

## LEGAL QUESTIONS COMMITTEE MAY 2021

### Proposed Deliverance

#### The General Assembly:

1. Receive the Report.
2. Amend Standing Orders as detailed in section 4 and Appendix B of the Report of the Assembly Business Committee. (*Section 1 – Amendments to Standing Orders*).
3. Note the intention of the Committee to bring a Church Courts Overture to the General Assembly of 2022 and encourage Kirk Sessions, Presbyteries and others to engage with the Committee in the preceding consultation process. (*Section 2 – New Church Courts Act*).
4. Note the work done by the Committee in relation to the solemnisation of same sex marriages including the draft Overture set out in Appendix A and the Procurator's Supplementary Opinion at Appendix B. (*Section 3 – Preparation of legislation for Same Sex Marriage and Appendices A & B*).
5. Instruct the Committee, in consultation with others, to continue to develop a process of Presbytery Review and report to the General Assembly of 2024. (*Section 4 – Presbytery Review*).
6. In relation to appeals:  
(*Sections of deliverance to be moved if the Presbytery Mission Plan Act and Local Mission Church Regulations are **not** agreed to by the General Assembly*)
  - (a) instruct the Committee to consider introducing a bespoke process for Presbytery Planning appeals and to report to a future General Assembly;
  - (b) instruct the Faith Nurture Forum, in consultation with the Legal Questions Committee and the Presbytery Clerks' Forum, (i) to prepare a manual of good practice for Presbyteries to follow in terms of Presbytery Planning procedures; and (ii) to consider good procedural practice in the process of PPTG deciding on concurrence with a Presbytery Plan and to introduce such changes as it may think appropriate and to bring a report to the General Assembly of 2022 on progress; and
  - (c) instruct the Committee to consider bringing proposed amendments to the Appeals Act to allow early consideration of the competency and relevancy of any Grounds of Appeal and to bring any proposals to the General Assembly of 2022.

*OR (Sections of deliverance to be moved if the Presbytery Mission Plan Act and Local Mission Church Regulations are agreed to by the General Assembly)*

  - (a) instruct the Faith Nurture Forum, in consultation with the Legal Questions Committee and the Presbytery Clerks' Forum, to prepare a manual of good practice for Presbyteries to follow in terms of Mission Plan procedures; and
  - (b) instruct the Committee to consider bringing proposed amendments to the Appeals Act to allow early consideration of the competency and relevancy of any Grounds of Appeal and to bring any proposals to the General Assembly of 2022. (*Section 6 – ADR and Presbytery Planning Appeals*).
7. Note that (1) the Vacancy Protocol and the arrangements for Presbyteries and Kirk Sessions to meet and vote by video-conferencing or audio-conferencing or a combination of the two, agreed by the Commission of Assembly on 7 July 2020, (2) the three Protocols agreed by the General Assembly of October 2020 (the Congregational Meetings on Bases of Adjustment Protocol, the Congregational Meetings for Adopting the Unitary Constitution Protocol and the Congregational Meetings on Sale or Disposal of Church Buildings Protocol) and (3) the arrangements for Financial Boards to meet and vote by video-conferencing or audio-conferencing or a combination of the two, have all proved useful and continue these arrangements until the General Assembly of 2022. (*Section 8 – Online meetings*).
8. Instruct that while the Covid-19 pandemic regulations prevent an in person congregational meeting taking place:
  - (a) Kirk Session shall have power to appoint to the Congregational Board members of the congregation who are not members of the Kirk Session to fill vacancies which have arisen, which appointments shall last only until such time as the Stated Annual Meeting is next held in person; and
  - (b) if in the Committee's view, at any time before the next General Assembly, alternative arrangements become necessary to enable elections to take place to Congregational Boards, the Committee shall have power to produce a Protocol to enable elections to Congregational Boards. (*Section 9 – Stated Annual Meetings and Elections to Congregational Boards*).
9. Pass an Act amending the Discipline Act (Act I 2019) as set out in Appendix C. (*Section 10 – Amendment to the Discipline Act*).

## Report

### 1. AMENDMENTS TO STANDING ORDERS

**1.1** The Report of the Assembly Business Committee contains various proposals to amend Standing Orders in light of the General Assembly of 2021 being held online. The details, including the proposed amended text of the Orders, are set out in full in there, in section 4 and Appendix B to the Report. In line with Standing Order 127, the section of deliverance to amend Standing Orders is however contained in the Report of this Committee.

### 2. NEW CHURCH COURTS ACT

**2.1.1** At the General Assembly of 2017 the Committee reported that “there is sufficient interest for a wider review to be undertaken of the Church Courts Act.” In the following year there was consultation with Presbytery and Session Clerks which was reported to the General Assembly of 2018.

**2.1.2** Since then the Committee has been seeking to set out a refreshed and expanded framework which provides for each Church Court clear statements on membership, functions and responsibilities, meetings and the relationship to the other Courts of the Church. We also hope to ensure that the new Act reflects the changes in civil law which have occurred since the current Act was drafted in the late 1990s.

**2.1.3** In the next stage of our work we will again be consulting with those who will make the most frequent reference to the Church Courts Act as they seek to order the business of Kirk Session, Presbytery and General Assembly.

**2.1.4** We will also be working with our colleagues in the Faith Nurture Forum with their particular interest in the development of the eldership.

**2.1.5** We regret that we are not in a position to bring an Overture to this General Assembly but given the changes being brought through the Presbytery reforms instructed in 2019 and the pressures imposed and the lessons learned during the Covid-19 pandemic the Committee hopes that the General Assembly will agree that a slight delay may enable a more appropriate and longer-lasting legal framework for the Church.

**2.2** The Committee also has a remit “to explore reducing the minimum age of eldership to 16”. We will ensure that this is part of our consultation and, if we feel it is appropriate, it will be included in the Overture which we will bring to the General Assembly of 2022.

**2.3** The Committee additionally has a remit “Encourage the Committee, as part of its review of the Church Courts Act, and in the light of changes in the membership of Kirk Sessions and Presbyteries, to consider whether an Elder in Presbytery might be a bona fide member of a congregation within the bounds rather than of a Kirk Session.” This will also be part of our consultation and drafting work in the coming months.

### 3. PREPARATION OF LEGISLATION FOR SAME SEX MARRIAGE

**3.1** When the Committee reported to the General Assembly of 2018 this section of deliverance was passed: “*Instruct the Committee to prepare legislation enabling those Ministers of Word and Sacrament and Deacons who wish to do so to be nominated to solemnise same sex marriage ceremonies in accordance with Section 9(1A) of the Marriage (Scotland) Act 1977, while also providing safeguards to address issues identified both in section 9 of the Report and in the Opinion of the Procurator annexed at Appendix I but only if the Committee finds that the said safeguards, in their opinion, sufficiently protect against the risks they identify; and report to the General Assembly of 2020.*”

**3.2** This instruction arose from a motion and an amendment by commissioners rather than on the initiative

of the Committee. This was given to us as a “technical” task to prepare and bring to the General Assembly a piece of work which, if the Church were to adopt it as law, would fulfil the brief set out in the deliverance.

**3.3** In preparing the legislation, the Committee offers the text of an Overture which it believes, if adopted and approved through the Barrier Act procedure, would “*enable Ministers of Word and Sacrament and Deacons who wish to do so to be nominated to solemnise same sex marriage ceremonies in accordance with Section 9(1A) of the Marriage (Scotland) Act 1977.*” The draft Overture is annexed at Appendix A.

**3.4** The Committee has also given close attention to the concerns and fears of those who may not wish to follow this new path and who may be concerned about the civil law risks of operating within this “mixed economy”. The Supplementary Opinion from the Procurator at Appendix B offers further insights on these matters.

**3.5** If this General Assembly should receive a motion as to sending the Overture down to Presbyteries under the Barrier Act and should decide to do this, the Committee will continue to work on a Guidance document to help ministers, deacons and others to understand how practical arrangements would work.

### 4. PRESBYTERY REVIEW

**4.1** The General Assembly of 2019 instructed the Committee to “prepare legislation to ensure that Presbytery Review engages all Presbyteries on a regular basis and to report to the General Assembly of 2020”. At that point two cycles of pilot Presbytery Review process had already been completed, involving around twenty Presbyteries.

**4.2** However, the same General Assembly also said that the number of Presbyteries should be reduced to around twelve by 2024 and set ambitious targets for these “new” Presbyteries in the context of the Radical Action Plan and the Report of the Special Commission on Structural Reform.

**4.3** In light of these major policy changes it seemed to the Committee that there would be little point in developing a Presbytery Review process for the current pattern of forty two Presbyteries when in a fairly short period of time the shape, nature and purpose of Presbytery life would be greatly changed. We are, therefore, asking the General Assembly to confirm this view and instruct the Committee to bring forward a scheme of Presbytery Review which will work in the setting the Church is seeking to create.

### 5. LEGAL COSTS IN DISCIPLINARY PROCEEDINGS

**5.1** The Committee was instructed by the General Assembly of 2019 “to consider the question of whether in principle a person who is subject to proceedings brought under the Discipline Act which result in no censure being imposed by the Discipline Tribunal should be entitled to recover from the Church’s central funds some or all of the legal expenses they have paid out in respect of their defence....”

**5.2** The starting point for the Committee’s consideration of this issue was, as instructed by the General Assembly, the possibility of Legal Expenses insurance. Discussions with the Church of Scotland Insurance Company concluded that putting such insurance in place was not a realistic option for two reasons. Firstly, an approach to the insurance market received no positive responses. Secondly, such policies contain a standard condition that a claim must have a greater than 50% chance of success before the insurance cover will come into play: in other words, the lawyer appointed by the insurer must believe that the insured person will be more likely than not to succeed in their defence/appeal. Examination of the cases which have reached the stage of formal disciplinary proceedings before the Presbyterial Commission in the period from 2001 to 2019

(the period of operation of Act III 2001) shows that in the vast majority of cases, any Legal Expenses policy would effectively provide no cover. Twenty-five cases were heard by the Commission. In only one case was no censure imposed. In all other cases a disciplinary sanction was imposed, ranging from a reprimand with instruction as to future conduct, to suspension of status for a fixed period and removal of status. The three cases in which a reprimand was imposed came to the Commission via the Accelerated Procedure provided for in Act III 2001 under which the respondent pled guilty to the charges against him/her. The Committee recognises that assessment of success may look different at an earlier stage in the proceedings but even so, based on the case-law to date, only one of the twenty-five respondents was likely to have been able to claim under any Legal Expenses insurance policy which may have been in place.

**5.3** The Committee believes that these statistics indicate the effectiveness of the initial “sift” procedure which was contained in Act III 2001 and which also now appears in the Discipline Act 2019) for testing any complaint coming to the Presbytery Clerk to ensure that it is not vexatious, and that it provides firm grounds for disciplinary action, before transmitting it for further procedure. A complaint will not be dealt with under the Discipline Act at all unless it is a serious matter of alleged misconduct and is supported by prima facie evidence of fault; lesser matters will be handled by the Presbytery under the Church’s Complaints Procedure. This is one of the hurdles which a complaint must clear if it is to proceed in terms of the Discipline Act. Other circumstances in which the complaint would not proceed as a disciplinary matter are where the complaint is an abuse of process; it is frivolous or vexatious; it has no reasonable prospect of providing grounds for disciplinary action; or it is suitable for Alternative Dispute Resolution (“ADR”). The Committee also wishes to take this opportunity to highlight that the Church is extremely fortunate to have the services of senior members of the Scottish judiciary as Conveners of the Discipline Tribunal and considers this to be a further factor which engenders confidence in the discipline process. The Committee accordingly believes that no amendment to the present legislation is needed to provide further protection for respondents.

**5.4** The Committee is mindful of the fact that other professional bodies require their members to meet the legal costs of representation in formal disciplinary proceedings, and of the option of union membership as an avenue for the payment of such costs, membership being open to ministers as well as to other professionals at a relatively small monthly cost. It is also acutely conscious that all sums paid to respondents under the Discipline Act come from the faithful giving of congregations and of the duty of the Church to exercise good stewardship of these monies. It recognises, however, that concerns about the financial impact of the Legal Aid in Disciplinary Proceedings Regulations (Regs I 2018) on respondents are genuinely held. The Committee will therefore undertake a review of the Regulations over the coming year and will report to the Assembly of 2022 as to any amendments which might be made, so as to ensure fairness and accessibility for respondents in the operation of the Regulations.

## 6. ADR AND PRESBYTERY PLANNING APPEALS

**6.1** In response to an Overture from the Presbytery of Inverness, the General Assembly of 2019 instructed the Legal Questions Committee:

- i. To review and consider proposing amendments to the Appeals Act (Act I 2014) to specifically draw to the attention of Parties to a dispute the possibility of resolving their dispute by means of the Alternative Dispute Resolution Processes Act (Act VI 2014) and so bring the Appeals Act into line with the new Discipline Act;
- ii. To draft a set of Guidelines to assist Parties to a dispute who wish to pursue ADR in setting up such a process;
- iii. In consultation with the Ministries Council\*\* [now part of the Faith Nurture Forum] to consider the development of a bespoke process for Presbytery planning appeals under the Appraisal and Adjustment Act (Act VII 2003) which also includes provision for ADR; and
- iv. To report to the General Assembly of 2020.”

**6.2** Following discussions with the Presbytery of Inverness it became clear that the Overture arose from an initiative to seek a different way of resolving Presbytery Planning appeals. Within the Presbytery Planning process, the Appeal which can currently be taken in terms of the Appeals Act is more akin to judicial review. It is about how the decision was taken. In the main, the outcome has been either to uphold the Presbytery’s decision, or to send the matter back to the Presbytery for the process to be rerun. These are not always satisfactory outcomes for the parties.

**6.3** In carrying out Presbytery Planning, the Presbytery is exercising a power to make a decision rather than deciding on a dispute. For that reason, the Committee’s view is that ADR, which is aimed at resolving a dispute between two parties before a hard and fast decision is made is not appropriate in the situation where a decision has already been taken by one of the parties. The question then is whether that decision was properly made.

**6.4** The Committee does, however, recognise that there are ongoing concerns and frustrations among Presbyteries and others about the existing appeal process. With that in mind, the new Presbytery Mission Plan Act being proposed by the Faith Nurture Forum sets up a new and different “appeal” process for Presbytery Planning matters, involving a quick review by a small group of experienced individuals. The Committee therefore thinks it is appropriate to offer two different sets of deliverances depending upon whether or not the Presbytery Mission Plan Act is agreed to by the Assembly. If that Act is passed, then the Committee thinks that work should be done to ensure good practice in the running of the new Mission Plan procedure and invites an instruction to the Faith Nurture Forum, in consultation with the Committee and the Presbytery Clerks’ Forum, to create a manual of good practice for Presbyteries to follow. Work has already begun on creating such a resource.

**6.5** On the other hand, if the Presbytery Mission Plan Act is not passed, the Committee thinks that consideration should be given to removing the Presbytery Planning appeal process from the Appeals Act and instead to creating a different means of reviewing the method by which the Presbytery made its Plan decisions. This might involve having the “Appeal” heard by a smaller body in a process akin to the Ministries Appeal Panel where a small group with appropriate experience and knowledge would have power to quash the planning decision and send it back to be done again if the appropriate process has not been followed. In this scenario, the Committee also suggests that a manual of good procedural practice should be created for Presbyteries to follow covering such things as consultation with

congregations. It would also be good to have the Presbytery Planning Task Group do more to check, when asked for concurrence with a Plan, that there has been sound Presbytery practice in reaching their Planning decisions.

**6.6** A more general point which has come to the Committee's attention in its consideration of the Overture is that there is no clear mechanism in the Appeals Act for "filtering" the Grounds of Appeal before the Appeal Hearing takes place, no matter how incompetent or irrelevant the Grounds may be. This applies both to appeals currently heard by the Appeals Committee, such as Presbytery Planning appeals, and also to personal/discipline case appeals heard by the Judicial Commission. The Committee on Overtures and Cases no longer has a role and in practice Conveners and Vice-Conveners have not used Rule 5.8 (which provides an opportunity at the Appeal Management Hearing to make an order which is "just and reasonable") to dismiss any Grounds of Appeal. This means that all Grounds need to be heard and decided upon by the full Appeals Committee/Judicial Commission at the final Appeal Hearing.

**6.7** The Committee, therefore, invites an instruction from the General Assembly to carry out a review of appeals processes, to consider adding to Rule 5.8 an express statement that the Convener and Vice-Convener at an Appeal Management Hearing may make decisions as to the competency and relevancy of any Ground of Appeal, which may include dismissal of a Ground which in their view is irrelevant and/or incompetent.

## **7. CHURCH LAW RESOURCES**

**7.1** The Church law textbook, *The Constitution and Laws of the Church of Scotland*, edited by James L Weatherhead, was published in 1997. Some work had been undertaken to create a second edition, with the intention of making this available on the Church's website. The task was complicated by the inevitably changing nature of Church law.

**7.2** The Committee has since reviewed its position on this matter and has decided that rather than attempt to update a resource which is more than 20 years out of date, the Committee should depart from work on updating Weatherhead. Instead it believes that efforts would be better directed at producing specific resources for those who need them, and to embrace new technology. This might mean learning from other denominations, and also looking at other areas where resources could be produced e.g. on Presbytery planning. Work to develop suitable resources is ongoing.

## **8. ON-LINE MEETINGS OF PRESBYTERIES, KIRK SESSIONS AND FINANCIAL BOARDS AND PROTOCOLS AS TO VARIOUS MEETINGS**

**8.1** At both the Commission of Assembly held on 7 July 2020, and the General Assembly of 2-3 October 2020, it was agreed that in the ongoing circumstances of the Covid-19 pandemic, Presbyteries, Kirk Sessions and the Financial Board of a congregation (as that expression is used in the General Trustees (Delegated Powers) Act (Act VII 1995) might meet and vote by video-conferencing or audio-conferencing or a combination of the two, provided that the principles set out in the Protocol agreed by the Commission of Assembly on 7 July 2020 are adhered to by all involved.

**8.2** Further at the same Commission of Assembly and General Assembly, protocols were agreed to enable vacancy process and congregational meetings in various situations to take place.

**8.3** The Committee understands that these arrangements have proved useful and proposes that with the pandemic still affecting daily life to a very significant degree at the time of writing, they should continue.

## **9. STATED ANNUAL MEETINGS AND ELECTIONS TO CONGREGATIONAL BOARDS**

**9.1** Stated Annual Meetings have not been able to take place since the spring of 2019, due to the Covid-19 pandemic. So far, the advice given has been to comply with the spirit of the Stated Annual Meeting, that is, let members of the congregation see the accounts (perhaps online) and then give them a means of asking questions - an email address or telephone number that they can use. It is also the case that OSCR know that "AGMs" are difficult/impossible to organise during a pandemic, although note that they still expect good governance to be adhered to: <https://www.oscr.org.uk/guidance-and-forms/covid-19-guidance-for-charities/3-charity-meetings-and-governance/>.

**9.2** In congregations operating under the Model Deed, the inability to hold the Stated Annual Meeting has had the knock-on effect that elections to congregational boards have not been able to take place. The Committee has considered whether there might be a need for a further Protocol, along the lines of those already agreed for Vacancy process and for various types of congregational meetings, to enable elections to congregational boards to take place if Stated Annual Meetings cannot be held in person. The relevant provision of the Model Deed allows for the Stated Annual Meetings to be held no later than 30 June (this was changed some years ago from 31 March) so the Committee is hopeful that, if necessary, such meetings might still be held in 2021. However, should that prove impossible, the Committee proposes two fall-back measures: (1) that in the short term and until an in-person Stated Annual meeting can be held, Kirk Sessions be empowered to make appointments to congregational boards to fill vacancies, and (2) should it become apparent that a further Protocol is required, the Committee asks that it be entrusted with this task. Any Protocol produced by the Committee in these circumstances would follow as much as possible the terms of those already in place, for example, the Protocol which allows for the election of a Nominating Committee.

**9.3** The Committee has also considered whether there is a need for a further Protocol about other types of congregational meeting. Those Protocols which are already in place for congregational meetings relate to specific meetings required under Church law and seek to put in place arrangements other than online meetings which are appropriate to the specific circumstances involved, i.e. each Protocol is bespoke. Given this approach, the Committee does not think that it is necessary nor would it be appropriate to prepare a further general Protocol relating to congregational meetings.

## **10. AMENDMENT TO THE DISCIPLINE ACT (ACT I 2019)**

**10.1** Some difficulties have arisen with timescales under the new Discipline Act where an Assessor has to make a decision or carry out certain investigations and this spans the Christmas/New Year period. Minor extensions to the relevant timescales are proposed. The draft amending Act can be found in Appendix C.

## **11. COMMITTEE REMIT**

**11.1** The Committee has spent some time considering its remit and has drafted a new one. The Assembly Trustees will bring this to the General Assembly for approval.

## **12. EXAMINATION OF RECORDS**

**12.1** In accordance with the arrangements set in place by the General Assembly of 2000, the Legal Questions Committee is asked to examine the relevant records of Assembly Forums, Council and Committees on an annual basis. In the circumstances of the current pandemic, such inspection has not proved possible and the Committee will

keep under review the question of when it may be possible to catch up with this work.

*In the name of the Committee*

S GRANT BARCLAY, *Convener*  
BARBARA R FINLAYSON, *Vice-Convener*  
GEORGE J WHYTE, *Secretary*

## Appendix A

### SOLEMNISATION OF SAME SEX MARRIAGE OVERTURE

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 2021.

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

#### Definitions and Interpretation

1. (a) "Parish Minister" shall have the meaning ascribed to it in the Parish Ministry Act (Act II 2018);
- (b) "Minister of Word and Sacrament" shall have the meaning ascribed to it in the Parish Ministry Act (Act II 2018);
- (c) "same sex marriage" shall mean the process described in the MSA;
- (d) "the MSA" shall mean the Marriage (Scotland) Act 1977 as it exists at [ ] May 2021 [if Overture is sent down to Presbyteries under the Barrier Act, that date];
- (e) "Deacon" shall mean a person holding the office of Deacon in terms of the Deacons Act (Act VIII 2010);
- (f) "Authorised Celebrant" for the purposes of this Act means a Minister of Word and Sacrament or a Deacon who is empowered to solemnise same sex marriage in terms of the MSA;
- (g) "Principal Clerk" includes a person deputising for the Principal Clerk.

#### General provisions

2. A Minister of Word and Sacrament or a Deacon may apply in terms of this Act to become an Authorised Celebrant for same sex marriage.
3. No person shall be required by this Act to participate in the solemnisation of, or be involved in the arrangements for, a same sex marriage.
4. In all matters referred to in this Act, including but not limited to making application to become an Authorised Celebrant, permitting or granting consent for use of buildings, arranging for the participation of others in the solemnisation of a same sex marriage, and making practical arrangements for same sex weddings, a Minister of Word and Sacrament or a Deacon, as the case may be, shall take account of the peace and unity and pastoral needs of the congregation and of any parish or other grouping of which it is a part.

#### Becoming an Authorised Celebrant for same sex marriage

5. The process for becoming an Authorised Celebrant shall be:
  - (i) Application shall be made initially to the Principal Clerk's Office on a form prescribed by the Principal Clerk.
  - (ii) The Principal Clerk will make application to the Registrar General for Scotland on behalf of the

Minister of Word and Sacrament or Deacon, as the case may be, in terms of section 9(1A) of the MSA.

- (iii) The Principal Clerk will liaise with and advise the Minister of Word and Sacrament or Deacon, as the case may be, of the outcome of the application.

6. The Principal Clerk shall maintain an up to date record of Authorised Celebrants.

7. Authorised Celebrants shall be responsible for initiating their own three yearly renewal of their status in terms of the MSA, although the actual process will be administered through the Principal Clerk's Office.

#### Use of buildings

8. Only a Parish Minister who has become an Authorised Celebrant in terms of sections 5 to 7 above may, in accordance with and subject to the terms of sections 12 to 15 of the Parish Ministry Act (Act II 2018):
  - (i) permit the use of a Church building in their charge for the solemnisation of same sex marriage, and
  - (ii) grant consent for other Authorised Celebrants to use such a building for the solemnisation of same sex marriage.

For the avoidance of doubt, any specific permission or consent for an individual same sex marriage granted by a Parish Minister in terms of this section 8 shall endure notwithstanding that such Parish Minister subsequently departs from the charge in respect of which such permission or consent was granted.

9. An Interim Moderator who is a Minister of Word and Sacrament shall, for the purposes of this Act, have the same rights and obligations as a Parish Minister under section 8 of this Act in relation to use of buildings.

#### Minister's or Deacon's discretion

10. Nothing in this Act shall contravene the general principle of Church law that any Minister of Word and Sacrament or Deacon has the right to determine at any time whether or not to conduct the marriage of any persons.

#### Territorial extent

11. This Act makes provision for same sex marriage conducted in accordance with the MSA.

#### Consequential amendments

12. The Recognition of Marriage Services Act (Act I 1977) shall be amended as follows:
  - (i) Section 2 shall be deleted and the following shall be substituted:
 

"Solemnisation of marriage in the Church of Scotland is effected by an ordained minister or deacon in a religious ceremony wherein, before God, and in the presence of the minister or deacon and at least two competent witnesses, the parties covenant together to take each other in marriage as long as they both shall live, and the minister or deacon declares the parties to be married."
  - (ii) In section 3, the words "or deacon" shall be inserted after the word "minister".
  - (iii) Section 4 shall be deleted.
13. The Parish Ministry Act (Act II 2018) shall be amended as follows:

Add a new sub-paragraph (5) as follows to section 4:

- (5) “where a Minister of Word and Sacrament who is an Authorised Celebrant in terms of the Solemnisation of Same Sex Marriage Act (Act [ ]), enters the bounds of the Charge of an existing Parish Minister who is not such an Authorised Celebrant, to solemnise a same sex marriage.”

### Guidance

14. The Legal Questions Committee shall produce Guidance to accompany this Act, which Guidance shall be reviewed by it from time to time. Such Guidance shall be taken into account by all those using or affected by this Act.

## Appendix B

### SUPPLEMENTARY OPINION OF THE PROCURATOR REGARDING SOLEMNISATION OF SAME SEX MARRIAGE IN THE CHURCH OF SCOTLAND

#### Background

1. The General Assembly of 2017 passed a Deliverance instructing the Legal Questions Committee to undertake a study of the matters which would require to be addressed in any legislation permitting Ministers and Deacons to officiate at same-sex marriage ceremonies. Following the Debate on this work at the 2018 Assembly, the Legal Questions Committee was instructed to prepare enabling legislation, whilst also including safeguards to protect those who did not wish to be involved in such ceremonies.
2. After the 2017 Assembly, Legal Questions formed a subcommittee on same sex marriage. The subcommittee has met regularly since August 2017, and reported to the main committee throughout its existence. In 2018, to accompany the Report of the study undertaken by Legal Questions, I provided an Opinion for the Assembly on the issue of same sex marriage.
3. This Supplementary Opinion also considers issues concerning same sex marriage, but in the context of the finalisation by both the sub-committee and the full committee of the text of a draft Overture to fulfil the instruction of the Assembly in 2018. The discussions which have taken place at meetings over the period referred to above (especially around the drafting process) have enabled detailed identification and thorough examination of the legal and practical aspects of creating a legislative scheme for same sex marriages. This Supplementary Opinion considers these points under headings which deal with celebrants, use of church premises, and involvement of participants other than Ministers and Deacons. In each case, the protections available under the Overture and under civil law are considered at the same time.

#### Celebrants

4. In the civil legislation, the Marriage (Scotland) Act 1977, the Church of Scotland is the only denomination specifically named in section 8 as having statutory authority for its Ministers and Deacons to solemnise marriage between persons of different sexes ('DSM'). Prescription of other denominations may take place in regulations made under s 8. In relation to marriage between persons of the same sex ('SSM'), prescription of a denomination under s 8 may also occur.
5. Since 2017, it has been understood that any authorisation of SSM celebrants within the Church of Scotland would not utilise the s 8 route, but would proceed under s 9 of the Marriage (Scotland) Act 1977. In relation to SSM, s 9(1A) of the 1977 Act allows nomination by a Church of individuals to be registered as empowered to solemnise SSM. In practice, this will

not occur unless an individual Minister or Deacon wishes it.

6. The civil legislation is permissive, thus s 8(1D) specifically provides that there is no duty on any religious body to nominate any members under s 9, nor is there any duty on any person to apply for temporary authorisation under s 12 to solemnise SSM. There is also provision stipulating that there is no duty on a person who is an approved celebrant in relation to SSM to solemnise such marriages.
7. Sections 5 to 7 of the draft Overture therefore set out the practical steps of an application process. Co-ordination will lie with the Office of the Principal Clerk, both in relation to application and renewal, although responsibility for initiating renewal will rest with individual celebrants.
8. The question of protection for individuals who do not wish to solemnise SSM is dealt with in the Overture at s 3. This provides:
 

No person shall be required by this Act to participate in the solemnisation of, or be involved in the arrangements for, a same sex marriage.
9. Section 3 is derived from the provisions of paragraph 25B of Schedule 3 to the Equality Act 2010, which provides:
  - (1) An approved celebrant does not contravene section 29 only by refusing to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex.
  - ...
  - (3) A person does not contravene section 29 only by refusing to participate in a religious or belief ceremony forming part of, or connected with, the solemnising of a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex.
10. It will be noted that this provision is not qualified in any way: if the reason why an approved celebrant will not solemnise a SSM, or a person will not participate in a SSM, is that it is a marriage of persons of the same sex, that suffices. The protection concerned is from claims alleging breach of s 29 of the Equality Act 2010; it is s 29 which governs alleged discrimination in the provision of services and the exercise of public functions. The extent of protection so far as concerning other people who might be involved is dealt with below.

#### Premises

11. It has only been through the detailed discussions in the SSM sub-committee that the complexities of devising provisions about premises have fully emerged.
12. The position which is taken in the Overture is to link use of premises for solemnisation of SSM to the authorisation as a celebrant of the serving Minister of the charge. By s 8 of the Overture, only a Parish Minister who is an authorised celebrant for SSM may permit the use of Church buildings in their charge for solemnisation of SSM. This extends to allowing other authorised celebrants to use the building. Provision is also made to preserve the effect of a grant of permission even if the celebrant who made the grant is no longer in post. Similarly, an Interim Moderator who is an authorised celebrant may conduct, or grant permission for, a SSM ceremony in a building in the charge for which he or she is responsible. In such a

situation, however, the provisions of s 4, quoted below, may be particularly important.

13. The protection which is provided in the Equality Act is found in Schedule 23, paragraph 2. In like manner to Schedule 3, discussed above, there is an unqualified protection in relation to the use of premises for solemnisation of SSM. Subparagraph (9A) of paragraph 2 protects an organisation from claims alleging breach of s 29 of the Equality Act in circumstances where the organisation refuses to allow premises to be used for the solemnisation of SSM, and subparagraph (9B) protects an individual who issues such a refusal.
14. In the lead-up to the passage of the Marriage and Civil Partnership (Scotland) Act 2014, the Scottish Government released a Joint Note agreed between the UK and Scottish governments. The Note made clear the intent that, if SSMs were introduced in Scotland, no religious or belief body would have to carry them out. It outlines the approach taken to the provision of further legislative protection in relation to discrimination. In relation to premises, the Note states
  28. [T]he current protection may not be available where a Minister of religion (or other person or body controlling the use of religious or belief premises) who is a member of a religious or belief body which has opted in advises a same sex couple that they cannot have their marriage ceremony or civil partnership in the premises because the ceremony would be a same sex marriage or a civil partnership.
  29. Therefore, the Government intends that the amendment of the 2010 Act for Scotland will provide that a person controlling the use of religious or belief premises does not contravene section 29 of the 2010 Act by refusing to allow the premises to be used for a same sex marriage or a civil partnership.
15. It is my view that these passages demonstrate a legislative intent to protect those individuals within a religious denomination where SSM is carried out who, themselves, do not wish to authorise the use of premises over which they have control for SSM ceremonies.

#### Other participants

16. Carrying out the solemnisation of a SSM in any church will involve individuals in addition to the celebrant. Dealing firstly with those who participate in the ceremony, there is, as already mentioned, a protection from claims based on s 29 for all who refuse to participate in a ceremony for the reason that it is SSM.
17. I dealt with the concept of 'participating' in my 2018 Opinion: in summary, 'participation' is taking part in a hands-on capacity. It is my view that this covers organists. Whether involvement of other individuals meets this test is harder to answer on a generalised basis. Balance is required between conscience-based objection and the rights of those who wish to marry. At some point, a line is crossed. The Joint Note gives as an example chauffeurs who do not wish to drive people to the venue where a SSM is to take place; there is no intent to protect such individuals against claims under the Equality Act based on discrimination.

18. It is possible that there will be individuals within the Church who, although they do not participate in a marriage ceremony in a 'hands-on' capacity, do not wish to provide their usual practical assistance, for the reason that this is SSM. The Overture provides protection for those individuals, who cannot be required to be involved in the arrangements for a SSM (section 3). The Equality Act requires that the service (in the overall sense) provided to a couple getting married cannot be a reduced offering. In other words, someone within the organisation which is providing the service cannot legitimately stymie the wedding.
19. It will, therefore, be necessary for provision to be made for understudies to fill the parts normally played in a DSM. This will be developed more fully in the Guidance, but overall responsibility for such practical forward planning will rest with the Minister or Deacon who intends to seek authorisation as a celebrant.

#### Concluding remarks

20. The Overture also addresses the territorial reach of the legislative scheme – it applies wherever the Marriage (Scotland) Act 1977 applies.
21. Finally, it is, I think, relevant to highlight section 4 of the Overture. As an overarching provision, it states

In all matters referred to in this Act, including but not limited to making application to become an Authorised Celebrant, permitting or granting consent for use of buildings, arranging for the participation of others in the solemnisation of a same sex marriage, and making practical arrangements for same sex weddings, a Minister of Word and Sacrament or a Deacon, as the case may be, shall take account of the peace and unity and pastoral needs of the congregation and of any parish or other grouping of which it is a part.

LAURA J DUNLOP  
20 February 2020  
Advocates Library  
Parliament House  
Edinburgh

#### Appendix C

#### [ ] ACT AMENDING THE DISCIPLINE ACT (ACT I 2019) (AS AMENDED)

Edinburgh, [ ] May 2021, Session [ ]

The General Assembly hereby enact and ordain that the Discipline Act (Act I 2019), as amended, shall be further amended as follows:

1. *In section 19(1) delete "twenty eight (28)" and substitute "thirty five (35)".*
2. *In section 22(1) delete "fourteen (14)" and substitute "twenty eight (28)", and on the first occasion it appears, delete "twenty eight (28)" and substitute "thirty five (35)".*
3. *In section 24(1) delete "twenty eight (28)" and substitute "thirty five (35)".*