adjacent to the main door;*

*Mr Arnold Butler, the Churchwarden who has administered this Faculty application, comments thus in an email: “... I have to say that we have used these sitings for the Public Notices before without any adverse comment...The position of the external display is actually better than before we had the new display cabinet outside the Porch.”*

*In terms of Miss Flowerday’s contentions about our procedures for the display of the Public Notice, I would make the following observations:*

- *In my years of service here no Public Notice has been pinned to the outside of the main door: we use external notice boards to prevent unauthorised removal or rain damage. We ceased pinning notices to the inner door of the church some years ago, following concerns expressed that this was inappropriate on a medieval church door. It is difficult to accept Miss Flowerday’s claim as to what is ‘traditional’ practice in this matter.*
- *The church is kept unlocked most mornings Monday-Friday, making both notices accessible;*
- *Miss Flowerday has never complained about the height of notice boards before in respect of other notices displayed which she finds difficult to read. She has never drawn our attention to this as a disability access issue, when she has done so for other matters.*
- *Following the Church Council’s decision to petition for Faculty, the usual steps were taken to inform the congregation. The congregation were clearly informed (through weekly notice sheets which also*

*appear on the parish website — through notices given by clergy in services and through informal conversation) that they were entitled to object and that public notices provide details of how to do so. The Chancellor should be aware that All Saints' is part of a Team Ministry and we have a Parish Magazine not a Church Magazine. We believe it would be inappropriate to use our Team Parish Magazine to draw people's attention to such matters as Faculties; we leave it to individual churches to communicate this sort of information at District level.*

*The factor most likely to have contributed to Miss Flowerday's missing the Public Notices was her absence from public worship at All Saints' for much of the summer and autumn of 2010. This was a personal decision taken because of a painful event in the life of the church which affected Miss Flowerday profoundly. At a meeting with the churchwardens in late October (after the end of the Public Notice period), Miss Flowerday confirmed that she had been consciously staying away from All Saints'. It seems likely to the other Petitioners and I that Miss Flowerday's regrettable absence is the most obvious explanation as to why she missed the Public Notices rather than any lack of prominence or publicity we gave to them. Her letter of objection comes well after the end of the Public Notice period, just as Miss Flowerday slowly picks up the threads of what has gone on while she has been away. We do not believe that we as Petitioners are responsible for what was, ultimately, the consequence of a conscious decision by Miss Flowerday.*

*I would like to assure the Chancellor that we as Petitioners acted entirely in accordance with the regulations and guidance provided to us by the Registry. Notwithstanding our rebuttal of Miss Flowerday's objections, as a matter of courtesy to the Chancellor, the DCC Standing Committee will happily review our procedures for the display of Public Notices particularly in respect of people with disabilities.*

*I will, of course, correspond with the Chancellor on the content of Miss Flowerday's objections should it become necessary.*

11. I note that the notice period expired on 14 November 2010. Thus if Miss Flowerday's meeting with the churchwardens was in late October it was not after the expiry of the notice period.
12. This letter was received in the Registry on 14 January 2011. On 11 January 2011, the Registry received a letter complaining that notice in respect of a petition for removal of

the pews had not been properly displayed, asserting that the usual procedure at Sanderstead was the posting of the public notice on the church door. The letter was based on a misunderstanding: there had been no such petition. In the circumstances, the misunderstanding was a reasonable one. It was based on an exchange of emails between Canon Butler and another parishioner but at a time when they were at cross-purposes. On 11 January 2011, that other parishioner indicated that if he had been aware of the proposal to remove the communion rails, he might have objected.

13. Canon Butler did not take up my suggestion of re-citation, and in fairness to him, his position is clear: citation took place in accordance with the Faculty Jurisdiction Rules, and there is no need for re-citation.

14. It seemed to me that, first and foremost, Miss Flowerday was in her letter giving an explanation as to why she personally did not see the notices. That explanation seemed to me a reasonable one, and I decided that it would be a disproportionate exercise to investigate the matter further. I considered that the key thing was that, against the background

- that she did not in fact see the notices
- that she has a reasonable explanation for not seeing the notices

her objection had reached me before I made a decision.

15. Accordingly, in the particular circumstances of her case, I extended Miss Flowerday's time for making an objection until 5 January 2011. The Registrar gave Miss Flowerday notice under rule 16 (3) of the Faculty Jurisdiction Rules 2000 informing of her right to become a party opponent if she so wished. By a letter dated 16 March 2011 she wrote

to the Registrar informing him that she did not wish to become a party opponent, but wished for her letter dated 3 January 2011 to be taken into account in my consideration of the petition.

### **Visit**

16. I visited the church on 17 December 2010, and I am grateful to Canon Butler for explaining the proposals to me so clearly.

### **The church and the communion rails**

17. All Saints' Church, Sanderstead is a Grade 1 listed building, and the oldest parts of it date back to the thirteenth century. It is a very good example of a church that has been altered over the years, and this adds much to its attractiveness. There was a Victorian extension, an extension in the 1930s and finally an extension which was dedicated as recently as 1981.
18. There are two sets of communion rails. As is usual, both incorporate a kneeler. The first set of communion rails enclose the sanctuary at the east of the church, with a gap in the middle. They were made in the 1930s and are an attractive piece of furnishing in themselves. They commemorate Hugh Rose, the son of a former Rector, who died on 15 January 1936.
19. The second set are arranged around a Holy Table in the 1981 extension. Known as the St Catherine's aisle, this now functions as a Lady Chapel, with the Holy Table in a north/south orientation. Although I have referred to these rails as a set, they do not in fact match each other. They are modern and functional. One of the rails is in memory of

Andrew Joseph Rimmer who died, aged 7 months, on 1 July 1965 and one was presented by Trevor, David, Peter and John Rimmer, Head Choristers 1967 – 1980.

#### **Pattern of services at All Saints'**

20. There is a service of Holy Communion at 8.30 am each Sunday, at which there are typically about 25 communicants. A Parish Eucharist is held on the first, third and fourth Sundays of the month at 10 am, at which there are typically 100 to 130 communicants. On the second Sunday of the month, there is a non-eucharistic service called "All Saints' Praise" which typically is attended by about 100 people. On the fifth Sunday of the month (when there is one), there is a service of Morning Worship attended by about 30 people, which is held in the St Catherine's aisle of the church, and at the same time a service called "Sanderstead Light" takes place in the church hall. This is attended by about 100 people. On Wednesdays at 10 am there is a service of Holy Communion held in the St Catherine's aisle at which there are typically 10 communicants.

21. All the Eucharistic services are conducted according to the forms of service contained in Common Worship except the Wednesday morning communion service which uses the form of service contained in the Book of Common Prayer.

#### **Reasons for the removal of the communion rails and consideration of the proposal within the parish**

22. The idea of removing the communion rails originated at the Annual General Meeting of All Saints' Church which was held on 23 March 2009. There were present some 33



members of the congregation. Under the Agenda Item *Ideas and Initiatives* the following is stated:

*Canon Butler raised the idea of experimenting with the removal of the communion rails in the church at both altars, which would then create more open space in the Sanctuary and Chancel and introduce greater flexibility in St Catherine's Aisle. A temporary Archdeacon's Faculty Licence would be required to remove the rails for a limited period. Most who spoke felt that this was a good idea, allowing for greater eye contact, assisting the less mobile, and creating more space for movement in the sanctuary. Those who had reservations acknowledge that this was often a matter of personal taste, but some were wary of the introduction of a "queuing" system. On a straw poll, roughly 80% of those present felt it was worth exploring. The matter will be referred to the DCC.*

23. The matter was then considered by the DCC at a meeting held on 23 April 2009:

*[Canon Butler] introduced the idea of a temporary removal of the communion rails (from the main altar and St Catherine's Aisle) and explained the advantages of space, comfort and convenience that might accrue. The Council resolved to ask the Archdeacon for a temporary licence to enable an experimental removal of the rails, initially for a period from September 2009 – January 2010 (including Christmas services). The Council expressed its wish that this experiment be explained well to the congregation to reduce the potential for misunderstanding.*

Accordingly, Canon Butler wrote to the Archdeacon applying for his licence for temporary re-ordering. The letter applying for the licence stated

*Our reasons for wishing to experiment with such an idea include:*

- The presence of a number of frailer folk who feel obliged to kneel to receive communion, despite encouragement to stand*
- Lack of space for good mobility in what is a small sanctuary*
- A desire to open up the sanctuary space a little more*
- A wish to try and speed up the distribution of Holy Communion.*

24. The Archdeacon of Croydon granted his licence on 7 July 2009, the licence expiring on 30 September 2010.<sup>2</sup>

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<sup>2</sup> I think that there may have been an earlier licence, but it was this latter one which was acted upon.

25. The matter came back to the DCC at a meeting held on 1 July 2010. Under an agenda item entitled *Communion Rails: Permanent Removal or Reinstatement?* the following was recorded

*A straw poll was taken of the DCC to discover whether the majority favoured removal or reinstatement of the Communion Rails. This revealed that most were in favour, one against, and a few abstentions. It was decided that the congregation would be consulted through leaflets in church and a notice in Cornerstone and if 25% (55 individual members) or more of the congregation wanted them [reinstated] then the Council would reconsider. Should the required 25% not be reached the Council approved the petition to the Chancellor for a faculty for permanent removal and disposal of the communion rails...*

Although it is not recorded in the Minutes, the Petitioners in the petition tell me that the voting on this resolution was 10 to 1 with 4 abstentions. There are 19 members of the Council.

26. The leaflet read as follows

*Communion Rails*

*The period of experimentation with removal of the Communion Rails at the main altar and in St Catherine's Aisle is coming to an end. The District Church Council now needs to determine the way ahead. We have to decide whether to ask for formal permission from the church authorities to remove the rails or, alternatively, to reinstate them in the autumn.*

*A clear majority of the Council favour the permanent removal of the rails. However, before it makes, a final decision, the Council wishes to consult the congregation.*

*To that end, members of the congregation who would prefer to see the Communion Rails **reinstated** are invited to send emails or letters to the Parish Office **by Sunday 8 August** requesting reinstatement of the Rails giving reasons for your request. Should 25% of the regular worshipping congregation do so (55 individual people) then the Council will be happy to reconsider its position, although it remains for the DCC to make the decision in our system of church government. Please keep your reasons which are personal to you (e.g. "I prefer church with the rails because...") rather than the more general (e.g. "Clearly people don't like it without rails...") as the latter kind of comments are impossible to judge with any degree of accuracy.*

*Please be aware that any request to permanently remove the Communion Rails will be subject to the usual faculty procedure, when a formal 28 days notice period will give parishioners a further opportunity to object to the Chancellor of the Diocese should they wish prior to his ruling on the granting of a Faculty.*

*We hope you will agree that this is a fair way to proceed.*

***All Saints' District Council.***

The emphases are in the original.

27. On 9 August 2010 there was a meeting of the Standing Committee of the DCC. Under the Agenda item Matters Arising not dealt with elsewhere, the following is recorded:

*Communion Rails: The Committee considered that the 14 objections received to the permanent removal of the Communion rails were not sufficient to require reversion to the DCC. Further consideration to be given to implications for those with disabilities through consultation with the DAC and disability charities. A letter received from a donor of the Communion Rails objecting to their removal.<sup>3</sup>*

### **The DAC position**

28. By a certificate dated 16 September 2010, the DAC recommended the proposal that is now subject to this petition. It certified that in its opinion the removal of the communion rails would not be likely to affect the character of the church as a building of special architectural or historic interest. I agree with this judgment. The communion rails are modern and not fixtures. Although these factors are not in my judgment determinative of this issue, in the circumstances of this case I do not think that the removal of the rails can be viewed as likely to affect the character of the church as a building of special architectural interest; I do not think that their removal would be capable of affecting its character as a building of special historic interest. The effect of

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<sup>3</sup> This referred to Mrs Rimmer's letter (see paragraph 5 above).

this is that I have not required the proposal to be advertised or for there to be consultation with the heritage bodies.

### **Mrs Rimmer's Objection**

29. In her objection dated 31 July 2010, Mrs Rimmer wrote

*I have shown hundreds of school children over the years around their parish church and always regarded the altar and railed sanctuary as the "holy place". Young people like to know that there are certain places they can regard with awe and respect. They don't usually want an "open plan" church any more than older parishioners who have always been able to kneel or bow at the rail to receive communion. Many who stand now – including me – do so because of our old knees which don't work any more...If you strip a church of its altar rails you declare that anywhere in the church is of equal value. We need our places of special importance and significance. I felt it a privilege as a lay person to step into that area to administer the chalice.*

### **Miss Flowerday's Objection**

30. The substance of Miss Flowerday's Objection is as follows

*Had I seen the notice I would have asked for the faculty to be rejected on the grounds that the removal of the Communion Rails discriminates directly against the disabled and the infirm and is therefore against both the Disability Discrimination Act and Equality Act which [replaces] it – which is both illegal and unchristian. As a disabled person I cannot take Communion standing and have for the past year been forced to either ask for assistance to receive at the main altar at services where St Catherine's has not been used, or on other Sundays use St Catherine's altar when all those around me in my pew have gone to the main altar.*

*Prior to removal of the communion rails I could and did take communion kneeling independently with everyone else and therefore was no different from anyone else in Church. I would like the communion rails to be returned so that I can return to taking Communion independently at the altar of my choosing, rather than being forced to the side altar regardless of where I am sitting, and constantly having to worry how I can receive today and always needing help and being reliant on others. I feel that if the communion rail is there people can still choose to stand instead of kneel if they wish; but if there is no communion rail I cannot choose to kneel as there is nothing to lean against or to hold on to. Standing using crutches, I do not have free hands to receive and looking like a baby bird with my mouth open to receive is extremely embarrassing.*

*Being asked to take communion seated in St Catherine's Aisle is not satisfactory either as people stand in front of me and I have to wait until sometimes very near the end before people move out of the way and I receive, which makes me feel frankly invisible and insignificant.*

*The reinstatement of the communion rails would give me back the choice to take communion independently with everyone else at an altar of my choosing and stop having to worry every week whether or not people will have thought about me today. I would also go back to being independent and able to take communion alongside everyone else at the altar of my choosing without anyone having to fuss or make special arrangements for me, which I absolutely hate and never used to be necessary.*

*In a church with an ageing congregation the number of people who will find taking Communion [difficult] standing with nothing to hold on to (something else which the communion rails provide) is only likely to increase. This will inevitably mean that more people will need communion brought to them rather than being able to go to the Communion table to receive.*

## **The Petitioner's response to the objections**

### **To the objection of Mrs Rimmer**

31. Canon Butler responded to Mrs Rimmer as follows

*Unfortunately, while I recognise that you have strong views regarding the "specialness" of particular parts of the church, I cannot go along with them...As a Church of the Reformation, the Church of England consciously took a step away from regarding particular parts of the church as "special" or "holy". While some may hold such a belief, and like you do so in good conscience, I would not want to encourage such belief myself as I think it runs against a fundamental of the gospel, namely the sanctification of all time, space and people by Christ through his Holy Spirit...To summarise it neatly, I entirely agree with you that to remove the communion rails means a declaration that anywhere in the church is of equal value and specialness. Unlike you, however, I think that's a good thing!*

### **To Miss Flowerday's objection**

32. Canon Butler has responded as follows:

*In numerous conversations with Miss Flowerday over this issue, she has expressed a desire to receive Holy Communion in a way [so that] she feels*

comfortable. The Petitioners have offered a number of solutions to this request:

*I The suggestion that Miss Flowerday receives Holy Communion in her pew, which is something others with restricted mobility happily do at All Saints'. She has declined this offer.*

*II The invitation for Miss Flowerday to receive Holy Communion seated in St Catherine's Aisle, which she had previously agreed to do. There were some initial problems with one or two people standing in front of Miss Flowerday (sometimes through insensitivity, sometimes because Miss Flowerday's own behaviour can make it hard for church members to know whether she is sitting in St Catherine's Aisle in order to receive Communion or for some other reason to do with personal distress), but this, for over a year, appears to have been a satisfactory conclusion. Despite apparently working for the period of the experiment...this appears now to have become unsatisfactory.*

*III Offers to provide methods which would enable Miss Flowerday to kneel to receive Holy Communion without requiring a full Communion Rail (e.g. a prie dieu or a kneeler made available). Miss Flowerday has found all these suggestions unsatisfactory.*

*IV Offers to provide Miss Flowerday with a chair in St Catherine's Aisle which could be used for support rather than sitting on. Again, this has been declined.*

*The Petitioners have thus sought to meet Miss Flowerday's request to receive the sacrament without discrimination or giving her a sense of embarrassment. None have proved acceptable to her. We remain committed to working with her – as we would with anyone who found it difficult to receive Holy Communion standing – to identify an abiding and workable solution.*

*One of the motivations for this petition was to make the reception of Holy Communion easier for people with disabilities and other mobility challenges, especially the large number of older people who find kneeling difficult. A number of people, including those previously worried about receiving the sacrament standing, have since expressed satisfaction with the change. We continue to believe that the presence of the rails did create some sense of obligation on those who received communion to see kneeling as "normative".*

*The reception of Holy Communion standing is widespread practice in the Church of England, including at our own Southwark Cathedral. We do not believe that in making this petition we are acting beyond what the Church of England sees as an entirely normal practice.*

*It is part of our responsibility to make "special arrangements" for those unable to receive Holy Communion in a way used by the majority of the congregation. We are more than happy to do it and, in a small way, see it as an act of Christian service.*

33. Canon Butler concluded that the Parish is committed to good practice in making the church accessible to people with disabilities and

*...in asking the Chancellor to grant the faculty and reject Miss Flowerday's objection, we stress our willingness to abide by the latest legislation in this field [and that we have] an ongoing commitment to find a solution for Miss Flowerday and any wheelchair user or person with restricted mobility who worships in our historic church.*

### **Authority**

34. It is important to begin by reminding myself that it is for the Petitioners to demonstrate the case for change, not for the objectors to prove that the change should not happen<sup>4</sup>. I am required to ask the so-called *Bishopsgate* questions<sup>5</sup>, which are as follows:

*(1) Have the petitioners proved a necessity for some or all of the proposed works, either because they are necessary for the pastoral wellbeing of St. Helen's or for some other compelling reason?*

*(2) Will some or all of the works adversely affect the character of the church as a building of special architectural and historic interest?*

*(3) If the answer to (2) is yes, then is the necessity proved by the petitioners such that in the exercise of the Court's discretion a faculty should be granted for some or all of the works?*

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<sup>4</sup> See *Peek v Trower* (1882) LR 7 PD 21.

<sup>5</sup> After *In re St Helen Bishopsgate* 26 November 1993 (unreported) (London Consistory Court: Sheila Cameron QC). The Bishopsgate questions were approved in *In re St Luke the Evangelist, Maidstone* [1995] Fam 1 (Court of Arches).

35. I am aware of only one case where the removal of communion rails has been considered. In *In re St Mary the Virgin, Monkseaton*<sup>6</sup>, HH Judge David Hodson Ch had to consider a re-ordering scheme which involved the introduction of a nave altar but without the provision of communion rails to facilitate kneeling; the arrangements which were being altered had evidently hitherto incorporated communion rails. This aspect of the scheme was objected to, both as a matter of principle and also in the circumstances of the case. One of the witnesses for the parties opponent said that *Filing along in a queue round the nave altar, I feel, robs the occasion of both dignity and reverence* and likened the experience of receiving at a nave altar as *akin to standing in a queue in the supermarket*.<sup>7</sup>

36. Hodson Ch recorded the Vicar's general evidence justifying the nave altar. He explained it as being a practical expression of a change from a liturgy offered by "a chosen few" to one which involved everybody.<sup>8</sup> Hodson Ch noted that

*The Vicar's theological evidence was only challenged in one minor respect which related to the scriptural authority concerning the taking of communion when standing. No evidence was put before me to enable me even to begin considering that question still less trying to answer it.*<sup>9</sup>

37. Accordingly it seems that Hodson Ch concluded that there was not any theological objection to the non-provision of communion rails. He concluded that the other objections to the scheme were not of sufficient weight to justify refusal of a faculty, but he did not say anything specific about the non-provision of communion rails.<sup>10</sup>

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<sup>6</sup> Newcastle Consistory Court, 6 September 2010, unreported, but summarised at (2011) 13 ELJ 243.

<sup>7</sup> See paragraphs 43 and 44.

<sup>8</sup> See paragraphs 13 – 19 of Hodson Ch's judgment.

<sup>9</sup> See paragraph 23.

<sup>10</sup> See paragraph 49.



## The provisions of the Equality Act 2010

38. Section 13 of the Act (Direct discrimination) provides as follows:

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

39. Section 15 of the Act (Discrimination arising from disability) provides as follows:

*(1) A person (A) discriminates against a disabled person (B) if—  
(a) A treats B unfavourably because of something arising in consequence of B's disability, and  
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

40. Section 20 of the Act (Duty to make adjustments) provides as follows:

*(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

*(2) The duty comprises the following three requirements.*

*(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

*(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

*(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

41. Section 29 of the Act (Provision of services, etc.) provides as follows:

*(1) A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.*

*(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—*

*(a) as to the terms on which A provides the service to B;*

*(b) by terminating the provision of the service to B;*

*(c) by subjecting B to any other detriment.*

*(3) A service-provider must not, in relation to the provision of the service, harass—*

*(a) a person requiring the service, or*

*(b) a person to whom the service-provider provides the service.*

...

*(7) A duty to make reasonable adjustments applies to—*

*(a) a service-provider*

*(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.*

### **Kneeling at Holy Communion**

42. Kneeling to receive the sacrament at Holy Communion is still the norm in parochial worship, which, apart from anything else, reflects the provision that is usually made by way of communion rails. Standing to receive is, in my experience, common in Cathedrals, where, of course, it does enable the administration of the sacrament to proceed more quickly, but it is also quite frequently encountered in parish churches. There cannot, on the face of it, be any **requirement** to receive the sacrament kneeling, or, conversely any in principle **objection** to receiving it standing. This is indeed my conclusion, set out at paragraph 56 below. Nonetheless the matter is not straightforward, and I think that it will be helpful to consider the matter in some detail.

43. In order to understand how it came about that kneeling to receive communion became the norm in the Church of England, it is necessary to go back to the First Prayer Book of Edward VI (1549)<sup>11</sup>. This made no provision as to the manner in which the sacrament was to be received. Kneeling was the general practice<sup>12</sup>, but was controversial. In the draft of the Second Prayer Book, Cranmer added a requirement that it should be received kneeling:

*Then shal the minister first receyve the Communion in both kyndes hymselfe, and next deliver it to other ministers, yf any be there present (that they may help the chief minister,) and after to the people in their handes kneeling.*

44. The Council required this to be re-considered, but Cranmer refused to change the draft, instead adding what became known as the “Black Rubric”. This made it clear that kneeling did not imply adoration of the sacrament, or carry with it any implication of the truth of transubstantiation:

*Although no ordre can be so perfectlye devised, but it may be of some, eyther for theyr ignoraunce and infermitie, or els of malice and obstinacie, misconstrued, depraved, and interpreted in a wrong part: And yet because brotherly charitie willeth, that so much as conveniently may be, offences shoulde be taken awaye: therefore we willing to doe the same. Whereas it is ordeyned in the booke of common prayer, in the administracion of the Lord's Supper, that the Communicants knelyng shoulde receyve the holye Communion. whiche thyng beyng well mente, for a sygnificacion of the humble and gratefull acknowledgyng of the benefites of Chryst, geven unto the woorthye receyver, and to avoyde the prophanacion and dysordre, which about the holy Communion myght els ensue: Leste yet the same kneelyng myght be thought or taken otherwyse, we dooe declare that it is not ment thereby, that any adoracion is doone, or oughte to bee doone, eyther unto the Sacramentall bread or wyne there bodily receyved, or unto anye reall and essencial presence there beeyng of Christ's naturall fleshe and bloude. For as concernynge the Sacramentall bread and wyne, they*

<sup>11</sup> Apart from what is set out in the historic documents themselves, essentially I rely for what follows upon Cuming *A History of Anglican Liturgy* (1969).

<sup>12</sup> Although not perhaps universal: at Deerhurst in Gloucestershire, the Puritan arrangement whereby communicants sat at a table aligned east west can be seen to this day (although it is not actually used).

*remayne styll in theyr verye naturall substaunces, and therefore may not be adored, for that were Idolatrye to be abhorred of all faythfull christians. And as concernynge the naturall body and blood of our saviour Christ, they are in heaven and not here. For it is agaynst the trueth of Christes true natural bodye, to be in moe places then in one, at one tyme.*

45. The Black Rubric was reflected in the first post-reformation Canons, which were promulgated in 1603; Canon 27 provided that

*No minister, when he celebrated the communion, shall wittingly administer the same to any but to such as kneel, under pain of suspension...*

46. At the Savoy Conference in 1661, convened to consider possible changes to the Payer Book following the restoration of Charles II, one of the Presbyterian grievances was the requirement for kneeling at Holy Communion. It was rejected, and it will be seen that the provisions of the Prayer Book of 1662 are virtually identical to those of the Second Prayer Book of Edward VI. (The requirement is now is that the people receive the sacrament into their hands all meekly kneeling). The Black Rubric was retained.

47. Prayer Book revision was again considered in 1689, but no changes were made; apparently the improved legal position of the dissenters meant there was less incentive to achieve a compromise settlement which might have been more comprehensive. The following rubric was considered for inclusion at that time:

*If any, not being satisfied herewith shall, some day in the week before they intend to receive the Holy Communion, come to the Minister of their Parish, and declare that they are verily persuaded in conscience that they cannot receive it kneeling without sin, then the Minister shall give them the sacramental bread and wine in some convenient place or pew without obliging them to kneel.*

48. Prayer Book revision did not thereafter become a live issue until the beginning of the twentieth century, and in the meantime Anglicans got used to the idea of kneeling at communion. The 1928 Prayer Book did not alter the requirement that the sacrament be received kneeling, and included the black rubric. The 1928 Prayer Book was not of course authorised in 1928. Prayer Book Revision actively began afresh in the 1960s and the 1928 Communion Service was finally authorised in 1966 as what was called “Series One”. Series One thus contained the requirement that communion be received kneeling, but it dropped the black rubric. “Series Two” was published and authorised in 1967. It said nothing about kneeling to receive communion or, indeed, about posture during any part of the service.

49. In the 1960s also the long gestated revision of the Canons of 1603 was brought to completion. Without specifically addressing the matter, *The Canon Law of the Church of England* (1947) (being the Report of the Archbishops’ Commission on Canon Law)<sup>13</sup>, recommended that Canon 27 be revoked, with no specific provision as to posture in which the sacrament should be received at Holy Communion being put in its place. This recommendation was put into effect in the new Canons which were promulgated in 1964 and 1969. Thus Canon B9.2 made the following provision as to posture

*[All persons presenting the time of divine service] shall reverently kneel or stand when the prayers are to be said, and shall stand at the singing or saying of the Canticles and the Creed and at the reading of the Holy Gospel, giving due reverence to the name of the Lord Jesus.*<sup>14</sup>

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<sup>13</sup> The Commission was set up in 1939.

<sup>14</sup> This wording is almost exactly that of the recommendation the Archbishops’ Commission. The current wording of B9.2 is similar, although it now recognises that regard may be had to the rubrics of the service and to locally established custom in regard to posture during prayers and the singing or saying of psalms and canticles.

50. “Series Three” was published and authorised in 1973. It made express provision as regards posture in respect of certain parts of the service (e.g. standing for the gospel and the creed) but said nothing about kneeling to receive communion. As regards posture generally it said

*Wherever a certain posture is particularly appropriate, it is indicated in the left-hand margin. At all other points local custom may be established and followed.*

An identical approach was taken in the Alternative Service Book (1980). In Common Worship (2000), nothing is said in the text of the Communion Service at any point as to posture, but the following guidance is given:

*Posture*

*Local custom may be followed and developed in relation to posture. The people should stand for the reading of the Gospel, for the Creed, for the Peace and the Dismissal. Any changes in posture during the Eucharistic Prayer should not detract from the essential unity of the prayer. It is appropriate that, on occasions, the congregation should kneel for prayers of penitence.*

**Requirements of ecclesiastical law as regards the provision of facilities for kneeling**

51. I think I need to begin by considering whether there is any legal requirement to provide facilities for kneeling to receive the sacrament at Holy Communion.
52. The argument that there is would proceed on these lines. If Holy Communion is celebrated according to the Book of Common Prayer, there is a legal requirement that those who receive should do so kneeling. If this be the case, appropriate facilities for kneeling have to be provided – it is unrealistic to expect people to kneel without a kneeler and a rail to assist them (particularly in getting up). If a communion rail has

been installed, it cannot be permissible to remove it without providing an equivalent replacement.

53. Against this is the argument that it surely cannot now be unlawful to administer the sacrament at a Prayer Book communion service to a congregation which receives the sacrament standing. It would be absurd to draw a distinction in this regard with the situation at a Common Worship communion service, where there evidently could be no objection to the congregation receiving the sacrament standing.

54. In *Liturgy, Order and the Law* (1998), Rupert Bursell QC has, writing extra-judicially<sup>15</sup>, considered the position.

He wrote

*...neither Rite A nor Rite B indicates any appropriate posture at the time of the reception of the sacrament; therefore, as local custom may be 'established and followed', kneeling is not essential in those rites. Moreover, a minister celebrating according to the Book of Common Prayer would be justified by the doctrine of necessity in distributing the sacrament to someone incapable of kneeling due to infirmity, at the very least upon an occasion (such as Easter) when the reception of communion is enjoined. Technically, on the other hand, he would in the past have been guilty of aiding and abetting an ecclesiastical offence if the recipient were not infirm...Now the minister could rely upon Canon B5.1: if kneeling is no longer regarded as essential in one rite it can hardly be regarded as essential in another.*<sup>16</sup>

A footnote notes that Canon B9.2 does not enjoin kneeling to receive, although Dr Bursell does not make the point that the new Canons promulgated in 1964 and 1969 revoked Canon 27 of the Canons of 1603, which can only strengthen his argument.

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<sup>15</sup> Dr Bursell is one of the most experienced of all Diocesan Chancellors and has written and lectured extensively on ecclesiastical law.

<sup>16</sup> See p 51.

55. Dr Bursell also notes that Briden and Hanson *Moore's Introduction to English Canon Law* (3<sup>rd</sup> edition: 1992) uses an argument based on Canon B5 in relation to those who are too infirm to kneel. This is true, but it is fair to point out that the learned editors<sup>17</sup> of that book see Canon B5 as reflecting the doctrine of necessity. They say of this doctrine that *[i]t is the only legal doctrine which, for example, would justify a priest in administering the Holy Communion according to rite of 1662 to a person who by reason of infirmity was unable to kneel as directed by the rubric*<sup>18</sup>. Accordingly it seems that *Introduction to English Canon Law* takes a narrower view than that of Dr Bursell, although it may be noted that the editors were revising an earlier text which referred to the position when the canons of 1603 were in force, and where the use of the word *only* was evidently apt.<sup>19</sup> They may, perhaps, not have addressed the issue as completely as Dr Bursell.
56. Be this as it may, it seems to me that Dr Bursell must be right in his conclusion. If it is now permissible to receive the sacrament standing in accordance with the Communion rites contained in Common Worship, it cannot now be unlawful to receive the sacrament standing when the rite celebrated is that contained in the Book of Common Prayer. In these circumstances, it absurd to think to think of a priest being prosecuted for administering the sacrament to a person who receives it standing<sup>20</sup>. There may be a

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<sup>17</sup> Timothy Briden is Chancellor of the Dioceses of Truro and of Bath and Wells, and Brian Hanson was Joint Registrar of the Provinces of Canterbury and York and Registrar of the Convocation of Canterbury. The first edition was written by E Garth Moore, who was a very distinguished predecessor of mine as Chancellor of this Diocese.

<sup>18</sup> Emphasis supplied.

<sup>19</sup> In the first edition (1967) E Garth Moore wrote *It is the only legal doctrine which, for, example, would justify a priest in administering the Holy communion, contrary to Canon 27, to a person who by reason of infirmity was unable to kneel as directed by the rubric* (pp64 – 65).

<sup>20</sup> It is not easy to envisage any prosecution of a priest for these sorts of infraction of the ecclesiastical law (if they be infractions) both because there are jurisdictional issues (which are discussed in Liturgy,



number of routes by which this conclusion is reached, but it seems to me that, at root, must it rest upon a permission to be implied from all the circumstances of the case.

57. I note in this connection that if one were to conclude otherwise, the obvious response from a church in a position like All Saints', where there is only one celebration each week of Holy Communion according to the Book of Common Prayer, would be to dispense with that service.<sup>21</sup> This would hardly be a desirable outcome. I think that this consideration tends to re-inforce the argument that it would be absurd to hold that it is not possible to celebrate Holy Communion according to the Book of Common Prayer and to administer the sacrament to the congregation which stands to receive it.
58. My analysis serves to confirm that Hodson Ch was correct in *In re St Mary the Virgin, Monkseaton* to proceed on the basis that there is no theological objection to standing to receive communion.

### **Requirements of the Equality Act 2010**

59. By virtue of section 29 of the Equality Act 2006, a "service-provider" has duties, among other duties, not to discriminate against persons who are disabled and to make reasonable adjustments – defined in section 20 of the Act – to accommodate persons who are disabled. This latter duty also extends to a person who exercises a public function that is not the provision of a service to the public.<sup>22</sup>

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<sup>21</sup> Order and the Law) and because of the general tolerance that exists within the Church of England. But as a matter of principle, it is difficult to see how a prosecution could be upheld in these circumstances. It may be noted in this regard that something which is similar to a Prayer Book Communion can be achieved by a celebration according to Order One of Common Worship, using the traditional language version.

<sup>22</sup> See section 29(7)(b).

60. One might not think that, using words in their natural meaning, by allowing the public to enter a church, an incumbent was providing a service, but section 19 (3) of the Disability Discrimination Act 1995 provided in respect of the duties under that Act:

*The following are examples of services...*

*(a) access to and use of any place which members of the public are permitted to enter.*

61. Although this example does not feature in the Equality Act 2010, the Statutory Code of Practice<sup>23</sup> says at paragraph 11.3 that a *service* includes *permitting access to and use of any place which members of the public are permitted to enter* and one may be confident that the Act would be interpreted in this way. In *In re Holy Cross, Pershore*<sup>24</sup> Mynors Ch pointed out the need for churches to comply with the duties imposed under the Disability Discrimination Act 1995 and it cannot I think be contemplated that the Equality Act 2010 would be interpreted in a less rigorous way. Certainly the Court of Arches in *In re Holy Trinity, Eccleshall*<sup>25</sup> envisaged the continuing application of the 2010 Act to churches<sup>26</sup>. Thus in recent years churches throughout this Diocese (and indeed throughout England) have made considerable improvements in access for those who are disabled or whose mobility is otherwise impaired and continue to do so.

62. It seems to me that the provision or otherwise of a communion rail is not a service in the same way as access and (permitting) use of a building is. If there be a duty imposed

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<sup>23</sup> The Code is made under section 14 of the Equality Act 2005.

<sup>24</sup> [2002] Fam 1.

<sup>25</sup> [2011] Fam 1.

<sup>26</sup> See paragraph 68 of the judgment.

upon a priest as a service provider, it seems to me it is because he is providing a service in the celebration of Holy Communion.

63. In my view a priest celebrating Holy Communion, or a church organisation facilitating the celebration of Holy Communion is not a “service-provider” for the purposes of section 29 of the Equality Act 2010. It seems to me that analysing the administration of the sacrament in the context of Divine Worship as provision of a service is not appropriate.<sup>27</sup>

64. More pertinently, however, the question arises whether the priest is exercising a public function in respect of the celebration of Holy Communion. Public function is defined by section 31(4) of the 2010 Act:

*A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.*

65. The reference to the Human Rights Act 1998 is to section 6 (3) (c) of that Act so that a “hybrid” public authority (ie one with certain private functions) includes

*a person certain of whose functions are of a public nature.*

66. Absent authority, I would incline to the view that a priest is fulfilling a function of a public nature in respect of the celebration of Holy Communion. By section 8 of the Sacrament Act 1547 a priest is not entitled to without lawful cause to deny the sacrament to a person who devoutly and humbly desires it. A parishioner has a common

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<sup>27</sup> At p22 of non-statutory guidance published by the Equality and Human Rights Commission *What equality law means for your voluntary and community sector organisation (including charities and religion [sic] or belief organisations)* it is said that religious acts of worship are not covered by equality law at all.

law right to attend divine worship in his parish church<sup>28</sup>. However in the *Aston Cantlow*<sup>29</sup> case the House of Lords emphasised that in order for the European convention on Human Rights to apply the function needs to be of a **governmental** nature. This emerges most clearly in the speech of Lord Rodger of Earlsferry<sup>30</sup>. It is much less easy to see the celebration of Divine Worship as a **governmental**, as opposed to a **public** function, and, in his speech, Lord Rodger specifically seemed to exclude the generality of Church of England services. He said:

*For the most part, in performing his duties and conducting the prescribed services, the minister is simply carrying out part of the mission of the Church, not any governmental function of the state. On the other hand, when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the 1998 Act.*<sup>31</sup>

67. The contrast Lord Rodger was drawing was between the purely “religious” services (which would include Holy Communion) and the celebration of marriage. One may readily see that the latter involves a governmental function in the way that other services do not. Lord Hobhouse of Woodborough drew a similar distinction:

*Thus the priest ministering in the parish may have responsibilities that are certainly not public, such as the supervision of the liturgies used or advising about doctrine, but may have other responsibilities which are of*

<sup>28</sup> See *Cole v Police Constable 443A* [1937] 1 KB 316 per Goddard J at 332. I think that there may be some doubt as to whether the right not to be denied communion is enforceable by a mandatory order under judicial review. In the past the duty has been enforced by means of the disciplinary arrangements in respect of the clergy then obtaining: see *Bannister v Thompson* [1908] P 362 (Court of Arches) and *Thompson v Dibdin* [1912] AC 533 (HL). However, I do not think that this is determinative of the issue whether a public duty is involved. Note that in *Thompson v Dibdin* the disciplinary penalty was challenged by way of judicial review. Although the remedy was denied, it was not suggested that the court lacked jurisdiction.

<sup>29</sup> I.e. *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546.

<sup>30</sup> See paragraphs 164 to 170 of his speech.

<sup>31</sup> See paragraph 170 of his speech.

*a public nature, such as a responsibility for marriages and burials and the keeping of registers.*<sup>32</sup>

The point that is being made is that in its religious functions the Church of England is in relation to the European Convention on Human Rights is in no different position to that of say, the Roman Catholic Church or the Methodist Church: the fact of the establishment makes no difference in this regard.

68. Accordingly I think that a duty to make reasonable adjustments does not arise under section 29 (7) of the 2010 Act. This said, the Church would obviously wish to avoid arrangements which could be regarded as discriminatory in a way that could be the subject of proper criticism. But I do not think that, even if the Act applied, there would be a failure to make reasonable adjustments. At the heart of the duty set out in section 20 of the 2010 Act is the concept of substantial disadvantage. I do not think that with reference to the current arrangements, Miss Flowerday is put at substantial disadvantage. I accept that she may not wish to receive communion standing for the practical reasons which she gives, but I do not accept that the reasonable alternatives suggested by Canon Butler put her at a substantial disadvantage. I should add that, conversely, I do not think that if the position were that the communion rails were in place that those who would be unable to kneel would be put at a substantial disadvantage. They would receive standing, which, from observation, is something that happens on a regular basis in parish churches throughout England.

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See paragraph 86 of his speech. Note however that Lord Nicholls of Birkenhead, while emphasising the limited scope of the European Convention in respect of church activities, did not draw a distinction between different church services: *As I see it, the only respect in which there is any "public" involvement is that parishioners have certain rights to attend church services and in respect of marriage and burial services. To that extent the state of repair of the church building may be said to affect rights of the public* (see paragraph 16 of his speech).

69. Further, looking at the matter broadly, I think that it is unlikely that a priest will treat a disabled person less favourably, or unfavourably, by the arrangements made for the reception of the sacrament at Holy Communion.
70. I first consider the usual arrangements. It is not unusual that there are members of a congregation, often through age, who find it difficult to kneel to receive communion. Accordingly they stand in front of the communion rail to do so. I do not think that someone so receiving would think, or would have any occasion to think, that he or she was being treated less favourably than those who knelt, or was being treated unfavourably.
71. I turn to consider the alternative arrangement, namely that all receive communion standing. I would guess, although I do not know, that there are fewer people who are unable to stand to receive communion than there are people who cannot kneel. So to organise things might, accordingly, be seen as emphasising the inclusiveness of communion – one of the reasons that Canon Butler wishes to see this arrangement continue at All Saints'. Nonetheless there will be some who cannot stand at all, and some (I would guess rather more) who, like Miss Flowerday cannot stand without the aid of a stick or sticks, and have to receive the sacrament directly into their mouths<sup>33</sup>; or for whom some alternative arrangement has to be made. I do not think that anyone so receiving would think, or evidently have occasion to think, that he or she was being treated less favourably than those who knelt, or was being treated unfavourably. Miss

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<sup>33</sup> This practice was enjoined by the First Prayer Book of Edward VI, apparently to ensure that the bread was consumed. It is the practice within some traditions in the Church of England, but is not general.

Flowerday apparently does feel that she is being treated unfavourably; I do not think, however, that she has any proper reason so to think.

72. I think however it is appropriately finally to note section 31 of the 2010 Act. This provides:

*(7) A reference to a service-provider not providing a person with a service includes a reference to—*

*...*

*(b) the service-provider not providing the person with the service in the manner in which, or on the terms on which, the service-provider usually provides the service to the public (or the section of it which includes the person).*

73. If this applied (which I do not consider that it does) Miss Flowerday could object to special provision being made for her. However it does not seem to me that under the current arrangements, objection could be taken on this basis that a person who walks with a stick or stick, and thus is unable to receive communion into his or her hands, is being denied a service.<sup>34</sup> Similarly, in churches where the arrangements are for communicants to kneel to receive the sacrament, those who come forward and receive the sacrament standing are not being denied a service.

74. I think that the analysis above points up the good sense of not seeking to apply a too legalistic approach to the law of discrimination. Otherwise one can see that one could end up with a situation where a person who could not stand (or stand without the aid of a stick or sticks) to receive communion could object to arrangements for receiving the sacrament standing, and a person who could not kneel could object to arrangements to receive the sacrament kneeling. It is theoretically possible that each arrangement could

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<sup>34</sup> If she did prefer in these circumstances, to receive communion in a different way, that is a matter for her: it would not affect the terms of the service” provided.

be discriminatory, but if the people of God are going to gather around the Lord's Table to receive Communion they have to do so in some manner. In my view, neither the arrangements proposed by the Petitioners in this case nor the usual arrangements where communicants kneel at a communion rail offend either the letter or the spirit of the Equality Act 2010.

### **Summary of the legal background to the exercise of my powers in this case**

75. On the view I take, there is no objection as a matter of ecclesiastical law to communion being administered to communicants who are standing. Accordingly there is no objection as a matter of ecclesiastical law to the proposals which are before me.
76. Further, on the view that I take there is no objection based on the terms of the Equality Act 2010 to the proposals which are before me.
77. I turn to consider the need for the proposals and the specific objections that are before me.

### **Need for the proposals**

78. As regards the first set of communion rails,, the position is that the sanctuary is comparatively small, and it facilitates use of this small space if the rails are not there. It is also felt that in the circumstances where the chancel is also small and its furnishings are quite imposing, that there is an aesthetic benefit. Finally, communion is now received by everyone standing: there is no pressure on those who are infirm to kneel, and the unity of the congregation is - because everyone stands – emphasised.



79. As regards the second set, it would facilitate flexible use of the St Catherine's Chapel if it this did not entail moving the communion rails when it was not being used for service. The space around the Holy Table would be less "cluttered" if the communion rails were removed. Finally, the same justification arises in respect of facilitating receiving communion standing.
80. Generally, the administration of communion does not take so long if those who receive communion do so standing.
81. Canon Butler has helpfully elaborated these reasons. As regards the smallness of the sanctuary, he explains the position as follows:

*There is a large altar which sits on a raised step. Servers sit on small stools to the south side of the altar, with assisting clergy and ministers sitting on chairs to the north. It is between the raised step and the rails that Holy Communion has been ministered and those doing so have to exercise great care so as to avoid tripping on the step or getting in the way of other ministers. Furthermore with such restricted circulation space, and with two or three ministers plus three servers in the sanctuary, ceremonial has to be conducted with great care, giving particular attention to avoiding tripping or knocking over candles, both of which have happened on more than one occasion. Our experience during the period of the temporary faculty was one of considerable gain, with ministers and servers having much more space to conduct the simple, dignified ceremonial of our style of worship, with greater circulation space for the distribution of Holy Communion and with a consequent reduction in the care required to avoid tripping and other accidents.*

82. There is also a reasonable concern to facilitate the receiving of the sacrament by those who are unable to kneel. On this Canon Butler has written:

*My initial decision to raise this with the church came from an encounter with an elderly and frail parishioner, sadly now deceased, who expressed a*

*wish to stand to receive communion in terms of "Would it be all right?"  
Further conversation with her and others revealed an historic expectation  
that one "had" to kneel to receive communion.*

I accept that if some have to stand, there is a benefit in terms of emphasising the inclusivity of the the rite if **all** stand (and remembering in this Miss Flowerday's position). For my part, I do not put too much weight upon this factor; I do not think that it is necessary generally in churches for kneeling to be replaced by standing for this reason.

83. Canon Butler has not elaborated the desire to "speed up" the administration of communion. Put in these terms it perhaps sounds somewhat inappropriate. Nonetheless I am satisfied that this is a legitimate aspiration, provided the seemliness of the distribution is preserved – and there is of course nothing intrinsically unseemly in standing to receive communion. If the administration of communion goes on for too long, the congregation can become distracted.

84. I do not think that there is any significant aesthetic benefit from the change – essentially in my view the change is neutral. Weighing all the other matters advanced by Canon Butler, I am satisfied that the petitioners have demonstrated a reasonable need for the proposals for which they seek a faculty. I turn to consider the specific objections which have been made to the grant of a faculty.

### **Objection of Mrs Rimmer**

85. In paragraphs 42 to 50 above, I have set out an historical account of the way kneeling to receive the sacrament has been viewed in the Church of England. Kneeling is of course

facilitated by the provision of communion rail, which very often, as in the present case incorporates a kneeler. But communion rails need not incorporate kneelers, and they also have the function in the post Reformation church of fencing off the Holy Table and preventing profane use of it<sup>35</sup>. As is well known, Archbishop Laud enforced the moving of the Holy Table to the east end of a church, and it being railed.

86. This was controversial at the time, but with the passage of time the arrangement has become usual, reflected in the design of the many new churches which were built in the reign of Queen Victoria. The rails reflected what Laud and those who succeeded him saw as the special holiness of the altar or Holy Table, and Mrs Rimmer stands in that tradition.
87. There are other traditions, and in the re-ordering schemes which became common in the twentieth century the Holy Table was moved into the middle of the church. A good example is at Stephen Walbrook in the City of London.<sup>36</sup> Canon Butler stands firmly in this tradition.
88. Differing views are evidently possible about the meaning and significance of “sacred space”. I would personally not see the two approaches that I have identified as being inconsistent, but, rather, as different ways of symbolically expressing truths about God’s presence in the world.

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<sup>35</sup> Before the Reformation there would have been no need for communion rails because the altar would have been protected by a chancel screen. For an account of the history of chancel furnishings, see *The Chancel of English Churches* (1916) by Francis Bond.

<sup>36</sup> The re-ordering was considered by the Court of Ecclesiastical Causes Reserved: see [1987] Fam 146. For an articulation of the views lying behind the best of these schemes see *Re-pitching the Tent* (2004: 3<sup>rd</sup> edition) by Richard Giles.

89. However this may be, in my judgment the fact that two views are possible means that, if there are other good reasons for making the change proposed, as I think that there are, Mrs Rimmer's objection cannot prevail.

#### **Objection of Miss Flowerday**

90. I have addressed above Miss Flowerday's objection that in law what is proposed contravenes the Equality Act 2010.

91. I do nonetheless have some sympathy with Miss Flowerday's position and the fact that a certain result is not dictated to me as a matter of law does not mean that, as a matter of discretion, I might not find it to be the best outcome. However, it seems to me that if there are good reasons for making the change proposed, as I think that there are, Miss Flowerday's objection is of insufficient weight to lead to decide not to grant the faculty.

#### **Further considerations**

92. The burden of proof lying generally with the Petitioners, it does not follow that a faculty should issue. I might still decide that I had not been satisfied that the case for change had been established, even though I did not accept the specific objections of Mrs Rimmer and Miss Flowerday. There might be other objections which outweighed the case on need, or perhaps other reasons why I should not grant a faculty.

93. In this case, there have been two matters which have given me pause. The first is the manner in which the change was consulted upon.

94. I should say, at the outset, that I accept that it is for an incumbent and the PCC, or as appropriate, the DCC, to give a lead. Moreover, the provisions under the Rules for changes to be made on an experimental basis seem to me to be sensible ones, allowing the impact of the change to be assessed in the light of experience. Thus there was nothing wrong in the way that the experiment was initiated. I do however have concerns about the way that it was assessed. The DCC did not invite comments on an open basis, so that it could assess them and then form a judgment. Rather it decided on 1 July 2010 – before any consultation had taken place - that it considered that the experiment was a good thing, and that it would only revisit the position if 55 people objected.
95. I think that an open consultation would have been better. I get the impression – which could be wrong - that the DCC was positively trying to discourage objection by raising a high bar to its reconsideration of the issue. Apart from anything else, it makes the views of those who are neutral – who could potentially be quite a large number of people – in effect count in favour of the proposal. In this context, I note that in the consultation leaflet the response *Clearly people don't like it without rails* was discouraged, because the comment would be impossible to assess with any degree of accuracy. I accept that of course there may have been difficulties assessing an open-ended consultation, but the effect of this discouragement would be that someone would not be likely to object because, neutral himself or herself, he or she was concerned about the effect on other people. The difficulty with a straight vote is that insofar as they are democratically governed<sup>37</sup>, parishes are representative democracies, with government being exercised through the democratically elected churchwardens and

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<sup>37</sup> Authority does not reside solely in the parish in the churchwardens and PCC.

PCCs and not by referendums. This said, if one is going to count heads there seems to me a strong argument for having a straight vote of everybody; or in a case like the present asking people to vote For/Against/Neutral. Also, I think that the ground rules – whatever they were going to be – should have been decided upon at the beginning of the experiment and not at its end. I think that it would have been better for the final decision to have been taken by the DCC and not the Standing Committee of the DCC.<sup>38</sup> My final concern is that, in this context, 14 people saying that they wished the kneelers to be retained is quite a high number (e.g. compare with the numbers of members of the Standing Committee of the DCC (9), of the DCC (19) and of those attending the AGM (33)).

96. I will return to this aspect of the matter in a moment.

97. The other matter that has given me pause is that I am being asked to dispense with arrangements for kneeling to receive communion where, as I have shown, that arrangement can be traced back to the Reformation as part of the Anglican compromise: keeping the mean *between the two extremes, of too much stiffness in refusing, and of too much easiness in admitting any variation from it*<sup>39</sup>. Many – perhaps most – who attend the Eucharist week by week will not know about the historical background. It will probably be the case that this is the way things have always been done in their experience, except perhaps when they have visited a Cathedral. They will guess that it has commended itself to the Church of England over the years because when they visit other churches they will have seen historic examples of communion rails. And if they think about the reason for kneeling, they will realise that it is intended

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<sup>38</sup> Apart from the importance of the matter warranting it going to the DCC itself, there appear to be co-opted members of the Standing Committee, who are not members of the DCC itself.

<sup>39</sup> See the Preface to the *Book of Common Prayer*.

to reflect the importance attaching to receiving the sacrament. It will not be surprising if some feel that it is a tradition which should be retained, even if not everybody is able clearly to articulate the reasons for it. It seems to me that such views are entitled to respect.

98. This all said, there may be good reasons why in any particular case a Parish should decide that the arrangements it makes should be for the sacrament to be received standing. In the present case, it seems to me that there is nothing wrong with the **reasons** which the Petitioners put forward in support of the change. To re-iterate, these reasons are the smallness of the Sanctuary, the desire that the distribution of the elements should happen more quickly, the desire to make it feel easier for the older members to receive communion standing<sup>40</sup>. If this petition had been unopposed both formally and in the sense that no-one in the Parish objected to it, I do not think that the basis for rejecting the petition would have existed.

99. I have identified aspects of the way the views of the congregation were taken into account by the DCC were not the best that could have been devised. However I think that I must beware of requiring after the event standards of the DCC which could be viewed as being too high. I must assume that the petitioners talk to members of the congregation – I am sure that they do. In this regard, Canon Butler tells me that

*During the year of the experiment, I kept an eye on the reactions to the removal of the rails and raised the matter at regular meetings with the churchwardens and also of the Church Council. I specifically asked for feedback, particularly from people who were expressing dissatisfaction. Very few such reports of unhappiness were forthcoming.*

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<sup>40</sup> Always recognising that there may be some, like Miss Flowerday, for whom kneeling is preferable from the point of view of their particular disability.

100. It may be – I do not know this – that the approach which has been taken has had the effect of “down playing” any opposition. But ultimately, if people object they must voice their objection. Assuming that Miss Flowerday participated in the vote, she is the only one of 14 people who pursued her objection to this Court. The others have either, on reflection, been persuaded of the change or have decided for the sake of harmony not to pursue their objections. If the latter, then the approach that they have taken is one that is deserving of considerable respect, reflecting a willingness to sink personal views for the perceived greater good of the whole community.

101. In the end, I am clear that this is a matter which I can and should properly leave to the Parish to decide – by which I mean that this is a category of decision where, if the parish decide upon a certain course upon reasonable grounds I should not seek to substitute my own judgment (whatever it might be) for theirs. Following the experimental period they might reasonably have decided to put the communion rails back or to make the experiment permanent. They decided on the latter course. If I were satisfied that no proper need had been shown for the change, I would not permit it, but I think that the Petitioners have overcome this hurdle. I have criticised the consultation process, but no member of the congregation apart from Miss Flowerday has objected; and she has objected for understandable reasons but ones which relate essentially to her own position. In terms of the *Bishopsgate* questions this is not a case where the proposal will adversely affect a listed building. Accordingly, I only need to be generally satisfied that no identified objection to the proposal outweighs the identified need. I am so satisfied. I shall grant the faculty as prayed. As a condition of the faculty, I shall require the communion rails to be stored. It is not easy to predict fashions in matters



relating to church ordering. Canon Butler acknowledges that it is possible that a different view might be taken in the future. Storing the rails preserves the option of easily restoring the *status quo ante* and there is, I understand, no difficulty in storing the communion rails in the Church hall, adjoining the church.

102. I do not think that it is necessary to incorporate this in the faculty, but there could be no objection to the use of the Communion Rails at occasional services – most appropriately perhaps at a Sunday celebration according to the rite of the Book of Common Prayer, if this were to happen at any time. Similarly there would be no objection to use of the communion rails for the celebration of the Wednesday morning Communion, either regularly or on special occasions, although I recognise that it may not be convenient to do this and that, in practical terms, the inconvenience may tell against this idea.

### **Concluding matters**

103. I note from Canon Butler that the DCC Standing Committee are happy to review its procedures as regards citation. It seems to me that there is a great deal for the traditional practice of posting public notice of petitions on the main door of the church. Then most, if not all, people entering the church must see what is evidently a formal legal document. If like Miss Flowerday they might have difficulty reading it, they will at least be aware of it, and can ask to what it relates.

104. I regret that this judgment has been somewhat delayed following Miss Flowerday's decision on March 2011 that she did not wish to become a party opponent. It seemed to me that the issues arising were not straightforward and warranted full consideration. I

hope that, although not everyone may agree with my judgment, they will be able clearly to understand what are the reasons that have led me to it. I also hope that it proves possible for a means to be arranged for Miss Flowerday to receive communion which she finds satisfactory.

A handwritten signature in dark ink, appearing to read 'Philip Petchey', with a horizontal line underneath.

**PHILIP PETCHEY**

Chancellor

28 June 2011