

Church of Scotland

In 2007, the Solicitor of the Church of Scotland and the Depute Clerk to the General Assembly gave seminars for practising lawyers on the Church's legal system and constitution, with particular focus on the provisions of Act III 2001 (discipline of ministers and others). These were very well received by solicitors and advocates and it became clear that many lawyers would find a volume introducing and outlining the law and practice of the Church to be both useful and interesting. It seemed a good opportunity to invite the Scottish Episcopal Church and the Roman Catholic Church, as other Christian denominations in Scotland also with systems of law and procedure, to take the opportunity to contribute information about their respective systems. The publication grew to encompass chapters from the Scottish Episcopal Church on its Polity, Law and Governance and its Judicial Procedures and a chapter describing the Scottish National Tribunal of the Roman Catholic Church as well as material on Presbyterian Governance as evidenced in the Church of Scotland, the various judicial Commissions of the Church of Scotland and its procedure and disciplinary process.

I have extracted the parts of the text on the Church of Scotland which address the questions and these are shown below. The first part really addresses three of the questions, namely,

1. What courts, tribunals or other adjudicative structures exist within your religion?
4. How are the decision makers selected? and
5. How detailed are rules of practice or procedure?

1 Courts of the Church of Scotland

1.1 *The General Assembly*

The General Assembly meets annually (in May) and lasts about a week. The voting membership of almost 800 is commissioned by all Presbyteries, and comprises equal numbers of ministers and elders, along with a much smaller number from the Diaconate.

The General Assembly is the legislating authority within the legal structure of the Church, passing Acts of the General Assembly, and Regulations, which are binding on the Courts, members and office-bearers of the Church. These may most conveniently be found in the Extranet section of the Church's web-site, where they are brought up to date following each Assembly.¹

The central administration of the Church is, in legal terms, the executive machinery of the General Assembly; and so much of the business of the Assembly consists of receiving from Councils and Committees written Reports of their diligence and policy-suggestions.

¹ <http://www.churchofscotlandextranet.org.uk/xchurchlaw/xchurchlawindex.htm>

To complete the traditional elements of a legal system, the General Assembly is the final appeal Court, able to receive appeals against the decisions of Presbyteries (both in their first-instance and appellate roles), and petitions seeking review of the decisions of executive bodies. Section 5 below, and Chapter 2, discuss the appeal processes of the Church, most of which are not now exercised directly by the General Assembly itself.

The General Assembly has an extensive set of Standing Orders, which remain substantially identical from year to year, but may be altered by the General Assembly to take account of changes of practice, or corrected by the Clerks to take account of minor developments (e.g. changes to the constitution of a committee). The Standing Orders govern questions of membership, debate and judicial process, as well as the shape of executive bodies and the rules to determine their membership.

1.2 *The Synod*

Synods were large regional bodies, which latterly had few powers and responsibilities. They were abolished in 1992, and are mentioned here because it may be important to be aware of them when undertaking any research on a particular question.

1.3 *The Presbytery*

The Presbytery, despite its name, was the last of the Church's Courts to emerge after the Reformation. It began as a place of spiritual exercise (Bible study, prayer and so on) but gradually evolved into a Court like the others, covering a smaller region than the Synod. It might be said to be the 'characteristic' Court in the system, because it is a Court of first instance for many purposes, but it can hear appeals against the decisions of Kirk Sessions, while its own decisions may be appealed to the General Assembly or its Commissions. This multi-dimensional nature of the Presbytery probably makes it the most useful and interesting to study.

The most solemn executive function of the Presbytery is the superintendence of the congregations, Kirk Sessions, ministers and deacons within its bounds. Superintendence of congregations is exercised regularly, normally on a five-year cycle. Non-routine interventions may, and indeed should, be made whenever the Presbytery becomes aware of circumstances suggesting that there is a situation requiring its attention. .

The most solemn ceremonial functions of the Presbytery are the ordination of ministers and deacons, the induction of parish ministers, and the formal introduction of other members of ministry teams. These symbolic acts of Presbytery helpfully remind the Church of the ongoing responsibility of superintendence exercised by that Court.

Presbyterianism is not a form of government by Presbytery, and neither is the General Assembly a federation or association of Presbyteries. Each Court determines its own membership, and normally each Court elects those who will serve on its committees. Most members of the General Assembly are commissioned by Presbyteries from among their ministers and deacons, and from the elders serving in the Kirk Sessions within their bounds; but the General Assembly scrutinizes those commissions to ensure they are all in order. Likewise, Kirk Sessions commission elders to serve on

the Presbytery in which they are located, but the Presbytery must scrutinize and agree to receive such commissions. Though the term ‘representative elder’ is used of the person commissioned by the Kirk Session to the Presbytery, members of Presbyteries and the General Assembly should always make up their own minds on each debate and should not be mandated in advance by the Court which commissioned them.

As for membership of committees, there was until recently quite an extensive system of appointment by Presbyteries of members of General Assembly committees. This is far less common now, and there is no such system operating between Kirk Sessions and Presbyteries, which determine their own committees’ membership.

1.4 *The Kirk Session*

Each congregation is governed by its Kirk Session, the lowest in rank of the Church’s Courts. Moderated by the Minister, and otherwise consisting of the ordained elders of the congregation, the Kirk Session always acts as a Court of first instance, normally by receiving Reports from its committees or office-bearers. It is extremely rare, though entirely possible, for a Kirk Session to receive an Overture or a Petition. The likelihood of lawyers appearing before Kirk Session meetings these days is very small because the discipline over parishioners is no longer the very formal moral exercise it once was.

It may be useful to note that ministers are subject to the Presbytery, and never to the Kirk Session, in all matters relating to life, doctrine and the exercise of ministry. It is neither legally competent nor pastorally appropriate for a Kirk Session to discuss these matters, and any concerns in this area should simply be conveyed to the Presbytery.

2 **Officials of the Courts of the Church**

2.1 *Moderator*

Each Court is chaired by a Moderator. In the case of the Kirk Session, the permanent Moderator is the inducted minister of the charge, or the Presbytery-appointed Interim Moderator in times of vacancy or long-term absence of the minister. The minister and Kirk Session may arrange for particular meetings to be chaired by another member of the Session, but that individual has no moderatorial responsibilities or privileges between meetings.

The Presbytery elects a Moderator annually (the Presbytery year varies from place to place), and may choose any of its members, whether minister, elder or deacon. The Moderator presides at Presbytery services, with non-ministerial moderators deferring to a minister (e.g. his or her immediate predecessor) for the conduct of Communion services. Otherwise the Moderator provides impartial chairing of all the business of the Presbytery, and serves to some extent in a representative rôle on the Court’s behalf throughout his or her year in office. In a Presbyterian system, the Moderator has no further role of personal leadership, and should never be confused with a bishop: strictly the equivalent of the bishop (i.e. the locus of *episkope*) is the Presbytery itself.

The Moderatorship of the General Assembly is, as befits the size and seniority of the Court, a much more weighty office. Its holder may be a minister, elder or deacon,

nominated by a committee of the General Assembly and formally appointed at the beginning of the Assembly week. The Moderator invariably takes a sabbatical of about fourteen months from his or her normal duties, to prepare for the General Assembly and then to represent the Church nationally and internationally throughout the year of office. Again, there is no element of personal *episkope* in the role, and the Moderator has at most an ambassadorial role, including a calling to exercise prophetic leadership on behalf of the whole Church.

2.2 Clerk

Each Court has a clerk, who is responsible for taking (and where necessary extracting) the minutes, keeping the papers and records of the Court, handling correspondence and servicing the administrative needs of the Court. Experienced clerks, in all Courts, tend to acquire a role of advising on procedure, and holding the institutional memory of the organisation.

Session Clerks are usually members of the Kirk Session, but need not be, and their rôle is a voluntary and very part-time one. Presbytery Clerks are usually paid, and most exercise the rôle on a part-time basis; while the largest Presbyteries have full-time clerks, and some Presbyteries have permanent offices with support staff. The General Assembly has two clerks, based in the administrative offices in Edinburgh.

Anyone wishing to write to a Court of the Church, to raise business with it, or to seek advice on questions of process, should approach the appropriate clerk in the first instance.

2. What matters are dealt with?

3 Types of Business at First Instance

3.1 Reports with Deliverances

In each Court of the Church, the vast bulk of business consists of Reports brought by the executive bodies (which may be termed committees, councils, boards, working parties, etc) responsible for implementing policy and developing new policy ideas. The Reports will demonstrate diligence in respect of previous instructions given by the Court, and may suggest new initiatives, often in the form of proposals for fresh instruction by the Court to the committee.

Each Report has attached to it a Proposed Deliverance in numbered sections, being the motions the reporting body hopes the Court will adopt. The first section is always a motion to 'receive' the Report, and this is virtually always accepted without debate, except in the very unusual circumstance that there is felt to be something vexatious or incompetent about the Report as a whole. The Court debates the Proposed Deliverance, discussing motions from the floor which may take the form of counter-motions and amendments. The resulting Final Deliverance provides the policy, instructions and resolutions of the Court.

3.2 Overtures

An item of business may be brought on the initiative of one Court to be considered by another, or may be brought to a Court by some of its own members. The Overture takes substantially the same written form as a committee's report, and has a Proposed

Deliverance attached, which is dealt with in the normal manner as above, though the Court will normally place more significance on the decision whether to receive the Overture before considering the remainder of the Proposed Deliverance.

While many Overtures are brought by inferior Courts to superior ones, the single most common use of Overture is to place before Presbyteries any proposal of the General Assembly to which the provisions of the Barrier Act of 1697 apply. This measure compels the General Assembly to consult the wider Church before innovating in the areas of worship, doctrine, discipline or church government, and the mechanism of an Overture is used whenever the Act is triggered by a particular piece of business.²

3.3 *Petitions*

Any individual or organisation, within or beyond the membership of the Church of Scotland, may petition any of its Courts on any subject, provided a legitimate interest can be shown to justify doing so and the Petition passes the tests of competency and relevancy.

While the purposes for which Petitions are used are often similar to the purposes of Overtures, Petitioners do not enjoy the privilege afforded to the promoters of Overtures i.e. they do not bring a Proposed Deliverance setting out exactly the terms of the remedy they seek. Instead, a Petition sets out a narrative, with the remedy sought set out in the form of a *Crave*. Upon consideration, it is up to the Court to frame all the motions to be considered, which again may be subject to counter-motion and amendment.

Each of these types of business may produce an Appeal, or a Dissent and Complaint, providing of course that the General Assembly has not been the Court of first instance.

3. Is legal representation permitted/encouraged?

The right to be represented before a Court, and the right to have that representation paid for from the funds of the Church, are different considerations.

The Church's practice in the matter of legal representation in its courts may be summarised by the following principle: there is no right to legal representation where no pecuniary interest is at stake. So for example, the Kirk Session exercises no judicial authority over anyone with a financial interest in its decisions, and any prejudicial decisions they do make would be administrative ones which could be challenged in civil law; so there has never been a right of legal representation before the Session. On the other hand, and demonstrating the obverse of this principle, cases heard by the Judicial Commission (Act II 1988) always have the capacity to affect the patrimonial interests of a minister or other Respondent, and the Act particularly provides that the right to representation cannot be qualified.

² Weatherhead, J.L., editor, *The Constitution and Laws of the Church of Scotland*, Edinburgh: Board of Practice and Procedure, 1997, p. 153 for the text of the Barrier Act.

The right to have legal advice or representation paid for by the Church is mainly regulated by the legislation governing each sort of process. The most extensive scheme is contained in Act III 2001 anent Discipline of Ministers (and others),. It is another illustration of the 'patrimonial interest' rule of thumb that Act IV 2007 anent Bullying, for example, specifically provides that the funds of the Church shall never be available for this purpose, because those who are subject to the discipline of that Act, and the censures available in it, are such that no patrimonial or professional interest is at stake.

In any case where the answer to either of these questions is not clearly determined in the relevant Act of the General Assembly, parties would normally contact the Clerks of the Assembly who would take advice from the Committee on Overtures and Cases or, if necessary, the Legal Questions Committee of the General Assembly.

6. What provisions exist for appeal and enforcement?

Appeal; Dissent and Complaint

An Appeal may be taken by an individual or legal body against a decision of a Kirk Session or Presbytery, provided that the appellant can demonstrate an interest in seeking the review of the original decision. The time-limit is very tight, and the Clerk of the Court appealed against should be contacted immediately.

A Dissent and Complaint may be taken by one or more members of the Court appealed against. Apart from a slight difference in the rules about notice of intention to dissent and complain, the procedure is identical to that of Appeal. Indeed, the appealing parties in many cases comprise a mixture of members and non-members of the respondent Court without any need to separate the complaint into separate cases.

For the avoidance of doubt, simple dissent may be entered against a decision to which objection is taken on a point of principle, without any element of complaint being taken to a superior Court. Obviously, simple dissent is more commonly used in the General Assembly than elsewhere, since from the Assembly (as supreme Court) there is of course no further resort and so no possibility of appeal/complaint.

The next chapter will describe the appellate bodies established in the Church of Scotland, each of which enables cases to be heard quickly, effectively and flexibly, rather than being heard (as once was the custom) by the whole General Assembly sitting as an appellate Court. For civil lawyers, by far the most common engagement with the legal system of the Church of Scotland will take the form of appearance before one or another of these bodies.

7. To what extent have these processes been subject to review or examination by the secular courts?

Long negotiations stretching from 1907 to 1929 found a largely-acceptable formula; incorporated it into a constitutional statement (the *Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual*³); arranged for it to be appended to a piece of civil legislation (the Church of Scotland Act 1921⁴); brought the Act into effect by statutory instrument (in 1926⁵); and used the text as the main element of the constitution of the post-1929 Church for spiritual purposes.⁶

The settlement, which can be found in Articles IV and VI of the Articles, declares the Church to have an independent spiritual jurisdiction which belongs inherently to the Church (i.e. is not conveyed by any civil, human, authority). The jurisdiction extends to the traditional four areas of worship, doctrine, church government and discipline. Provided that the Church can succeed in arguing that a decision of any of its Courts falls entirely into one or more of those categories, there should be no possibility of review of the decision by the civil courts. Decisions which have other elements, or decisions challenged for reasons of process not substance, produce from time to time problematic cases, in which it is disputed whether the civil courts should have a *locus*.⁷

Most recently the following case tested the boundary of jurisdictions in respect of the employment rights of non-inducted ministers: *Percy (AP) (Appellant) v Church of Scotland Board of National Mission (Respondent) (Scotland)* [2005] UKHL 73; 2006 SC (HL) 1. The substantive issue here has been resolved in a radical way by the Church, which has recently adopted the practice of employing (in the full, secular sense of the term) all its working ministers except inducted parish ministers.

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³ Weatherhead, J.L., editor, *The Constitution and Laws of the Church of Scotland*, Edinburgh: Board of Practice and Procedure, 1997, p. 159 for the text of the Articles Declaratory.

⁴ c.29

⁶ See for example Murray, D.M., *Rebuilding the Kirk: Presbyterian Reunion in Scotland 1909-1929*, Edinburgh: Scottish Academic Press, 2000