

LEGAL QUESTIONS COMMITTEE

May 2006

PROPOSED DELIVERANCE

The General Assembly:

1. Receive the Report.
2. Approve the arrangements for the appointment of future Procurators (section 1 of the Report).
3. Pass an Act amending Act VI 1997 anent the Commission of Assembly (as amended) as set out in Appendix A (section 3).
4. Approve the Overture anent the Ministries Appeals Panel as set out in Appendix B and transmit the same to Presbyteries under the Barrier Act, directing that returns be sent to the Principal Clerk not later than 31 December 2006 (section 4).
5. Approve the Regulations amending Regulation I 1999, as set out in Appendix C (section 5).
6. Pass an Act anent the Diaconate as set out in Appendix D (section 7).
7. Instruct the Committee to consider the place of the Westminster Confession of Faith within the Church's constitution, to consult thereanent with the Mission and Discipleship Council and to report to the General Assembly of 2007 (section 12 and Appendix E).
8. Approve the Overture anent Superintendence of Congregations, as set out in Appendix F, and transmit the same to Presbyteries under the Barrier Act, directing that returns be sent to the Principal Clerk by 31 December 2006 (section 13).
9. Pass an Act amending Act II 1984 anent Presbytery Visits (as amended), as set out in Appendix G (section 13).
10. Pass a Declaratory Act anent Civil Partnerships as set out in Appendix H (section 15).
11. Commend the work of the Churches' Mediation Network (Scotland) and encourage the practice of mediation in situations of discord (section 17).

6.4

REPORT

I. Appointment of Procurator

I.1 There is a very small number of people from whom a Procurator can be chosen. The Church needs the Procurator to represent the Church in the Courts, potentially in the highest Courts, and so he or she should be one of Her Majesty's Counsel in Scotland. The Church also needs someone who has an interest in the Church and preferably some knowledge of how the Church operates.

I.2 In the light of last year's restructuring of Committee responsibilities, and bearing in mind the considerations

mentioned above, the Committee consulted with the Clerk to the Faculty of Advocates (himself a former member of the Committee) to review the system for filling future vacancies in the Procuratorship.

I.3 The Committee has come to the following conclusions:

I.3.1 The Procurator should continue to be a practising QC.

I.3.2 On the resignation of the Procurator the Secretary of the Legal Questions Committee should approach the Clerk of the Faculty of Advocates to obtain the names of those eligible.

1.3.3 Advice should be sought informally (as now) from the outgoing Procurator; and any former holders of the office, on the suitability or otherwise of any of those named.

1.3.4 An ad hoc Committee of the Conveners of the Legal Questions and Assembly Arrangements Committees, the Principal Clerk (whom failing the Depute Clerk), the Solicitor to the Church and a member of the General Trustees (not a member of staff) should meet to decide who should be approached. The Legal Questions Committee Convener should be the Convener of this Committee. Thereafter the Committee should meet with the person suggested, and a recommendation should be made to the General Assembly under the Legal Questions Committee Report.

2. Youth Representatives' Vote

The Committee received a suggestion that consideration should be given to giving the vote to those Youth Representatives who happened to be elders. This topic largely repeated queries discussed in previous years by the Board of Practice and Procedure. On grounds of fairness and with concerns about possible ageism, the Committee did not believe any change should be made to Standing Orders, pointing out that elders under 25 years of age were eligible for commissioning by their Presbyteries.

3. Commission of Assembly – Committee on Overtures and Cases

Recently the Committee on Overtures and Cases has applied the Standing Orders of the General Assembly to the hearing of appeals by the Commission of Assembly. The Legal Questions Committee believes the practice is a correct interpretation of the procedures of the Assembly, but that it is desirable to have it enshrined in the legislation governing the Commission, for the avoidance of all doubt. An amending Act to achieve this is set out in Appendix A.

4. Commission of Assembly – Ministries Appeals Panel

4.1 The Committee has reviewed the operation of the

Commission of Assembly in terms of Act VI 1997. The removal of many Appeals, Dissents and Complaints, and Petitions from the forum of the General Assembly has been a success. Cases can be heard at different times of year, removing much of the element of delay that previously existed; the preparatory processes under the Act allow a more focused scrutiny of the facts of each case; and the separation of Assembly and Commission meetings permits a more leisured consideration of each case in an environment unpressured by other kinds of business. The Committee felt that the Commission retains the principal benefit of the old system, that the hearing of cases is in the hands of a nationally-representative body.

4.2 However, in recent years there have arisen from time to time appeals by individuals against decisions of the Board of Ministry (now the Ministries Council) in the context of recruitment, selection and training for the ministry, and admission of ministers to status within the Church of Scotland. Two kinds of problems exist in taking such appeals to the Commission of Assembly. First, these are often highly delicate decisions involving personal and confidential information, and they do not happily belong to a large judicial body. Second, the constant development and consolidation of training for the different forms of ministry (Full-time, Auxiliary, Diaconate, Readership) in the new Council has left an element of inconsistency in the appeal provisions applicable to the different categories, as these appear (or in some cases do not clearly appear) in the legislation of the Church.

4.3 The Committee, supported by the Ministries Council, proposes a new appeals body ('Ministries Appeal Panel') to hear ministries appeals by individuals. A Panel of five, appointed not by or from the Council but separately by the General Assembly, will have the same extent of powers and responsibilities as the Commission of Assembly. It will be the single and final place of resort for all appeals of this type, as specified in the various Acts that regulate the work of the Council in this field. The sole exception to this is the retention of Committee reviews of Assessment Conference decisions, which will provide an earlier point of

review before the case goes to the Ministries Appeal Panel. But in all cases the Panel will replace the Commission where the decision has been taken by the Ministries Council or a Committee established by it.

4.4 For the avoidance of doubt, the new provision will make clear that decisions taken against decisions made solely by a Presbytery should still be heard by the Commission. In other words, appeals against a decision of a Court of the Church will continue to belong to the Commission of Assembly.

4.5 An Overture setting out these proposals is to be found at Appendix B.

5. Committee to Nominate the Moderator

At the request of the Committee to Nominate the Moderator (because it does not bring a Deliverance to the General Assembly) the Legal Questions Committee brings a proposed amendment to the Regulations governing the nomination of the Moderator. The current Regulations provide that at the first of the Committee's two meetings no individual names are to be discussed. However in recent years, members of the Committee have clearly found it helpful to discuss individuals, and have had to do so outwith the plenary session of the Committee meeting in order to keep within the letter of the Regulations. This year's Committee felt that this artifice could be avoided if the restriction were removed from the Regulations, and an amendment to effect this is set out in Appendix C.

6. Report of Inspection of Records Committee

6.1 A sub-committee of the Legal Questions Committee inspected the minutes of the Committees of the General Assembly, covering the period of February 2005 to February 2006. That period included the point of transition from the old structure of Boards and Committees to the current structure of Councils and Committees, and therefore the process of inspection was more complicated than usual with old and new records to be examined.

6.2 For the avoidance of doubt, future inspections will relate to all seven Councils, and those Committees under

the Support and Services Council which report separately to the Assembly.

6.3 With so many changes of personnel and structures, the inspectors found that various issues had arisen relating to the proper keeping of minutes. Though all could be cured by the relevant staff, and appropriate comments were made to enable this, the Legal Questions Committee decided to circulate some guidance notes to all Secretaries to assist them in their important task of keeping good minutes.

7. Deacons and Presbytery Membership

7.1 Like ministers, many deacons occupy seats in Presbyteries as a result of having an appointment that so qualifies them in terms of Act III 2000. However, in the case of deacons, that Act is premised on such deacons always being appointed under the authority of a court or Committee of the Church. This year, some chaplains (especially in the health-care field) become employees of NHS Trusts and other organisations or bodies: while this does not affect the Presbytery membership of ministers, it has the effect of disqualifying deacons in this situation in a way not intended by the legislation.

7.2 In drafting a small amending measure to overcome this problem (see Appendix D) the Committee spotted two other slight anomalies in the legislation regulating the diaconate. One is an incorrect reference to admissions procedure, and the other is merely a duplication of provisions. The opportunity has been taken to have these corrected.

8. Deacons and Marriages

8.1 The General Assembly of 2004 passed an Act to authorise members of the Diaconate to conduct marriage services. In the case of most deacons in Scotland (except for one in a remote area, for whom special consent was obtained from the Registrar General) the Assembly's legislation could come into effect only once civil marriage law was changed by the Scottish Parliament.

8.2 For technical reasons beyond the control of the Registrar's office at the time of writing, the civil law change has yet to be made. The Committee is immensely grateful to the Registrar General, who has used his powers under the existing legislation to give special authority (which it is expected will be renewed annually if necessary) to all deacons to officiate at weddings; and this arrangement will continue pending the necessary change in secular legislation.

9. Readers as Members of Courts

9.1 Under the debate on the Report of the Board of Parish Education, the General Assembly of 2005 instructed the Legal Questions Committee *'to consider the possibility of readers as full members of Presbyteries and to report to a future General Assembly'*.

9.2 The Committee discussed the policy question at issue, and attempted to draft the sort of legislative measure that would be required. This exercise threw up some difficulties, arising from the fact that readers (unlike ministers and deacons) do not lose their status as serving elders upon being set apart as readers. They are eligible to belong, in other words, to one of the groups in which the governance of the Church already resides. A reader who is an elder may be commissioned to the Presbytery (or General Assembly), holding such an appointment by virtue of the decision and appointment of his or her Kirk Session (or Presbytery).

9.3 If readers who are elders are given membership of the superior courts *ex officio* as readers, they enjoy a privilege that does not belong to other elders, who may exercise an equally committed spiritual leadership in other roles. If readers who are *not* elders are given these privileges, it will override the Kirk Session's presumably reasoned decision not to ordain them as elders.

9.4 Because of the anomalies that might arise, and because of the precedent such a development might raise in the minds of other Church workers (paid and unpaid), the Committee did not feel that the policy case was strong

enough to bring a recommendation for change to this year's General Assembly.

10. Practising Certificates – Overseas Ministers

10.1 The Committee has considered a request from the Presbytery of Edinburgh for thought to be given to the question of granting Practising Certificates to ministers residing overseas. Some such ministers are outwith the effective supervision of any home Presbytery because they are out of touch or not personally known to most other members, but others in the same category keep close ties with the home Presbytery and can reasonably have a certificate renewed. The World Mission Council encourages membership of a local Presbyterian denomination where one exists, but not all overseas ministers can conveniently transfer to a suitable local church.

10.2 The Committee acknowledges that this is a difficult issue and believes that it has to be addressed by the responsible implementation of Act II 2000 by Presbyteries. Presbyteries have a discretion to exercise in this matter, and should grant a certificate only where there is a genuine need and where a meaningful assessment of the minister's good standing is possible.

11. Church Law Refresher Course

11.1 Probationers receive teaching in Church Law from the Depute Clerk, and are required to prove proficiency in their understanding of it. The same teaching is given to candidates for the Diaconate and the Auxiliary Ministry, and to ministers entering the ministry of the Church of Scotland from other denominations. It is difficult to keep that knowledge up-to-date, even with the most diligent attendance to General Assembly enactments and deliverances; and so the Committee offered to Presbyteries a half-day refresher course.

11.2 Singly or in neighbouring groups, about half of all Presbyteries have taken up the offer (a total so far of about 250 individuals attending), with Dr MacLean travelling to convenient locations arranged locally. Some seminars have received a general presentation of the material used with

probationers. Others have requested a particular focus on a difficult topic, for example vacancies or adjustment. The courses have been warmly received, and the Committee remains willing to keep the offer open.

12. Westminster Confession of Faith

12.1 The Westminster Confession of Faith is defined in the *Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual* as the Church's "principal subordinate standard". First adopted by the General Assembly of 1647, and even then with a qualification concerning the power of the civil magistrate, the history of the Church's relationship with the Confession has not been without controversy over the intervening three and a half centuries. Adherence to the Confession is now qualified by various Declaratory Acts, most recently by the General Assembly of 1986 which dissociated the Church from its abusive anti-Catholic rhetoric, judged appropriate in the seventeenth century, but certainly not in the present day.

12.2 Between 1968 and 1974 the adequacy of the Confession for present day needs was considered in great depth and detail by the Panel on Doctrine as well as by Presbyteries and Kirk Sessions. Essentially, there were two related proposals before the Church. The first of these was to redefine the Church of Scotland's relationship with the Westminster Confession, acknowledging it no longer as "principal subordinate standard" but as "historic statement of the faith of the Reformed Church". The second proposal was that a new Statement of Faith, appropriate for the present day, should be drawn up.

12.3 The ensuing debate covered a range of constitutional and theological issues, with legal challenges to the Church's freedom to act in the way proposed, scepticism as to the ability of the Church to agree a form of words which could give adequate expression to its faith and anxiety over whether and how liberty of opinion would relate to such a form of words. Nevertheless, consensus to depart from the Confession of Faith as the principal subordinate standard did emerge and the agreement of two-thirds

of Presbyteries in two successive years (the requirement for an amendment of the Articles Declaratory) was achieved along with the agreement of two successive General Assemblies. When, however, the matter came for final approval by the Assembly of 1974 a counter-motion prevailed by a majority of 292 to 238 and the matter was departed from until such time as a new Confession was accepted by the General Assembly. As anticipated by some, this was no easy task and was eventually abandoned in 1978. Eventually, in 1992 a more modest Statement of Faith was approved for use in worship and Christian education and this is available in *Common Order*.

12.4 The Committee raises this matter now from a constitutional perspective and does so out of a continuing concern that it is not satisfactory that a document so hedged about with declarations and qualifications, and in language barely accessible to church members, should continue to be referred to as a "principal subordinate standard", second only to the "supreme rule of faith and life" of "the Word of God contained in the Scriptures of the Old and New Testaments". It is evident that thirty years ago there was a strong consensus to adjust the Confession's constitutional status. It is equally evident that the insuperable obstacle then was the challenge, not so much of producing, but agreeing a new Confession.

12.5 It seems to the Committee that the issues of constitutional status and a new Confession of Faith are separable. The Committee recognises that the question of a new Confession is not something which lies within its remit and has, therefore, had a preliminary conversation with representatives of the Ministries and Discipleship Council with responsibility for doctrinal matters. It is the Committee's view that a redefining of the Confession's status amongst the Church's honoured texts is possible. A continuing affirmation of the Word of God contained in Scripture, and the Confession of Faith located in the ancient creeds as well as in the Scots and Westminster Confessions, would provide an adequate constitutional framework, leaving open the option of drawing up and adopting a new Confession in the future. The First

Declaratory Article (set out in Appendix E for ease of reference) which contains a summary of fundamental doctrines would remain.

12.6 The Committee therefore seeks a remit from the General Assembly to consider the place of the Westminster Confession of Faith within the Church's constitution, to consult thereon with the Mission and Discipleship Council and to report to the General Assembly of 2007.

13. Disruption in Congregational Life

13.1 The Committee has given thorough consideration over the past year to the broad issue of unacceptable behaviour on the part of elders, and to a lesser extent other office-bearers and congregational members. It is a major threat to the peace of the Church in some places. It is also a very large topic, and the discussion is bolstered by a vast corpus of anecdotes about individuals who have been divisive, disruptive, vexatious or unreasonable. Such situations can be amongst the most energy-sapping that a minister or Kirk Session has to face, and quite destructive of the ongoing ministry in that place. The Ministries Council recognises this issue in its Report (section 3.7.6) and intends to do some work in this area. The Legal Questions Committee in this Report, meanwhile, addresses broader issues of superintendence that belong within the Committee's own remit.

13.2 Church legislation is a good deal clearer about procedures relating to the professional ministry. Act III 2001 sets out the process in a case of alleged indiscipline of a minister, deacon or graduate candidate. Act I 1988 addresses the situation where a congregation may have fallen into an 'unsatisfactory state', and provides a remedy which sometimes involves a 'no-fault-presumed' removal of the minister from the charge. Much of the spur for the Committee's discussion was a sense that Act I processes could often lead to a devastating outcome for the minister where the real culprit was quite another personality in the congregation. Therefore the Committee wondered whether a parallel process, equivalent to that in Act III 2001, should be designed to apply to those not subject to

the existing provisions.

Step One: Recognising many kinds of difficulty

13.3 The Committee's Working Group, considering its members' personal experience, realised that the variety of circumstances was so wide, and the mischief in each case so unique, that there would be a real danger that devising a new process would create a mechanism that did not fit many kinds of cases. There are circumstances where conciliation will be more appropriate than litigation, circumstances where the office-bearer is acting so irrationally that a more pastoral intervention is needed, circumstances where the behaviour of office-bearers turns out to be entirely proper in the light of the conduct of the minister, and so on. The Committee concluded that the issue was a broad one of maintaining the peace of the Church through a variety of tools, and not a narrow one calling for a new disciplinary code. And in any case, the Committee believes, the Church already has the right process in place, if only it were more robustly and confidently used.

Step Two: Presbytery Visits in terms of Act II 1984 (as amended)

13.4 The process of Presbytery visits (previously known as 'quinquennial visits' or sometimes as 'five-yearly visits') provides a routine opportunity for the Presbytery to explore the life, ethos and dynamics of a congregation, to identify the early stages of difficulties and to make pastoral or formal interventions as a result. The *Basis of Preparation* appended to the Act encourages the thorough preparation, in advance, of the visit and suggests areas of congregational life to be scrutinised.

13.5 There is, however, a common failure to use the process robustly and thoroughly. Visits that are not deep and incisive enough, visiting teams that are not trained or prepared enough, written reports that contain nothing to challenge the congregation and its leaders, Presbytery deliverances that set no demanding goals, and – *above all these* – office-bearers who simply are not fully honest in the course of meeting with the visitors: these and other weaknesses can mean the regular visit fails to uncover

a latent dispute or pattern of disruptive behaviour. The desire not to stir up trouble in the short term can leave a deeper long-term problem festering unaddressed. The Committee strongly urges all Presbyteries to be as vigorous as possible in using the 1984 legislation robustly. The Committee believes, in other words, that there would be no point in introducing a new system where it is clear that the existing one is adequate but under-utilised.

13.6 A weakness of the current working of the Act is that Presbyteries struggle to enable a proper, bilateral discussion between the minister and the office-bearers. There may be problems or criticisms in either direction, and the Presbytery has to be able to deal with them even-handedly; but at present the visitors meet privately only with the minister and not with the Session. The minister is entitled to be present at any meeting of the Kirk Session, even one called by authority of the Presbytery. To achieve an encounter between Presbytery representatives and elders without the minister present demands a generous gesture on the part of the minister to withdraw (perhaps unlikely in a situation of broken trust), or an informal meeting with elders, or a formal meeting broken into small groups. The Committee believes such artifices should not be necessary, and brings legislation (Appendix F hereto) that will enable a Presbytery to call a meeting of the Kirk Session without the minister present. This change will not extend to any other type of Kirk Session meeting.

Step Three: Considering Mediation

13.7 Following the stage of Presbytery Visit, either routinely under Act II 1984 or specially on cause shown, the Presbytery should have an idea of the situation locally.

13.7.1 Sometimes the problem and its solution may be so obvious to the Presbytery that it should be dealt with immediately in the Deliverance of the Presbytery on receiving the report of the Superintendence Committee. Instructions may be issued, affirmations made, recommendations brought forward, which give the congregation the clearest direction for the future, even to the point of compulsion on the most serious issues.

13.7.2 Often, though, the situation discovered by the Presbytery may be unclear, or it may be apparent that it is complicated with right or wrong on more than one side of a dispute, or the misbehaviour of an individual may be so subtle that it is difficult to deal with it. In such a situation, and at this point of the process, there may well be a strong case for trying to mediate, or use other dispute-resolving techniques to avoid resort, wherever possible, to the Presbytery's formal powers of discipline and compulsion. Using these is not always the best way to proceed in situations with hurt feelings and multi-faceted issues at hand. Details of the Church's increasing work in the field of mediation is found elsewhere in this Report.

Step Four: Exercising the Presbytery's authority

13.8 Where the conversations surrounding a Presbytery visit do not resolve the issues which emerge, and where more extensive steps of mediation and support have failed, the congregation is finally faced with the prospect of using the legal authority of the Church to cure the problem. Whereas the minister is accountable for life and doctrine to the Presbytery, elders and members are accountable for their conduct to the Kirk Session. The Committee believes it must be extremely difficult and embarrassing for a Kirk Session to discipline one of its own number, especially in the modern era when the Session is less routinely a dispenser of disciplinary justice. It also believes it would be much easier, in a situation of difficulty involving both the minister and someone else, for the same court to deal with all aspects. Therefore the Committee includes in its proposed legislation a provision that the Presbytery should be the court of first instance (albeit if necessary at the request of the Kirk Session) in circumstances where a superintendence question has arisen in respect of any elder or other office-bearer. As this represents a major change in the jurisdiction of two Church courts, the legislation is cast as an Overture under the Barrier Act.

Commending best practice

13.9 The suggestions above represent the changes the Committee believes the Church should make in its legal framework. There are, however, many aspects of good

practice which are commended to Presbyteries and Kirk Sessions:

13.10 *Election of elders* – the Committee believes that the process of discernment of suitable elders may be best served by the practice of involving the congregation in selecting potential elders, as provided for in Act X 1932.

13.11 *Fixed-term eldership* – following the recommendations of the 2001 Special Commission on Review and Reform ('Church Without Walls'), the Committee recognises the advantages of a Kirk Session moving voluntarily to some system of fixed-term periods of membership of a Kirk Session. Though ordination is for life, a scheme of fixed periods of active service (perhaps introduced through the Session's own Standing Orders) provides leverage and flexibility and can help with many aspects of the development of the leadership of the congregation.

13.12 *Presbyterial ('Quinquennial') Visits:*

13.12.1 *Visitors* – Presbyteries should ensure that those visiting congregations are trained and prepared, and that they include strong and experienced individuals who are able to make the best of the process especially in difficult situations.

13.12.2 *Time frame of visit* – The Committee shares the view of those Presbyteries which have developed the visitation process so that it forms an ongoing relationship over the quinquennium, rather than consisting of a one-off visit. The latter, more traditional, pattern can leave a congregation with a feeling that there is for years at a stretch no continuing superintendence relationship with the Presbytery, which may be the very thing they feel they need in times of tension. The current legislation is perfectly compatible with this good practice, though it ensures a routine of formal reporting which keeps the sense of a five-year cycle.

13.12.3 *Intention of the visit* – Presbyteries should ensure that everyone visited is aware of the intention of the visit as described in s.2 of Act II 1984: *'to strengthen the hands*

of the minister, Kirk Session, office-bearers, and members, to advise them should anything appear to be unsatisfactory in the state of the congregation or not in accord with Church law and order, and in general to give counsel and encouragement as may be suitable to the circumstances of the case'. On occasions it may be necessary to remind individuals of the ordination vow that gives a commitment to uphold the peace and unity of the Church. That peace and unity is a profound aim and standard, and may have to be served by the kind of firm intervention that disturbs the false 'peace' of a problem unaddressed. This is a difficult feat to achieve, and may need highly experienced and skilful visitors to manage it. It may involve reassuring ministers, elders and others that the functions of superintendence and support are not incompatible with each other, and indeed a superintendence intervention is likely to be the most supportive act a Presbytery can make in a time of difficulty.

13.12.4 *Reports* – Presbyteries should give clear guidance to those writing reports so that they are meaningful, forward-looking and challenging.

13.12.5 *Problems* – Presbyteries should be resolved to deal early with problems that emerge, and should encourage honesty in bringing difficulties to light. One implication of this is that the Presbytery should receive the whole report, and not a version highly sanitised by the reporting Superintendence Committee. Clearly, the Superintendence Committee should also see the whole report, and not merely a paraphrase of the visitors' findings. There will be occasional circumstances in which a potentially disciplinary situation, or delicate personal details, mean that the Presbytery should not receive the full report. The Legal Questions Committee believes these should be very much the exception to the norm.

13.12.6 *Changes to Act II 1984* – in addition to the legislative changes described earlier, the Committee brings one small change to Act II (see Appendix G below). This will ensure that this area of difficulty is explicitly mentioned in the *Basis of Preparation*, and the visiting team will try to explore the working relationships amongst the whole leadership team in the congregation.

14. DTI

During the past year the Committee has been involved in ongoing conversations with the Department of Trade and Industry (DTI) in relation to its proposal to extend employment rights to clergy. At all stages there has been consultation with the Ministries Council. The DTI has asked all faiths and denominations involved in the talks to work towards a Code of Good Practice for their clergy. The Committee and the Council believe this can best be achieved by the Council undertaking a rewrite of the Ministers' handbook. Since the area of greatest concern for the DTI and for AMICUS (the Union representing some clergy) is grievance procedures, it will be important in the new handbook to gather together all the relevant rights and obligations relating to clergy. The DTI has also prepared a questionnaire designed to ascertain whether, and to what extent, ministers are aware of their rights and obligations. The Committee and the Council have responded to the draft questionnaire and at the time of writing it is about to be finalised. The DTI has requested the names and addresses of ministers from the Church and from all the other faith groupings. It will then randomly select a number to whom to send the questionnaire. It is their intention to process these responses and to send a further questionnaire in two years time so as to ascertain whether the awareness of ministers regarding their rights has improved, and also whether the rights themselves are sufficient to satisfy them that we provide remedies for our ministers which are at least as good as those which they would enjoy under civil employment law. At that stage the DTI will make a decision whether to extend employment rights to clergy.

15. Civil Partnerships

Introduction

15.1 In December 2005 legislation providing for civil partnerships came into force (the Civil Partnership Act 2004). In the autumn of last year correspondence was received by the Principal Clerk asking about the implications for pastoral ministry and the matter was referred to the Committee for its consideration and advice. Throughout

this section of the Report, references to ministers should be regarded as including deacons.

15.2 The Committee has taken care to keep within its own remit of seeking answers to questions of civil law and Church law, and has not explored the wider questions of policy that it believes the Church has yet to answer fully.

Bodies of Opinion

15.3 There are four broad bodies of opinion. One includes those ministers, employees and members of the Church who define themselves as gay, and includes prospective candidates for ministries of the Church preparing for the assessment process. The second includes those ministers who are sympathetic to gay Christians and wish to be able to express solidarity through their liturgical and pastoral ministry without fear of damaging repercussions. A third group includes those who are clear about their opposition to the recognition of a legitimate gay element in the Church. The fourth body of opinion, which may be sizeable, is of those who do not fit into either the second or third approaches: while wishing to advance with compassion, they are sensible of the complexities and contradictions inherent in the whole issue. There arise several complex questions, including the protection of the consciences of people of every point of view.

The Church and the Civil Law

15.4 An obvious new pressure on the Church is the reality now of civil partnerships being entered into and legally recognised. While such partnerships cannot be entered into by persons of the opposite sex, there is no presumption in law that a sexual relationship exists where a civil partnership has been entered. An arrangement may exist between friends for legal and financial reasons. To some extent, therefore, it is necessary to take a neutral view of the implications of civil partnerships, but inevitably the issue is bound to be a controversial one, as inferences are likely to be drawn.

15.5 The Church in fulfilling its civil law obligations, especially in relation to employment law, cannot avoid recognising the legal reality. Though the Church has the

protection of its own distinctive practice, through the independent spiritual jurisdiction in general and through measures like Employment Rights regulations which provide some exceptions (see for example the Employment Equality (Sexual Orientation) Regulations 2003), it is not exempt from civil law in ancillary matters like pension rights and other patrimonial issues. The Committee believes that in these civil law respects the General Assembly does not need to take any particular measures, but simply to recognise the patrimonial implications of the new legislation that came into effect in December 2005, for example in the area of pension entitlement or housing provision on retirement through the Housing and Loan Fund.

Pensions

15.6 The three pension schemes of the Church (The Church of Scotland Pension Scheme for Ministers and Overseas Missionaries, The Church of Scotland Pension Scheme for Staff and The Church of Scotland Pension Scheme for what used to be the Board of National Mission), which provide legal benefits, pay a spouse's pension on the death of a scheme member only to a legal spouse. The Sexual Orientation Regulations require a spouse's pension to be extended to civil partners from 5 December 2005 in respect of service after that date.

15.7 Another benefit, the Death in Service lump sum, is paid entirely at the discretion of the Trustees, and ministers are invited from time to time to nominate a beneficiary, who need not be a spouse. The Trustees will normally respect those wishes, and rarely have a problem doing so. The Committee believes that in the case of civil partnerships there is no reason not to respect wishes in exactly the same way.

Civil Partnerships – Religious Services

15.8 The other major question facing the Committee, this one belonging more to the sphere of Church law than civil law, was whether ministers and others may act in ways which recognise the status conferred by the civil law event. At the moment there is no expectation that civil law will seek to devise the equivalent of religious marriage

in the area of civil partnerships, and so the Church does not anticipate having to address the question whether its ministers would become celebrants for that legal function. However, religious individuals entering a civil partnership cannot have any religious element in that ceremony, and so they are likely to turn to sympathetic ministers to provide some kind of religious ceremony to mark the event. Since the passing in 2001 of the current disciplinary process for ministers, no case-law has emerged to indicate the line the Presbyterian Commission would be likely to take if the matter were raised by a Presbytery in terms of Act III 2001 (anent Discipline etc).

15.9 However, a willingness to mark same-sex committed relationships currently has to be packaged as an act of pastoral necessity in order to meet the implicit criterion that emerged from the Assembly's sexuality debates of the 1990s. If a minister takes this approach with integrity, it is arguable that such services are legitimate *in extremis* but not as a matter of routine,¹ in order to try to avoid disciplinary consequences. There is a likelihood of incurring Presbytery disapproval in some places and not others.

15.10 The Committee, while acknowledging that this is a controversial question, believes that it is important to recognise the existing freedom of pastoral conscience of ministers and others, and to guarantee that they do not face censure in the wake of providing a service in this context. Appended to this report (Appendix H) is a Declaratory Act that would effect that clarification. However, the Committee is clear that no two people who have entered into a Civil Partnership can claim any right to such a service.

¹ 'Routine' here should not be taken as suggesting that such services will be frequently sought. We mean only that such occasional requests would be treated as legitimate without the requirement of a particularly painful pastoral context to justify them.

15.11 It is also necessary to respect the rights of those who in conscience could not affirm a same-sex relationship, legally recognised through a civil partnership. While recognising that, contrary to popular media parlance civil partnerships are not marriages, the Committee nevertheless noted some parallels with the decision of the General Assembly in 1959 to permit the re-marriage of divorced persons in Church. This offended the consciences of many ministers at the time and the legislation made clear that no minister was required to perform such a marriage against his conscience. The Committee believes that it is important to respect integrity and freedom on both sides of the argument surrounding the current issue, so that neither side need fear repercussions from their conduct. The proposed Declaratory Act is permissive in tone, in order to protect conscience on all sides.

Intrusion.

15.12 Proceeding by way of permissive legislation will inevitably result in a territorial divide between parishes with ministers who are prepared to conduct services and parishes with ministers who are not. The proposed Declaratory Act therefore ensures that parties may approach a sympathetic minister for help, regardless of geography, but does not permit ministers to make their services available in any inappropriate way.

16. Helen Percy v Board of National Mission

In October 2005 the House of Lords heard legal arguments in the case of *Helen Percy v Board of National Mission*. In December judgement was given, finding that in this particular case the civil law on sex discrimination applied, and remitting the substantive case back to the Employment Tribunal to be heard. The Lords' judgement may be found at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051>

At the time of writing the case has not yet been brought to the Tribunal.

17. Churches' Mediation Network (Scotland)

17.1 In the summer of 2004 an inter-denominational

group met for a week's training in Christian mediation skills at Scottish Churches' House, Dunblane, under the expert guidance of 'Bridge Builders', the mediation skills arm of the Mennonite Church in Great Britain. There already existed in Scotland a pool of trained mediators amongst the Churches, some of whom are professionals in the mediation field. The Dunblane course increased the extent of this human resource, widened the variety of denominations involved, and provided a catalyst for bringing together people who had developed a strong sense of the importance of mediation in Church life.

17.2 Most of the denominations, and certainly the Church of Scotland, are familiar with using a 'court-case' model for resolving disputes in a judicial way. Most, too, try as often as possible to find ways to mediate a suitable solution so that all parties' needs are met without the need for a 'winner' and a 'loser' and the bitterness that can generate. It seemed to this new interest-group that it was desirable to build up a resource of expertise in mediation, to complement the formal, judicial processes of each Church. Though there are situations in which mediation does not normally have a role – especially serious disciplinary cases – it is a technique that can help to overcome distrust and broken relationships, even in a complex congregational situation.

17.3 And so over the last two years the Churches' Mediation Network (Scotland) has grown as an e-mail community co-ordinated by the Depute Clerk, and it has held very occasional meetings. The professional mediators in the group have worked out a very simple system to ensure that church-based mediations needing expert resourcing can have access to such help on a semi- *pro bono* basis; and this has already been utilised. The other ministers, priests, elders *etc* in the group are able to provide support to the professionals in cases requiring more than one person; though in their case issues of continuing training, appraisal, insurance *etc* are still being worked out by the network as a whole.

17.4 Requests for mediation assistance will normally come through the Ministries Council or the Principal Clerk's Office, and to either of these any questions may be directed.

18. Charity Law Reform

The Charities and Trustee Investment (Scotland) Act received Royal Assent on 14 July 2005. It is intended that the majority of the provisions in the Act relating to the regulation of charities by the newly established Office of the Scottish Charities Regulator (“OSCR”) will be in force by around April 2006. The Act retains the concept of designated religious bodies (renamed as designated religious charities) and the Church will therefore remain exempt from a number of regulatory powers exercisable by the Courts and OSCR. However, in common with other charities, congregations and other church charities will in due course require to demonstrate continued eligibility for charitable status and in particular that they provide public benefit. It seems likely, as at the time of writing, that OSCR will not however commence its “rolling review” of existing charities before Spring 2007. In the meantime, all charities will automatically be entered onto the new Scottish Charity Register. Charities will have new obligations to fulfil concerning the provision of financial and other information to OSCR and it is intended that guidance will be issued to congregations regarding these and other aspects of the legislation. The Church through its membership on the Scottish Churches Committee has been represented at a number of meetings which have taken place with officials of OSCR to discuss the implications of the new arrangements for Church bodies.

19. Presbyterian Superintendence

Reports show that Presbytery Visits have produced no case requiring action by the General Assembly; and also that Presbytery records are being properly kept.

In the name and by the authority of the Committee

ANN INGLIS, *Convener*
IAN McLEAN, *Vice-Convener*
MARJORY A MACLEAN, *Secretary*

APPENDIX A

ACT AMENDING ACT VI 1997 ANENT THE COMMISSION OF ASSEMBLY (AS AMENDED)

Edinburgh, xx May 2006, Sess. yy

The General Assembly hereby enact and ordain that Act VI 1997 as amended is hereby further amended as follows:

By numbering the existing text of section 8 as sub-section (1) thereof, and adding a new sub-section (2) to read:

“(2) For the avoidance of doubt, cases shall be subject to the scrutiny of the Committee on Overtures and Cases in relation to questions of competency and relevancy.

(a) The Committee may produce a report for inclusion in the papers distributed to Commission members and to parties, and make interim recommendations on process to parties and to the Investigating Committee.

(b) In the event of the Committee transmitting the case without qualification, it shall not be necessary for a written report to be prepared.

(c) Any report by the Committee shall be debated by the Commission of Assembly at the outset of the case, and parties given an opportunity to be heard in the course of such debate”.

APPENDIX B

OVERTURE ANENT THE MINISTRIES APPEALS PANEL

The General Assembly adopt the Overture the tenor whereof follows, and transmit the same to Presbyteries for their consideration under the Barrier Act, directing that returns be sent to the Principal Clerk not later than 31 December 2006.

The General Assembly, with the consent of a majority of Presbyteries, enact and ordain as follows:

1. The General Assembly hereby appoints a standing Committee to be known as the ‘Ministries Appeals Panel’ to hear and finally dispose of such appeals as are delegated to it in terms of this Act. The decisions of the Ministries Appeals

Panel shall be final, and there shall be no right of appeal against them. For the avoidance of doubt, no decision taken solely by any Kirk Session or Presbytery of the Church may be appealed to the Ministries Appeal Panel.

2. The Ministries Appeals Panel shall consist of a Convener, Vice-Convener and three members all appointed by the General Assembly on the nomination of the Nomination Committee and in terms of the Standing Orders of the General Assembly. At least one member should be legally qualified, and at least one should be a minister. The quorum of the Ministries Appeals Panel shall be three including either the Convener or Vice-Convener. The Secretary of the Ministries Appeals Panel shall be one of the Clerks of the General Assembly.

3. Procedure shall be in accordance with the Standing Orders of the General Assembly so far as applicable and consistent with this Act. The Ministries Appeals Panel shall act in accordance with the Constitution of the Church and the Acts of the General Assembly and nothing in this Act shall be construed as conferring power to contravene or amend existing legislation, or to legislate. The Ministries Appeals Panel shall be accountable to the General Assembly which may revoke any action in excess of the powers conferred by this Act.

4. The Ministries Council shall report to the General Assembly all decisions made by the Ministries Appeals Panel in terms of this Act.

5. The Ministries Appeals Panel shall hear appeals by individuals against decisions of the Ministries Council or any of its Committees, relating to questions of recruitment, selection, education and training for the full-time Ministry of Word and Sacrament, the Auxiliary Ministry, the Diaconate and the Readership, in accordance with the relevant Acts and Regulations of the General Assembly.

6. Act VI 1997 anent the Commission of Assembly (as amended) is hereby further amended by the addition to sub-paragraph 5(d)(i) of the words “, and with the further exception of those delegated to the Ministries Appeals

Panel in terms of Act x 2007”.

7. Act XVII 1992 anent the Readership (as amended) is hereby further amended by the addition of a new section 10 to read: “Appeals against decisions of the Ministries Council in terms of sections 1, 2 and 9 of this Act shall be subject to the provisions of Act x 2007 anent the Ministries Appeals Panel”.

8. Act IX 2001 anent Selection, Training and Admission of Deacons (as amended) is hereby further amended by the addition to the end of section 2 of the sentence: “For the avoidance of doubt appeals against decisions taken in terms of this section shall be subject to the provisions of Act x 2007 anent the Ministries Appeals Panel”.

9. Act IX 2002 anent Admission and Readmission of Ministers (as amended) is hereby further amended by the deletion of section 12 and the substitution of the following: “Appeals against decisions of the Committee in terms of this Act shall be subject to the provisions of Act x 2007 anent the Ministries Appeals Panel”.

10. Act XIII 2003 anent the Auxiliary Ministry (as amended) is hereby further amended by the addition of a new section 20 (with consequent renumbering) to read:

“20. Appeals

Appeals against decisions of the Ministries Council in terms of this Act shall be subject to the provisions of Act x 2007 anent the Ministries Appeals Panel.”

11. Act X 2004 anent Selection and Training for the Full-time Ministry and Eligibility for Ordination (as amended) is hereby further amended as follows:

(a) By the deletion in sub-section 6(5) of the words “Commission of Assembly” and the substitution of “Ministries Appeals Panel”.

(b) By the deletion at the end of subsection 6(6) of the words “Act VI 1997 anent the Commission of Assembly” and the substitution of “Act x 2007 anent the Ministries Appeals Panel”.

(c) By the addition (i) at the end of the first sentence of section 10 and (ii) at the end of section 11, of the words "to the Commission of Assembly".

**APPENDIX C
REGULATIONS AMENDING
REGULATIONS I 1999 (ANENT THE
NOMINATION OF THE MODERATOR OF THE
GENERAL ASSEMBLY) AS AMENDED**

Edinburgh, xx May 2006 Sess. yy

Regulations I 1999 (as amended) are hereby further amended by the deletion from section 5(a) of the last four words, *ie* 'without discussing particular individuals'.

**APPENDIX D
ACT ANENT THE DIACONATE (AMENDING
ACTS VIII 1998 (AS AMENDED), III 2000
(AS AMENDED) AND IX 2002 (AS AMENDED))**

Edinburgh, May xx 2006, Sess. yy

The General Assembly enact and ordain as follows:

1. Act VIII 1998 (anent the Status and Function of Deacons) (as amended) is hereby further amended by the deletion of section 8.
2. Act III 2000 (Consolidating Act anent Church Courts) (as amended) is hereby further amended by the addition to the end of sub-section 26(1) of a further sentence reading: "A deacon appointed as a hospital chaplain, prison chaplain, industrial chaplain, or to any form of chaplaincy recognised (for this purpose only) by the Ministries Council, shall be entitled to membership of the Presbytery within whose bounds he or she serves".
3. Act IX 2001 (anent Selection, Training and Admission of Deacons) (as amended) is hereby further amended by the amendment of section 7 to read "Act IX 2002 (as amended) shall apply to the diaconate *mutatis mutandis*".

APPENDIX E

**Article I of the Articles Declaratory of the Constitution
of the Church of Scotland in Matters Spiritual**

The Church of Scotland is part of the Holy Catholic or Universal Church; worshipping one God, Almighty, all-wise, and all-loving, in the Trinity of the Father, the Son, and the Holy Ghost, the same in substance, equal in power and glory; adoring the Father, infinite in Majesty, of whom are all things; confessing our Lord Jesus Christ, the Eternal Son, made very man for our salvation; glorying in His Cross and Resurrection, and owning obedience to Him as the Head over all things to His Church; trusting in the promised renewal and guidance of the Holy Spirit; proclaiming the forgiveness of sins and acceptance with God through faith in Christ, and the gift of Eternal Life; and labouring for the advancement of the Kingdom of God throughout the world. The Church of Scotland adheres to the Scottish Reformation; receives the Word of God which is contained in the Scriptures of the Old and New Testaments as its supreme rule of faith and life; and avows the fundamental doctrines of the Catholic faith founded thereupon.

**APPENDIX F
OVERTURE ANENT SUPERINTENDENCE OF
CONGREGATIONS**

Edinburgh, xx May 2006, Sess. yy

The General Assembly adopt the Overture, the tenor whereof follows, and transmit the same to Presbyteries for their consideration under the Barrier Act, directing that returns be sent into the Principal Clerk not later than 31 December 2006.

The General Assembly, with the consent of a majority of Presbyteries, enact and ordain as follows:

1. Act III 2000 (Consolidating Act anent Church Courts) (as amended) is hereby further amended (1) by the addition of a new heading and sections 38 and 39 to read as follows:

"Kirk Session and Presbytery

38. Where circumstances exist that suggest to the Kirk Session that a dispute or disturbance has occurred in the

congregation, which involves an elder or another office-bearer of the congregation and which requires formal action to be taken, the Kirk Session shall immediately refer the matter to the Presbytery of the bounds, and the Presbytery shall act as the court of first instance in the matter, subject to the normal rights of appeal to the Commission of Assembly. Where the Presbytery itself becomes aware of such circumstances, it shall proceed to exercise appropriate superintendence, informing the Kirk Session of all steps taken and instructing the Kirk Session to take further steps where necessary.

39. Whenever a Kirk Session meeting is called by the authority of the Presbytery in terms of Act II 1984 anent Presbytery Visits (as amended), or for any other purpose relating to the superintendence of the congregation by the Presbytery, the representative of Presbytery appointed to moderate the meeting shall determine whether on any occasion the Kirk Session shall meet without the presence of the minister.”

(2) by renumbering the existing sections 38-41 as 40-43.

2. Act II 1984 anent Presbytery Visits to Congregations (as amended) is hereby further amended by the deletion of the final sentence of section 6.

APPENDIX G ACT AMENDING ACT II 1984 ANENT PRESBYTERY VISITS (AS AMENDED)

Edinburgh, xx May 2006, Sess. yy

The General Assembly hereby enact and ordain that Act II 1984 (anent Presbytery Visits) (as amended) be hereby further amended as follows:

The Basis for Preparation appended to the Act is hereby amended by the addition of a new question B.5, reading:

“What is the nature of the working relationships amongst office-bearers, and between the office-bearers and the minister(s)? (This question should be explored separately with minister and elders as a matter of routine, even where either party expresses a willingness to discuss it with the other

party present. It should be approached flexibly, and all lines of enquiry which emerge should be appropriately pursued.)”

APPENDIX H DECLARATORY ACT ANENT CIVIL PARTNERSHIPS

Edinburgh, xx May 2006 Sess yy

Whereas the Civil Partnership Act 2004 does not confer on ministers or deacons the power to create civil partnerships;

Whereas a service marking a partnership under the Civil Partnership Act 2004 is to be distinguished from the joining together of a man and a woman in marriage;

Whereas ministers and deacons are uncertain whether they may expect to be charged with a disciplinary offence in the event of conducting a service for those who have contracted a partnership in terms of the Civil Partnership Act;

Whereas ministers and deacons who are unwilling to conduct such services are entitled to have their opinions protected;

And whereas the diversity of view on the matter means that the availability of such services varies from parish to parish;

The General Assembly declare as follows:

1. A minister or deacon who conducts any service marking a civil partnership does not commit a disciplinary offence in terms of Act III 2001 (as amended).
2. No minister or deacon shall be compelled or obliged to conduct such a service against his or her conscience.
3. Where a minister or deacon officiating at such service has been approached by the parties in the first instance, or where a minister or deacon so approached officiates in circumstances where the parish minister has declined to officiate, such minister or deacon shall not be deemed to have intruded upon the sphere of ministry of a parish minister in terms of section 18 of Act II 2000.

