

## **V. PROTECTION AGAINST DISCRIMINATION ACT (AS AMENDED BY ACTS III AND VIII 2012 AND IV 2014)**

*Edinburgh, 19 May 2007, Sess. I*

The General Assembly hereby enact and ordain as follows:

1. For the purposes of this Act:
  - (a) protected grounds shall be one or more of the following: age, gender, marital status, colour, racial group, ethnic origin, national origin, nationality, sexual orientation or disability (where “disability” shall mean a disability certified by the individual’s general practitioner): but in each case the protection granted by this Act shall be interpreted in conformity with the existing legislation of the General Assembly;
  - (b) ‘direct discrimination’ shall mean the treatment of an individual less favourably than another, on any of the grounds listed in paragraph (a) above, where the relevant circumstances of the cases are not materially different;
  - (c) ‘indirect discrimination’ shall mean the application of a provision, criterion or practice which disproportionately impacts on certain individuals according to their age, gender, marital status, colour, racial group, ethnic origin, national origin, nationality, sexual orientation or disability;
  - (d) ‘discrimination in the course of ministerial profession’ shall mean discrimination that affects the selection, appointment, translation or training of any minister of Word and Sacrament to whom the provisions of civil employment law do not apply, or any other detriment to him or her, or that affects the selection of a Nominee in terms of Act VIII 2003 (as amended).
  - (e) ‘harassment’ shall mean behaviour (including speech, writing or action, or any combination of them) unfairly perpetrated against a person as a result of discrimination, and which in the opinion of the Presbytery would alarm or distress a reasonable person or compel his or her actions or decisions;
  - (f) ‘victimisation’ shall mean any behaviour including speech, writing or action, or any combination of them, unfairly perpetrated against a person as a result of his or her having made a complaint in terms of this Act, or given evidence on behalf of someone making a complaint, or been otherwise involved in the procedures described in this Act;
  - (g) ‘complaint’ shall mean a complaint that discrimination, harassment or victimisation has been committed, or that the commission of discrimination, harassment or victimisation has been knowingly permitted and not prevented;
  - (h) ‘Respondent’ shall mean a person, committee or court of the Church against whom an accusation of discrimination, harassment or victimisation has been made;
  - (i) ‘Committee’ shall mean a Council, Statutory Corporation or committee of the General Assembly, or a committee of any inferior court or financial body.
  - (j) ‘Presbytery’ shall mean the Presbytery in whose bounds is the congregation of which the Respondent is a member or adherent.
  - (k) ‘The Judicial Proceedings Panel’ shall mean the Panel referred to in section 1(1)(e) of Act III, 2001 (as amended).
  - (l) ‘Special Committee of Presbytery’ shall mean a Committee of three persons appointed from the Judicial Proceedings Panel in terms of section 12 of whom at least one will be a minister and one an elder.

2. This Act shall apply only to discrimination and harassment committed by a court or committee of the Church or by an individual member or agent of a Court or committee in the performance of his or her duties.
3. It is unlawful to discriminate either directly or indirectly against a person.
4. It is unlawful to perpetrate harassment or victimisation, as defined in section 1 above, against any person.
5. Where an individual against whom an allegation of discrimination, harassment or victimisation is made is a minister, licentiate, deacon or graduate candidate, the provisions of Act III 2001 anent Discipline of Ministers, Licentiates, Deacons and Graduate Candidates (as amended) shall apply and the Presbytery shall proceed in terms of that Act. For the purposes of that process, discrimination, harassment and victimisation as defined in this Act are hereby declared to constitute disciplinary offences in terms of the said Act III.
6. For the avoidance of doubt, where an individual against whom an allegation of discrimination is made is an employee of any court or committee of the Church, and that allegation arises within the context of that individual's employment, the provisions of civil employment law shall apply.

#### **Allegation of Discrimination**

7. Notice of circumstances indicating that discrimination has been committed by a court or committee of the Church or by an individual member or agent of a Court or committee in the performance of his or her duties, must be submitted to the Presbytery Clerk within three months of such alleged discrimination. Except where section 5 or 6 above applies, the Presbytery Clerk shall within seven days remit the matter to the Presbytery's Superintendence Committee in terms of this Act, and report that action to the next ordinary meeting of the Presbytery.
8. The Superintendence Committee shall within seven days of its receipt of the complaint appoint a Group of three members of the Presbytery (but not of the Superintendence Committee), or two such members along with one member of a neighbouring Presbytery appointed for this purpose in terms of Act VI 2002 (as amended) section 2.
9. The Group shall meet separately with the complainer (if any), with the person(s) allegedly discriminated against (if other than the complainer), with the Respondent, and with any other individuals the Group believes it appropriate to meet. The purpose of these meetings shall be to ascertain a preliminary account of the circumstances.
10. The Group shall normally institute steps to effect mediation or conciliation between or among the parties, and these steps and their outcome shall be reported to Presbytery through the Superintendence Committee. The report to Presbytery need not contain the names of any of the parties in the event that the steps have, in the opinion of the Superintendence Committee, resolved the complaint without the need for further action on the part of the Presbytery.

11. The Group may decide not to attempt to institute the steps referred to in section 10, but shall narrate to the Presbytery, through the Superintendence Committee their reasons for such a decision, and the Presbytery may instruct the Committee to make a fresh attempt to resolve the matter through mediation or conciliation.

### **Initial Consideration**

12. In the event that the complaint has not been resolved through the steps referred to in section 10, the Presbytery shall appoint from the Judicial Proceedings Panel a Special Committee of Presbytery. For the avoidance of doubt, a Presbytery shall not select anyone to serve on a Special Committee who is a member of their own Presbytery.

13. (1) In considering whether to carry out an investigation the Special Committee of Presbytery shall have regard to all the relevant facts, and in particular
  - (a) the bona fides of any person making an allegation that discrimination may have been committed;
  - (b) any representation made by the person who is the subject of the allegation; and
  - (c) the gravity of the alleged offence.

For the avoidance of doubt the standard of proof throughout proceedings shall be a balance of probabilities.

- (2) Before deciding whether to carry out investigation the Special Committee of Presbytery shall intimate in writing to the Respondent the nature of the offence alleged and the nature of the evidence purported to exist in support of the allegation and shall offer him or her the opportunity to make any answer thereto, provided that he or she shall not be obliged to answer.
- (3) If the Special Committee decides that it is not appropriate to carry out an investigation in respect of all or any of the allegations made, the Special Committee shall report that decision to the Presbytery. At the same time the Special Committee shall also advise the person or persons (if any) who made the allegation or allegations of its decision and the reasons for it. At such time, the Special Committee of Presbytery may also issue guidance to the Respondent regarding his or her conduct. Such guidance will be kept in a Record Apart.
- (4)
  - (a) For the avoidance of doubt a decision of the Special Committee that it is not appropriate to carry out an investigation into all or any of the allegations made shall not be subject to appeal or dissent and complaint or any other form of review other than a procedural review carried out by three members of the Judicial Proceedings Panel appointed by the Legal Questions Committee.
  - (b) Said review must be requested by the person or persons who made the allegation or allegations within fourteen days of the date upon which the Special Committee of Presbytery reported its decision to such persons.
  - (c) Such request shall be made by sending or delivering a written request to the Presbytery Clerk, and such request shall also intimate, in brief specific numbered propositions, the grounds (as specified at sub-paragraph (e) below) which the person or persons making the allegation or allegations consider justify such a review taking place.

- (d) In intimating its decision to the person or person who made the allegation or allegations, the Special Committee of Presbytery shall advise of the right to a procedural review.
- (e) A procedural review can be sought only on one or both of the following grounds: (a) that there was an irregularity or breach of the principles of natural justice in the process followed by the Special Committee which materially influenced its decision; and, (b) that its decision was materially influenced by some incorrect fact.
- (f) In the event that the persons so appointed to carry out such a procedural review determine that one or both of the foregoing grounds have been established, they shall order a new investigation to be carried out by a different Special Committee of Presbytery selected from the Judicial Proceedings Panel.
- (g) The decision of the procedural review shall be final and not subject to appeal, dissent and complaint or any other form of review.

**Investigation of complaint**

14. (1) If the Special Committee of Presbytery decides to initiate investigatory proceedings it shall:
    - (a) give notice to the Respondent of the decision to investigate the case and of the allegation or allegations which are to be investigated;
    - (b) give notice to the Presbytery of that decision and of the allegation or allegations which are to be investigated; and
    - (c) give notice to the Legal Questions Committee, which shall appoint a legally qualified assessor to advise the Special Committee of Presbytery on matters of law and procedure.
  - (2) On receipt of the notice referred to in section 14(1)(b), the Presbytery shall make such arrangements as appear to it appropriate for the provision of pastoral support for the Respondent and his or her family, for the person or persons who made the allegation and for any witnesses within the bounds of the Presbytery.
  - (3) At the request of the Special Committee, or on its own initiative, the Presbytery may impose upon the Respondent an administrative suspension, being an instruction by the Presbytery to the individual to abstain from the exercise of all the functions of his or her office until proceedings under this Act are finally disposed of; and it shall not constitute a form of censure.
15. The Special Committee of Presbytery shall carry out such investigations as it deems necessary to determine whether discrimination may have been committed, and keep a Record Apart of the investigatory proceedings.
  16. Before reaching any conclusion, the Special Committee of Presbytery shall make known to the Respondent the substance of the complaint made against him or her and the nature of the evidence existing in support of the allegation and shall offer him or her the opportunity to make any answer thereto; provided that he or she shall not be obliged to answer.

17. Upon consideration of the allegations and evidence submitted and of any answers given, the Special Committee shall be entitled to resolve that no further investigation shall be carried out if there is no case to answer. In that event, it shall report to the Presbytery which shall recall any administrative suspension imposed in terms of section 14(3).
18.
  - (a) For the avoidance of doubt a decision of the Special Committee that no further investigation shall be carried out shall not be subject to appeal or dissent and complaint or any other form of review other than a procedural review carried out by three members of the Judicial Proceedings Panel appointed by the Legal Questions Committee.
  - (b) Said review must be requested by the person or persons who made the allegation or allegations within fourteen days of the date upon which the Special Committee of Presbytery reported its decision to such persons.
  - (c) Such request shall be made by sending or delivering a written request to the Presbytery Clerk, and such request shall also intimate, in brief specific numbered propositions, the grounds (as specified at sub-paragraph (e) below) which the person or persons making the allegation or allegations consider justify such a review taking place.
  - (d) In intimating its decision to the person or person who made the allegation or allegations, the Special Committee of Presbytery shall advise of the right to a procedural review.
  - (e) A procedural review can be sought only on one or both of the following grounds: (a) that there was an irregularity or breach of the principles of natural justice in the process followed by the Special Committee which materially influenced its decision; and, (b) that its decision was materially influenced by some incorrect fact.
  - (f) In the event that the persons so appointed to carry out such a procedural review determine that one or both of the foregoing grounds have been established, they shall order a new investigation to be carried out by a different Special Committee of Presbytery selected from the Judicial Proceedings Panel.
  - (g) The decision of the procedural review shall be final and not subject to appeal, dissent and complaint or any other form of review.
19. In the event that the Special Committee of Presbytery decides to proceed further in terms of this Act, it shall bring a report to the Presbytery in numbered paragraphs stating its findings in fact, a recommendation as to disposal of the case, and a determination of whether there has been any element of harassment or victimisation. The Presbytery shall hear and dispose of the Report.

### **Disposal of Complaint**

20. The Presbytery shall dispose of the case as seems appropriate to it. Where the Presbytery determines that discrimination has been committed by an individual, it shall select one of following disposals:
- (a) instruction to any party regarding future conduct; disobedience of such instruction constituting the disciplinary offence of contumacy;
  - (b) reprimand, which shall be an expression of disapproval or particular behaviour with counsel regarding future conduct;
  - (c) removal from a particular office held, including removal from membership of a Kirk Session;
  - (d) deprivation of status as an elder, subject to future restoration by the Presbytery.

#### **Harassment and Victimisation**

21. In disposing of the case, the Presbytery shall always take into consideration whether there has been
- (a) any element of harassment; or
  - (b) any element of victimisation of the complainer following the bringing of the complaint;
- by any party, and shall adjust the severity of any disposal accordingly.

#### **Miscellaneous**

22. A complaint may be made in terms of this Act against a Presbytery or a committee or Council of the General Assembly, and shall take the form of a Petition to the Commission of Assembly.
23. If either the Special Committee of Presbytery or the Respondent is dissatisfied with a decision made by a Presbytery in terms of section 20 of this Act, they may appeal to the Judicial Commission in terms of the Appeals Act (Act I 2014), on the basis of one or more of the grounds of appeal set out in section 2(3) of that Act. Such appeal must be intimated within fourteen days of the decision.
24. No legal expenses in connection with this Act shall be met from the central funds of the Church.
25. Act VI 2002 anent Co-operation by Presbyteries (as amended) is hereby further amended by the removal in section 2 of the word 'or' and the addition, to the end of section 2, of the words 'or Acts IV and V 2007'.
26. This Act shall come into effect on 1 September 2007.