

# JOINT REPORT OF THE LEGAL QUESTIONS COMMITTEE, MINISTRIES COUNCIL, CHURCH AND SOCIETY COUNCIL, ECUMENICAL RELATIONS COMMITTEE AND THE THEOLOGICAL FORUM ON THE SOLEMNISATION OF MARRIAGES

May 2015

## PROPOSED DELIVERANCE

The General Assembly:

1. Receive the Report.

## REPORT

1. The 2013 General Assembly issued the following instruction:

Instruct the [Legal Questions] Committee, jointly with the Ministries and Church and Society Councils, Ecumenical Relations Committee and Theological Forum, to explore the possibility of ministers and deacons ceasing to act as Civil Registrars for the purpose of solemnising marriages and report to the General Assembly of 2015.

2. This deliverance, which originated from the floor of the Assembly, arose because of the creation of a legally recognised relationship called 'same sex marriage'. In short, it was argued that the Church would avoid a number of problems, external and internal, if its ministers and deacons ceased to act as agents of the Scottish Government when solemnising marriages. This would mean the Church withdrawing from the statutory scheme for solemnising marriages which is set out in the Marriage (Scotland) Act 1977. In the debate legal, theological and missional concerns were raised.

### Same Sex Marriage

3. The Marriage and Civil Partnership (Scotland) Act 2014 created a legally recognised relationship called 'same sex marriage'. Broadly, two persons of the same sex may enter into a same sex marriage (i) if they are already in a civil partnership, by changing their civil partnership into a marriage either administratively or through a civil, religious or belief ceremony; or (ii) by entering into a civil same sex marriage solemnised by a civil registrar or a religious or belief same sex marriage which is solemnised by an approved celebrant of a religious or belief body. The Scottish Government activated the relevant provisions of the 2014 Act with effect from 16 December 2014. At present no minister or deacon of the Church is an approved celebrant for the purposes of same sex marriage. In order for a minister or deacon to be an approved celebrant the Church would first require either to (i) request the Scottish Government to prescribe it as a religious body whose ministers and deacons are approved celebrants, or (ii) request the Scottish Government to recognise those ministers and deacons who wish to solemnise same sex marriages as entitled to do so. The Church has taken neither of these steps.

4. As discussed in more detail in their Joint Report to the Committee on Returns to Overtures (GA14 LQC Del 6), it is the opinion of the Forum and LQC that, before the Church could request that all or some of its ministers and deacons be approved as celebrants, the matter would require further study, reflection and debate and specific enabling legislation enacted by the Church under Barrier Act procedure.

### **Risks of legal challenge**

5. LQC, on behalf of the Church, has voiced concern that, as the statutory scheme for same sex marriage might be said to permit discrimination, it could be vulnerable to legal challenge in the future. The scheme enables bodies, such as the Church of Scotland, and individual celebrants to be authorised to conduct different sex marriages while at the same time refraining from seeking authorisation to conduct same sex marriages. This legal structure may be argued to be discriminatory contrary to Articles 12 and 14 of the European Convention on Human Rights.

6. LQC remains concerned that there is a real possibility of a challenge to the scheme itself and to any body or celebrant who chooses not to become authorised to solemnise same sex marriage. While recognising that Article 9 enshrines the right to freedom of thought, conscience and religion, we are not persuaded by bald assurances that such challenges will not come or, if they do, can be seen off with ease. Recent decisions of the UK Supreme Court provide limited comfort.

7. LQC has argued in favour of a change to the 1977 Act so that ministers or deacons of the Church of Scotland would no longer be acting as agents of the state when solemnising marriages. Instead, marriages solemnised by ministers and deacons would be recognised as having legal effect. Recognition of the legal effectiveness of a marriage ceremony is a different concept from authorisation. Regrettably, the Scottish Government was unpersuaded by our argument.

8. If a legal challenge to the statutory scheme was successful it would be repealed and would probably be

replaced with a scheme which requires those who wish to carry out different sex marriages to carry out same sex marriages also. It might mean the exclusion of churches which are unwilling to instruct their clergy to conduct same sex marriages from an important part of the life of the nation. To its credit, this is something that the current Scottish Government wishes to avoid.

9. If a successful legal challenge was directed against the Church and an individual minister or deacon, the Church and the individual might be found liable in damages and for legal expenses. Even if such a challenge were thought unlikely to succeed, the Church would have to weigh up the costs of defending a challenge. These costs would be both financial and reputational.

10. Anti-discrimination law is in a constant state of development. It develops through legislation in European countries, the governments and parliaments of which are responding to changing social views. Furthermore, anti-discrimination law develops through the courts as interested parties challenge the status quo and push the envelope of current jurisprudence. The European Court of Human Rights has made clear that it will take account of shifts in consensus when reaching its decisions.

11. As yet there are no court decisions directly in point, so it cannot be said with certainty how the scheme would fare if challenged. What is clear is that, whatever the prospects of a successful challenge at this time these may change with the passage of time and developing social, political and legal views.

### **Ministries Council**

12. The Ministries Council wants to balance two principles that are to a degree in conflict with each other. 1) For many Ministers conducting marriages is an important aspect of their ministry. The joy of ministry is to be with people at all points on their life journey and the challenge of ministry is to be a conduit for God's love and wisdom at each point. To withdraw from the solemnising of marriages would rob ministers of one significant pastoral and evangelical opportunity. 2) The Church

needs to ensure that its ministers are not unnecessarily put at risk of any kind, and in the context of this discussion, particularly those of the financial consequences of being sued, or the consequent reputational damage of being accused of breaching human rights legislation.

### **Ecumenical Relations**

13. Different churches in Scotland are adopting different approaches to the introduction of same sex marriage. This influences their understanding of their position under Scots law. There is broad agreement among the churches in their approach to the new legislation. Most are content to hold a monitoring position in the short-term while doing some further thinking around the theology of marriage, the authority of Scripture and how to live with deep difference within the church. The Methodist Church and the Scottish Episcopal Church are engaged in a process which could lead to the redefinition of their understanding of marriage.

14. Responding to the Scottish Government's consultations the United Reformed Church Synod of Scotland has affirmed and welcomed the permissive rather than prescriptive approach of consultation papers. The General Assembly of the United Reformed Church in July 2014 expressed no view on same-sex marriage but raised questions focused on doctrinal and constitutional issues for the denomination. The Scottish Synod awaits clear rulings on these doctrinal and constitutional issues. Thereafter, should some of its clergy become authorised celebrants for same-sex marriage, the Synod is clear that the implications for Local Ecumenical Partnerships would need to be discussed with relevant partners.

15. The Religious Society of Friends (Quakers) has indicated that it wishes to be designated as a religious body authorised to conduct same sex marriages. It should be noted that their 'celebrants' have no religious function in marriages, being there primarily to ensure that all legal requirements are met.

16. None of the denominations approached suggested that a change of practice in the Church of Scotland, such

that ministers and deacons would no longer solemnise marriages, would be detrimental to their practice should they seek to continue to do so. Nevertheless, given the general unanimity in the churches in their approach to the legislation, it would be important that, if any such step were to be taken by the Church of Scotland, it should be done following full consultation with other churches.

### **Conclusion**

17. The secular legal position is uncertain and developing. Unless all ministers and deacons are instructed and are prepared to solemnise different sex marriages and same sex marriages without discrimination, there are risks if ministers and deacons continue to act as agents of the state under the 1977 Act. However, unless and until the picture clarifies, LQC does not believe that external legal considerations require the immediate withdrawal of the Church and its ministers and deacons. LQC will continue to monitor developments in European, UK and Scots law.

18. The Ministries Council, having considered the opinion of the Legal Questions Committee, is of the opinion that at present the benefits of continuing to be involved in marriages outweigh the risks.

19. The Church and Society Council recognises the important social and pastoral role played by ministers and deacons in relation to marriages, and welcomes the commitment of the Scottish Government in seeking to maintain that role in changed circumstances. The Council therefore supports the conclusion that this should continue unless and until the intended safeguards prove inadequate.

20. The Ecumenical Relations Committee encourages continued ecumenical discussion as partners engage in theological thinking around the Christian understanding of marriage. It will be important that we follow closely the processes of reflection and discussion being undertaken in other churches, most notably the Methodist Church and the Scottish Episcopal Church. We would encourage the

Church of Scotland to embark on a similar process through the Theological Forum.

21. The Theological Forum recognises that 'any move to regarding same-sex marriage as a legitimate Christian understanding would be a fundamental shift' for the Church (Reports to the General Assembly of the Church of Scotland 2012: Report of the Mission and Discipleship Council, Appendix 1, section 6.11). The Forum may be instructed to think theologically about same sex marriage. This would initiate a formal period of theological study, reflection and debate across the Church. Until this is concluded the Forum sees no theological reason for the Church to withdraw its ministers and deacons from the solemnisation of marriages.

*In the name of the Legal Questions Committee, the Ministries Council, the Church & Society Council, the Ecumenical Relations Committee and the Theological Forum*

ALAN J HAMILTON, *Convener*  
GEORGE J WHYTE, *Secretary*  
NEIL DOUGALL, *Convener*  
MARTIN SCOTT, *Secretary*  
SALLY FOSTER-FULTON, *Convener*  
MARTIN JOHNSTONE, *Secretary*  
ALISON P MCDONALD, *Convener*  
SHEILAGH M KESTING, *Secretary*  
IAIN TORRANCE, *Convener*  
PAULINE WEIBYE, *Acting Secretary*