

REPORT OF THE LEGAL QUESTIONS COMMITTEE MARCH 2022

Proposed deliverance:

The Commission of Assembly:

1. Receive the Report.
2. Agree that this meeting of the Commission of Assembly where some members are attending online is a properly constituted meeting of the Commission and that decisions made during this session of the Commission are competent in terms of Act VI 1997.
3. Agree that, notwithstanding the decision of the General Assembly of 2021 to call the next General Assembly to meet in Edinburgh on 21 May 2022, it would be competent for the Commission to vary the meeting format of the General Assembly of 2022 to the extent that some commissioners and others may attend the Assembly through an online platform.

Report

1. Background

1.1 In 2020 and 2021 the General Assembly met with commissioners attending on line. These emergency provisions were made because Scottish Government Covid-19 Regulations forbade large, in person gatherings.

1.2 In line with normal practice the General Assembly of 2021 passed an Act during the closing session appointing the next General Assembly to meet in Edinburgh on the 21st of May 2022.

1.3 The Assembly Business Committee has recently expressed the view that it may not be possible to completely fulfil this arrangement because of Covid-19-related concerns, specifically that some persons may have concerns about travelling and/or attending the large in person gathering which is the General Assembly. They asked that the Legal Questions Committee (the Committee) call a meeting of the Commission of Assembly to consider approving an alternative format for the General Assembly. At its meeting on 24th February the Committee agreed to this request with the proviso that the Committee would place before the Commission this Report.

1.4 The Committee is asking that the Commission consider three sections of deliverance prior to taking up consideration of the Report of the Assembly Business Committee.

2. Calling a Meeting of the Commission with Some Members Attending Online

2.1 Section 2 of the proposed deliverance asks the Commission's approval for the way in which the meeting on 23 March has been called and how it is proposed that business be transacted.

2.2 It should be noted that there is no provision in the [Commission of Assembly Act](#) (Act VI 1997) for the Commission to meet with some or all of its members participating online. However, given the point at which the Commission needed to be called so that decisions could be made about the General Assembly, the Committee agreed that while the Commission would be called to meet primarily in person in the Assembly Hall they would offer that, where a member of the Commission has a concern about travelling to Edinburgh and/or participating in such a meeting on 23 March, there would be the facility provided for them to attend and participate in debate through an online platform. The second section of proposed deliverance for consideration by the Commission is, therefore, the approval of this temporary variation in our practice.

2.3 There is provision in section 2 of the Act for those appointed to a Commission who are unable to attend to be substituted. However, the time limits for intimating substitution would deny a Commissioner, compelled to self-isolate following a positive Covid test, from being substituted. It would appear more equitable to permit online participation of some members of the Commission than have no participation from those required to self-isolate.

3. Competence of Decision Making

3.1 Section 3 of the proposed deliverance moves on to questions of competence in terms of how Act VI 1997 sits against the Act which the General Assembly passed in May last year calling the General Assembly of 2022 to meet in Edinburgh. In other words, does the Commission of Assembly have the right to instruct a different format for the meeting of the General Assembly of 2022? The Committee believes that the relevant sections of the Act are sections 4, 5, 9 and 11 – see the Appendix.

3.2 The Committee suggest that sections 5(1)(c) and 11 of the Act permit the Commission, on this occasion and in light of current circumstances, to make such a determination but also that it is for the Commission itself, having been made aware of these points, to agree that it would be acting competently in allowing a variation of meeting format for the General Assembly of 2022. It should be further noted that the Committee will be proposing in its Assembly Report that the Act should be amended to clarify the Commission's authority in this regard i.e. to expressly enable the Commission to "*decide on the date, meeting place and format of the next General Assembly, in circumstances where it subsequently becomes apparent that the date, meeting place and/or format specified by one Assembly for the next Assembly should be reconsidered*".

3.3 In particular, it can be argued that the Commission is the body to which the General Assembly has entrusted authority to deal with matters arising between General Assemblies in terms of section 5(1)(c). Whether in terms of section 11, the "*relevant circumstances have significantly changed*" is arguable both ways: in May 2021 it might not have been envisaged that the pandemic would still continue to have affected daily life as it has and it is reasonable and proportionate to make allowance for the concerns that some people have, while others might say that the pandemic now appears to be receding and with no Government restrictions expected to be in place in May regarding a meeting of the size of the Assembly, no change is warranted. It is for the Commission to make a decision in light of these and other considerations.

In the name of the Committee

S GRANT BARCLAY, *Convener*
VICTORIA LINFORD, *Vice-Convener*
GEORGE J WHYTE, *Secretary*

APPENDIX

COMMISSION OF ASSEMBLY ACT (ACT VI 1997) (AS AMENDED BY ACTS VII 2003, II 2005, XIII 2006, VI 2007, III 2009, II 2013 AND VIII 2020)

Edinburgh, 17th May 1997, Session I.

(This Act is to be construed in conformity with Act VII 2003)

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

1. As from the date of this Act the General Assembly shall, at their closing session each year, appoint a Commission of Assembly, hereinafter referred to as "the Commission", as herein provided, and each Commission shall continue in office until the next Commission is appointed.

Membership

2. The membership of the Commission shall be:

- (a) one tenth of the ministers and elders commissioned by Presbyteries to the General Assembly in that year, such Commissioners to be designated by the appointing Presbyteries in accordance with the rules set out in Schedule to the Appeals Act (Act I 2014).
- (b) one in ten or part of ten of the members of the Diaconate commissioned by Presbyteries to the General Assembly in that year, such members to be selected at random by the Clerks of Assembly.
- (c) members *ex officiis* of the General Assembly appointing the Commission, with the exception of

the Moderator of the previous General Assembly, all of whom shall hold the same offices in the Commission as they did in the General Assembly.

Where a minister or elder designated under section (a) is unable to attend a meeting of the Commission due to ill-health or subsequent decease, or has, after the date of appointment, been administratively or judicially suspended or has demitted status, the Presbytery in question may appoint a substitute and shall provide to the Clerks of Assembly, at least seven days in advance of the date of the meeting of the Commission, the name and other required details of the substitute appointee. Substitutions shall not be permitted in any other circumstances. A minister shall be substituted for a minister and an elder for an elder. Substitutes need not have been Commissioners at the General Assembly which appointed the Commission.

Quorum

3. The quorum of the Commission shall be one-third of its total membership, and of this quorum at least one-third must be ministers and at least one-third must be elders.

Meetings

4. The Legal Questions Committee shall, if instructed by the General Assembly, and may at its sole discretion, on its own initiative, or on receipt of a request from any court of the Church or Committee of the General Assembly, or on receipt of a requisition signed by a quorum of the Commission, call a meeting or meetings of the Commission at such time or times as shall, in the opinion of the Committee, be justified by the proposed business, provided that meetings to hear cases which must be heard by the Commission in terms of Sub-section 5(d) below shall be called by the Principal Clerk in consultation with the Convener of the Procedure Committee, and should, as far as possible, be held in the months of October, February and May.

Powers

5. (1) The following powers are hereby delegated to the Commission, and this delegation to the Commission constituted in accordance with this Act is declared to be consistent with the law and practice of the Church hitherto and in accordance with the Articles Declaratory of the Constitution of the Church in Matters Spiritual as hereby interpreted by the Church:-

- (a) in the absence of the Moderator from any meeting, to choose their own Moderator from their own number for that meeting;
- (b) to dispose of any matter referred to them by or in view of any Act, order or deliverance of the General Assembly;
- (c) to dispose of any matter affecting the interests of the Church at home and abroad when the Church would be adversely affected by postponing consideration until the time of the next General Assembly;
- (d) to hear and dispose finally of:
 - (i) all appeals and dissents and complaints, with the exception of those delegated to the Judicial Commission but including those hitherto delegated to the Property Commission, and with the further exception of those delegated to the Ministries Appeals Panel in terms of Act VI 2007;
 - (ii) all references in terms of Act VII 2003;
 - (iii) all petitions which seek review of judgements of Presbyteries on the grounds that the Petitioners could not have come by appeal or dissent and complaint or have been obstructed in so doing by the Presbytery concerned; and the Legal Questions Committee shall for each such case appoint an Investigating Committee of not less than three and not more than five members to ascertain the facts of the case before the Commission is called to deal with it, and to report to the Commission; and it is expressly declared that the General Assembly themselves shall not hear or dispose of such cases nor shall the judgements of the Commission of Assembly thereon be subject to review by the General Assembly; provided that any case in which, in the opinion of the Commission, an important issue of principle is at stake may be referred by the Commission to the General Assembly;

- (e) to hear and dispose finally of cases other than those in sub-section (d) above, including cases in which the General Assembly are the court of first instance, but excluding petitions for admission and re-admission of ministers; provided that any case in which, in the opinion of the Commission, an important issue of principle is at stake may be referred by the Commission to the General Assembly;
 - (f) to appoint representatives on behalf of the General Assembly where such appointments are required before the next General Assembly;
 - (g) to appoint a representative or representatives to present any matter referred by the Commission to the General Assembly.
- (2) The Clerks of the General Assembly shall act as Clerks to the Commission of Assembly, though not members thereof, but the duties may be carried out by one of them. If neither of them is present, the Commission of Assembly shall appoint a substitute, whether or not a member thereof, to act as Clerk of the Commission during the sittings thereof, and the oath *de fidei* shall be administered to him or her and recorded.

Note: With effect from 18 May 2013, the provisions of section 5 should be interpreted subject to the provisions of the Appeals Act (Act I 2014).

Procedure

6. The Principal Clerk shall issue notices calling each meeting to each member of the Commission at least fourteen days before the meeting, such notices to contain intimation of the item or items of business and to be accompanied by all relevant papers.
7. When the meeting has been constituted, the Commission shall consider whether or not to proceed with any or all of the items of business, provided that this option shall not apply to matters referred by the General Assembly in terms of Sub-section 5(b) nor to cases in terms of Sub-section 5(d); and it shall be competent for the meeting to add items of which notice has not been given, provided that the outcome will not be prejudiced by the lack of notice; and the agreement at this stage to proceed with any item shall be without prejudice to consideration of the question of competence when the item is dealt with.
8. (1) Procedure shall be in accordance with the Standing Orders of the General Assembly so far as applicable and consistent with this Act.
- (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.

Relation to Legislation

9. The Commission 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.
10. The decisions of the Commission being final, there shall be no right of appeal against them.
11. The Commission shall not have power to review any decision of the General Assembly unless, in the case of non-judicial decisions only, the Commission is fully satisfied that relevant circumstances have significantly changed.
12. The Commission shall be accountable to the General Assembly which may revoke any action in excess of the powers conferred by this Act.

Lower Courts

13. When a meeting of the Commission coincides with an ordinary meeting of a Presbytery or Kirk Session of which any member of the Commission is a member, such Presbytery or Kirk Session has permission to meet, but the priority for such member is to attend the Commission, and the Presbytery or Kirk Session shall not in the absence of such member transact any business which might be prejudicial to his or her interests.

14. All Presbyteries and Kirk Sessions shall comply with decisions of the Commission as if they were decisions of the General Assembly, as they shall be answerable to the next General Assembly.

Report to the General Assembly

15. The Legal Questions Committee shall report to the General Assembly all decisions made by the Committee in terms of Section 4 of this Act, and any other matters in connection with the Commission which, in the opinion of the Committee, should be brought to the notice of the General Assembly.

16. The Minutes of all meetings of the Commission shall be submitted to the General Assembly through the Legal Questions Committee, in the Volume of Reports, or in the Order of Proceedings, or in the Daily Papers, and they shall be laid on the table, without discussion, provided that the General Assembly may take appropriate steps to consider and deal with any allegation that the Commission has acted in excess of the powers conferred by this Act.

Repeal

17. Act V 1981, and Act XIII 1992 are hereby repealed, and references in Act XIX 1992, and Regulations 1, 2 and 3 1992 to "the Property Commission" are amended to read "the Commission of Assembly".