



University  
of Glasgow

# Religion in Scots Law: Report of an Audit at the University of Glasgow

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Humanist Society Scotland  
Edinburgh 2016

**RELIGION IN SCOTS LAW:  
THE REPORT OF AN AUDIT  
AT THE UNIVERSITY OF  
GLASGOW**

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# Humanist Society Scotland

## Chief Executive's Preface

It is an honour to be able to give a preface to this landmark report.

Humanist Society Scotland commissioned this research in November 2014. The motivation for this commission came from the increased public and political awareness of the changing role of religion and belief in Scottish public life. Our history, our institutions and our society have been shaped by religious and non-religious believers over centuries. At a time when Scotland remains in deep conversation about where we are going, it is necessary that we first understand where we are now and how we got here.

From the outset, the scope that HSS set for this project was that it should be a wide audit of the ways in which religious individuals or organisations were specifically protected or privileged in Scots Law. Another key objective of this project was to help develop the sophistication of the ongoing debate about the role of religion in public life. Understandably, issues of religion and belief sometimes elicit an emotional or highly sensitive response. We wanted to help produce a document which could be used to inform all sides of this debate, and, hopefully, to contribute to a better quality of discussion.

In order to do that, HSS and the University of Glasgow agreed that this report should be published in full, free of charge in the public domain. We hope that this will be a useful document to academics, policy-makers and campaigners, as well as members of the general public who are interested in these issues.

Gordon MacRae  
HSS Chief Executive

# About Humanist Society Scotland

Humanist Society Scotland is the national organisation for Humanists in Scotland. It is a Scottish charitable incorporated organisation, and is a member of the European Humanist Federation and the International Humanist and Ethical Union.

Humanist Society Scotland traces its origins back to the first Scottish Humanist Conference which took place in Edinburgh in 1962, although there had been an ethical non-religious movement in Scotland in the guise of the Rationalist Press Association of the 1930s. In the 1970s, in the context of ongoing discussion of proposals for devolution to Scotland, the Humanist groups of Glasgow and Edinburgh agreed to set up a Scottish Humanist Council. This led to the formal establishment of the Humanist Society Scotland in 1989.

In the early 1980s HSS saw a significant increase in the demand for meaningful secular alternatives to religious ceremonies for marking the major occasions in life. In 2005, after successful campaigning by HSS, the Registrar General Scotland was persuaded of the arguments to grant Humanists in Scotland the right to conduct legal wedding ceremonies. It is now the case that the network of HSS Registered Celebrants provide one of Scotland's most popular types of wedding ceremonies.

HSS experienced a continued rise in membership which led in 2011 to the Society becoming incorporated and beginning to seek the input of professional staff and consultants. As of January 2016 HSS has over 15,000 members in Scotland and across the UK.

## Authors' Preface

This project was commissioned in Spring 2014 by Humanist Society Scotland (HSS). The Society funded the research to be conducted jointly by the Principal Investigator, Callum Brown, and the Co-investigator, Jane Mair, both at the University of Glasgow. The funding enabled the employment of a researcher for ten months, and Dr Thomas Green joined the project between October 2014 and August 2015. A series of intermediate reports, one written and two presentations, were submitted to the Board of Trustees and the Edinburgh branch of HSS during the early part of 2015, and a presentation report was made to the Commission on Religion and Belief in British Public Life (CORAB) on its evidence-gathering hearing at University of Glasgow in April 2015.

Green undertook all the primary research for this Report, looking principally at statute law together with some selected case law, and undertook the writing of initial research reports to the investigators. Mair, Green and Brown then jointly participated in the writing of the Final Report, presented to the HSS in January 2016. Final editing and copy-editing has been by all three. Further copyediting and proof-reading has been by Gary McLelland of HSS.

This project took place against the background of growing co-operation between the University of Glasgow and HSS, including a series of four research workshops, funded by the Royal Society of Edinburgh, on Humanism and Civil Society in Scotland which were conducted at Gilmorehill between March 2014 and January 2015; as part of that series, an open evening for the public was held in November 2014. Other joint meetings and liaison have developed over a number of issues concerning Humanism in Scottish civil life, including in the Education sector and in relation to research into the place of belief and non-belief in Scots life and law, and co-hosting by the University of Glasgow and HSS of a visit by CORAB in April 2015. Callum Brown utilised financing from the Royal Society of Edinburgh to digitise the records of the HSS, and obtained HSS assistance over several years in recruiting volunteers to be interviewed for his project on the history of modern

humanism. From these activities grew interest in establishing an authoritative guide to the place of religion in Scots law.

The authors wish to thank office bearers of HSS who commissioned and participated in the project. A constant figure assisting us has been Gary McLelland, currently Head of Communications and Public Affairs for HSS, as well as HSS Chief Executive Gordon MacRae. At the University of Glasgow, thanks for financial and administrative management go to Elaine Wilson, formerly of the School of Humanities Office (now College of Arts Research Office), and to James Muir in the School of Law.

## About the Authors

**Callum Brown** Since 2013, Callum Brown has been Professor of Late Modern European History at the University of Glasgow; prior to that he held chairs at the University of Strathclyde and University of Dundee. His primary research interest is in secularisation in which he has researched for 35 years. He has published over 50 articles and book chapters, co-edited two books, and is the author of 11 monographs on the history of religion, historical theory, the social history of Scotland, and the history of Britain, including: *The Death of Christian Britain: Understanding Secularisation 1800-2000* (Routledge, 2001 and 2009), and *Religion and the Demographic Revolution: Women and Secularisation in Canada, Ireland, UK and USA since the 1960s* (Boydell, 2013). His next book, *Becoming Atheist: Humanism and the Secular West* (Bloomsbury) will be published in 2016.

**Thomas Green** Thomas Green is a Scottish ecclesiastical and legal historian specialising in the early modern period, but with interests ranging from 1500 to the present. He is a former Stair Society scholar, holds degrees in history, historical theology and ecclesiastical history, and spent three years in the School of Law, University of Edinburgh, as a British Academy Postdoctoral Fellow. Dr Green is a published authority on the history of Scots marriage law, and spent ten months as the research assistant on the present project regarding religion in Scots law. He is currently an Honorary Research Fellow at the School of Law, University of Glasgow.

**Jane Mair** Jane Mair is a Professor of Private Law in the School of Law where her work focuses on family law, employment law and aspects of discrimination. She has a particular research interest in the place of religion in contemporary domestic and international law, the difficulties of accommodating pluralism within both public and private law and the influence of religious and non-religious beliefs in the legal regulation of marriage and other family relationships. Her recent publications include *The Place of Religion in Family Law: A Comparative Search* (2011), *A Religious Revival in Family Law* (2015) and *Belief in Marriage* (2015).

# **PART I**

## **The Context**

In this opening Part of the Report, the historical and religious context is briefly explored, together with the aims and outcomes of the project.

# Chapter 1

## Introduction

- 1.1 Where might we find religion in law?
- 1.2 The Scottish background: the historical origins of religion in Scots law
- 1.3 The impact of secularisation
- 1.4 What this project has done
- 1.5 The structure of this report

### **1.1 Where might we find religion in law?**

Scots lawyers, in common with lawyers in many other western European legal systems, have tended to assume that contemporary law is secular and if they have considered the place of religion in law, it has been predominantly from an historical perspective. Whereas religion once had a central place in Scots law, most obviously in the form of Canon law, that is now firmly in the past. Recently, however, there has been a remarkable revival of interest in religion and law. Many reasons might be put forward for this; the increasing presence of religion in the courts in the context of individual human rights and equality-based claims; the presence of minority religions and concerns about religious fundamentalism; the strength of religious voices in public consultation and debate.

This revival of interest in religion and law highlights the complexity of their interaction. While we might have assumed relatively straight and simple paths of decline and divergence, the reality is likely to be much more complex. The old ties between an established church and the legal system may now be much weaker but in their place are new protections for religion in terms of human rights and guarantees of equality. Where once the issue was the place of a single, dominant religion or church in the legal system, the questions are now more about religious diversity and pluralistic beliefs.

In Scotland, there has been little detailed exploration or analysis of the place of religion in contemporary law and, in the absence of explicit conflict in the courts

between secular and religious values, such as has occurred in other jurisdictions in the context of crucifixes in schools or Islamic head coverings in public spaces, there has been little need to consider the interaction between law and religion. The Scottish legal landscape has been relatively untroubled by religion in recent times, and as a result it has been rather overlooked. The Scottish government in recent years has tended to emphasise the diversity of Scottish society and its tolerance to pluralist values but, it might be argued, there is little detailed evidence on which to base these claims. We might assume that the law is broadly secular but in truth we have rarely looked.

This research project offers an important opportunity to address that neglect and to begin to explore what place, privileged or otherwise, religion has in contemporary Scots law. So where might we look for religion in Scots law? Scots law has four principal sources: legislation, common law, Institutional writers and custom. While much of modern law is now contained in legislation, the remaining sources remain important particularly where there are gaps in the coverage of the legislation. The starting point for our research is legislation, both current and historical and it is here that the changing place of religion is most obviously seen. While in many areas of regulation, it is the legislation which represents the modern restatement of law, it often builds upon pre-existing common law or is underpinned by deep rooted values. Theology informed much of the work of the Institutional Writers and, while modern legislation may seem far removed from their work, their founding principles of Scots law may continue to shape legal understanding. Religion may not be explicit in the legislation but its influence might still be discernible in the underlying values and models.

Legislation is often used to create a framework within which individuals or institutions have considerable discretion. Various forms of guidance or policy might be used to inform the exercise of that discretion. While such guidance is not legally enforceable it may nonetheless be highly influential. Custom too has a significant role to play in the way that law is interpreted and applied. Practices continue because that is the way things have always happened without consideration of why or whether they remain appropriate.

There can be significant gaps between the law “in books” and the law as it operates in practice. Within the confines of a relatively short project, we can only look at the law as it is written but we can begin to identify areas where the practice may be of significance and where further investigation might be usefully conducted. The principal focus of this research is legislation. In some areas, we have sought to identify only current legislation in force whereas in the other areas we have tried to trace the pattern of change in order to highlight how religion has retained a privileged place or indeed where it has become equalised with other beliefs. Where there are significant decisions of the Scottish courts, these have been highlighted but no exhaustive search of case law has been carried out: here too there may be scope for further work.

Identifying the place of religion in Scots law is not a simple task. We can highlight provisions, identify areas of regulation and point out anomalies but the interaction between law and religion is complex. Religious values, religious influence, individual religious beliefs and religious organisations all emerge in different ways within the law: sometimes privileged, sometimes protected and sometimes equalised. Increasingly, the place of religion and religious organisations in at least some areas of law is changing to incorporate the place of non-religious belief and its related organisations.

## **1.2 The Scottish background: the historical origins of religion in Scots law**

Like all nations in Europe, Christianity was embedded in the laws of Scotland from the early medieval period. With the arrival of Christian missionaries, and the prolonged and intermittent conversion of what we now refer to as Scotland to the Christian faith, legal systems of the various kingdoms and that of the Scottish kingdom which came into being in the early Middle Ages became infused with Christian ideas. From then until the Reformation, the Roman Catholic Church was the form of Christianity that covered most of Western and Northern Europe, and

enveloped Scotland as it did other territories. The Scottish Reformation, generally dated to the year 1560, introduced a Protestant ascendancy to Scotland, which until 1690 vacillated in its form of government between presbyterianism and episcopacy, changing numerous times in 130 years. The enduring of presbyterianism injected four key influences into legislation of the Scottish Parliament down to 1707: the special protected status of Protestantism and presbyterian forms of church government; the outlawing of “Popery” and, intermittently, episcopacy; the imposition of legal constraints upon the people to uphold mainly presbyterian ideals of behaviour (for instance in relation to observing the Sabbath); and the promotion of a Protestant education policy (with the plan for a school in every parish). These four influences were to be sustained in continuously modified forms well in the late modern period after the 1707 Union. To this day, in certain regards, they – and especially the last two – retain a presence, welcome or unwelcome, in legislation affecting Scotland.

This is most apparent in relation to the outlawing of Roman Catholicism in the centuries after 1560. This was a struggle told by other scholars in some detail, and the Report cannot better those accounts.<sup>1</sup> Gradually, the penalties against Catholics and the Catholic Church were removed: in 1793, in 1837, 1926, and 2013. Still surviving is the law preventing a monarch of the United Kingdom being a Roman Catholic, and failing to be a member and “Supreme Governor” of the Church of England. In all other respects, the heritage of religious discrimination has been removed from virtually the entirety of Scots Law, and made subservient to equal opportunities of European Law and anti-bigotry legislation of the Scottish Parliament.

The bulk of historical religious legislation since 1560 has been concerned with the status and governance of the Church of Scotland, and its interaction with the people. As this Report will show, not everything was legislated; much was assumed in Scots Law regarding popular behaviour, and unlike other nations there were areas (such as Sabbath legislation) that Scotland was, perhaps paradoxically, weak in legislating. Other areas of activity were less well legislated for. Some offences, for instance, were

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<sup>1</sup> For which, good starting points are Jane E A Dawson, *Scotland Re-Formed, 1488-1587* (Edinburgh, Edinburgh University Press, 2007); Christine Johnson, *Developments in the Roman Catholic Church in Scotland 1789-1829* (Edinburgh, John Donald, 1983); John R Watts, *Scalan: The Forbidden College, 1716-99: The History of a Catholic Seminary, 1716-99* (Edinburgh, Tuckwell Press, 1999).

seen to be both civil and ecclesiastical in nature, and might be investigated and seemingly tried by both civil and church courts; this extended to witchcraft, infanticide, public drunkenness, and even on occasion murder when isolated kirk sessions of the Church of Scotland might undertake investigations in the absence of a civil magistrate. This overlap between civil and church powers was not unusual in Europe, but was regarded by many Scots of the nineteenth and twentieth centuries as a baleful, distinctively Scottish, heritage. For others, the persistence of ecclesiastical influence in the law of Scotland after 1707 was considered vital to the survival of a sense of Scottish nationhood and national identity in the midst of union into Great Britain and, from 1801, the United Kingdom. Scottish opinion has always been divided on this issue, though, including amongst those who might share a nationalist dream of reclaiming political independence. The Kirk has been seen as both character-giving and malevolent in Scottish history (including in Scottish literature and the arts), and the same has applied concerning the religious influence in law.

For many, religion has claimed a monopoly over people's belief systems. From the 1450s to the 1720s, Scotland became transfixed by witchcraft, in the form of state-prosecuted witch-hunts and a popular culture which accepted accusations of witch activity as legitimate grounds for pursuing grievances of all sorts in religious and civil courts; in 1722, the last execution in the British Isles for witchcraft took place at Dornoch when Janet Horne was accused of turning her daughter into a donkey.<sup>2</sup> In 1698, Scotland achieved the unenviable status of being one of the last places in Western Europe where somebody, student Thomas Aikenhead, was executed for blasphemy, in his case *inter alia* for doubting miracles and the trinity, by burning at the stake at a spot adjacent to what is now Leith Walk in Edinburgh.<sup>3</sup> The kirk session system was obsessed from the late 17<sup>th</sup> to the mid nineteenth centuries in pursuing the sexual misdemeanours of Scottish people, bringing before them parishioners accused of fornication and adultery, and punishing them with monetary fines and humiliation

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<sup>2</sup> See Julian Goodare, *The Scottish Witch-Hunt in Context* (Manchester, Manchester University Press, 2002)

<sup>3</sup> Michael F Graham, *The Blasphemies of Thomas Aikenhead: Boundaries of Belief on the Eve of the Enlightenment* (Edinburgh, Edinburgh University Press, 2008).

before Sunday congregations.<sup>4</sup> Church taxes also raised ire, though perhaps not so commonly as elsewhere in Europe. Indeed, one of the key features of distinctiveness about Scottish church history of the last three centuries is how weak anticlericalism was, even when people were forced to pay church taxes at harvest time and every time fish was landed at river or seaport.<sup>5</sup>

Finally, a word about the civil courts. In the eighteenth and nineteenth centuries, during the operation of the state support of Church of Scotland ministers in their manse and glebes (or farm land), the lower courts of the judicial system were often clogged with case brought by ministers complaining that heritors (landowners) and sometimes parishioners were not stumping up the legislated-for slice of the harvest for the maintenance of the minister's household, and not performing the required labour dues (or work) upon the glebe and the re-thatching of the manse or church. A special court, the Court of Teinds, sat from 1707 to the 1930s, sorting out the cases appealed from Sheriff courts. We will learn something of the legislation behind this, but we will not be dealing here with the way this infused Scottish culture – in formal legal announcements from the pulpit punctuating Sunday sermons, and the appeals for assistance to ministers suffering from inadequate financial returns from the heritors. The way that religion entered Scots law is only a fraction of the way it impacted upon the people as well as the power system of the land. For that, we commend you read one or more of the many histories of Scottish religion.

### **1.3 The impact of secularisation**

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<sup>4</sup> Leah Leneman and Rosalind Mitchison, *Sin in the City: Sexuality and Social Control in Urban Scotland, 1660–1780* (Edinburgh, Scottish Cultural Press, 1998).

<sup>5</sup> Callum Brown 'Rotavating the Kailyard: re-imagining the Scottish 'meenister' in discourse and the parish state since 1707' in N Aston and M. Cragoe (eds.), *Anticlericalism in Britain c.1500-1914* (Stroud, Sutton, 2000), pp. 138-58.; but see Pete Aitchison, *Black Friday: The Eyemouth Fishing Disaster of 1881* (Edinburgh, Birlinn, 2006). Green notes: A reason there may have been little anticlericalism over tithes is because the teinds were often simply uplifted by the landowner along with his rents (with no churchmen in sight) and then the landowner had to pay up stipend in his capacity as parochial heritor. Certainly, before the Reformation tithes went straight to churchmen, but after the Reformation many tended to go straight to laymen.

Scotland has long been famed for the strength of its religious institutions, the enduring place of religion upon the civil institutions and popular culture of the country, and the vibrant place of faith in the lives of the people. From the Reformation, it was renowned for the disputatious character of its ecclesiastical history, and the predilection for church schism within the dominant Presbyterian community. In the 1920s, an American delegate to the general assembly of the Church of Scotland, told commissioners: “We find that wherever a great piece of work is being done a Scot is at the back of it, and whenever there is an ecclesiastical dispute a Scot is at the bottom of it.”<sup>6</sup>

But things have changed in the late twentieth and twenty-first centuries. Scotland has been propelled with some vigour and speed from a position in which it was famed within Europe in 1960 for its religious character, to being in 2016 – along with the Netherlands, the Nordic nations, and some former Eastern bloc countries – one of the most secular nations in the western world. Decline in churches, falling church membership and affiliation, and the rising proportion of Scots registered as having “no religion” (sometimes referred to by sociologists as “the nones”) has transformed church and faith. Following on, somewhat lagging, have been the diminishing religious influence in public affairs. Changes in the law have been the most interesting and in some regards the most telling aspect of this secularisation of the nation. This section contextualises the legal changes – their timing, nature and extent – which are the subject of the rest of the Report.

In 1980, one of the leading experts on the law of church and state in Scotland, Francis Lyall, wrote that: “It seems inevitable that there will be further change in the Law of Scotland on Church and State. The decline of institutional Christianity, the polarisation of divergences within the denominations, the spread of the smaller and more cohesive churches, and the trend towards individualism and ‘liberty’ in civil life, in short the emergence of the so called ‘secular society’, will make that change

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<sup>6</sup> Quoted in Lord Sands, “Historical origins of the religious divisions in Scotland,” *Records of the Scottish Church History Society* vol. 3 (1929), p. 94.

and development necessary.”<sup>7</sup> The necessity of which he spoke has not diminished in the intervening years, but, rather, has intensified. Secularisation has changed in ways not envisaged by Lyall, inflecting the moral law which, long governed by the churches, has been savaged by both non-religious forces and by changing theology which, when not actually changing the majority of the denominations, has certainly weakened resolve. In the realms of laws on gay marriage, non-religious forms of marriage and removal of Sabbath restriction, and in the wider societal acceptance of freedoms relating to each of these, Scotland has shifted markedly to be one of the least religious regulated countries of Europe. Other changes are pending which signify secularisation: the legalisation of medically-assisted suicide, already introduced in some nations, is a change that may not be far away in Scotland.

#### **1.4 What this project has done**

The idea of an “audit” of Scots law lay behind this project and with that word came notions of examination, checking and reporting. The term perhaps belies the complexity and uncertainty involved in what we sought to do. Law is rarely a matter of black and white.

The principal objective was to look at the place of religion in contemporary Scots law but, the nature of the legal system and the piecemeal ways of reform meant that we often needed to combine a review of current law with an exploration of its history. We combined a broad review of contemporary legislation and cases across a wide range of areas of law with a series of three detailed case studies: (1) the Church of Scotland, (2) marriage and (3) education.

The starting point for our research was legislation which was traced through Westlaw; an extensive legal database. Beginning with current legislation, we worked backwards through a series of reforms. Where appropriate, we sought to uncover how the legislation has been applied and interpreted by the courts in reported cases. Again these were tracked through Westlaw, supplemented by other legal databases, legislation and case reports where needed. Wider reading was also undertaken particularly in the context of the three studies in Part 2 of the Report.

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<sup>7</sup> Francis Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen, Aberdeen University Press, 1980), p. 147.

This report is intended to set out the current legal landscape and therefore it sets out considerable material quoted from statute and other primary sources. There is an overview of debates and of wider literature and there is some commentary from the authors, particularly in areas where the law is uncertain or untested, but, by and large, this report is intended as a resource to be used as a starting point for future development.

### **1.5 The structure of this report**

The report is divided into three parts. The first part sets out the context; explaining the background to the study. It explains the nature of Scots law with a view to identifying the various ways in which religion might influence law or be regulated by it. It also situates the legal research within a historical context with a view to highlighting the changing position between law and religion which we might expect to find.

The second part consists of three detailed case studies which focus on the law relating to the Church of Scotland, marriage and education.. To some extent this research consisted of an exploration: an investigation to see if and how religion features in various aspects of contemporary Scots law. In these three areas, however, we already knew that there was an obvious interplay between religion and law. We also knew that these were areas of particular interest to HSS and so our aim here was to explore the relationship between law and religion in much more detail. In part 2, therefore, we trace in some detail the development of the law in each of the three areas, identifying historical origins of the law, highlighting key points of reform and seeking to relate them to the current legal provisions.

In the third part of the report the intention is to provide a much more general and consequently superficial audit of a wide range of areas of law. The focus is predominantly on areas of law which have a specific Scottish context and we have looked less at areas where the law operates in broadly similar terms across the UK. Here it was our aim to identify provisions which in some way recognize, regulate or protect religion, religious belief, religious organisations etc. Unlike in Part 2, where we present in-depth studies, the findings in Part 3 are intended as a starting point.

They set out the law as it currently exists and highlight issues which may merit further exploration.



## **Part II**

### **Three Case Studies**

**In this Part, we examine the three areas of Scots law to which religion has been most linked historically – those relating to the Church of Scotland, Marriage and Education.**

# **Chapter 2**

## **The Church of Scotland**

### Chapter 2: The Church of Scotland

- 2.1 How do we identify an Established Church in Scotland?
  - 2.1.1 The nature of establishment
  - 2.1.2 The peculiar case of Scotland
- 2.2 The establishment legacy from sixteenth and seventeenth-century Scotland
- 2.3 Opinions on the existence of the Established Church of Scotland
  - 2.3.1 Before the 1920s
  - 2.3.2 The 1921 Declaratory Act
  - 2.3.3 Other modern facets of establishment
  - 2.3.4 Complexity of Church of Scotland status
- 2.4 Historical Statutes and the Church of Scotland: The Place of Scottish Protestantism in the constituting documents of the United Kingdom of Great Britain
- 2.5 Repeal and desuetude (or disuse) of historical Scottish Acts
  - 2.5.1 Desuetude
  - 2.5.2 Oaths
  - 2.5.3 Repeal of aspects of the Union Agreement
  - 2.5.4 The status of Historical Scottish Acts
- 2.6 Presbyterian re-union and the status of the present-day Church of Scotland
  - 2.6.1 Property of the Church of Scotland
  - 2.6.2 Royal Recognition of the present day Church of Scotland
  - 2.6.3 Historical legislation
  - 2.6.4 Church government
  - 2.6.5 Church courts
  - 2.6.6 The Church of Scotland and the four ancient Scottish universities
  - 2.6.7 The Church of Scotland Scottish state-funded schools
  - 2.6.8 The Church of Scotland and Scottish prisons

2.6.9 The Church of Scotland and the solemnisation of Regular  
Marriage

2.7 Conclusions

**2.1 How do we identify an Established Church in Scotland?**

The status of the Church of Scotland has been something of a bone of contention since at least the 1920s, and, in various indirect guises, since the Union settlement of 1707. The reason is that, unlike most other nations in Europe, the exact linkage of the Church to the state has been, and remains, very far from clear and indisputable in Scotland. It has been suggested that the issue of establishment in Scotland is less controversial than in England because the establishment status is less visible north of the border.<sup>8</sup> Nonetheless, there remains the central issue: is the Church of Scotland an “Established” church?

In this chapter, we look firstly at the possible conditions of church establishment, and then at the arguments of various scholars concerning it. Then, the chapter proceeds to look in detail at the trail of legislation and the survival of rights and privileges of the Kirk in the present day.

**2.1.1 The nature of establishment**

Many European nations have, or have had, established churches. The nature of the link between church and state is or has been identified usually by one of the following:

- (a) A constitutional statement or code that one church holds a special position in regard to the state

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<sup>8</sup> R.M. Morris, 'Introduction', in R.M. Morris (ed.), *Church and State in 21st Century Britain: The Future of Church Establishment* (Basingstoke, Palgrave Macmillan, 2009), p. 2.

- (b) Sovereignty of the head of state, national legislature or government over control of the church, demonstrated in acts which control its management, powers and/or some or all of its official appointments
- (c) Ecclesiastical representation by right in the national legislature in recognition of the church-state link
- (d) The people's payment of church taxes for its maintenance, or the state's subvention of monies for that purpose
- (e) The people's compulsory membership, or submission to the authority, of the Church

In most nations, one or more of the above have pertained in those European nations which have, or have had, established churches.<sup>9</sup> There may be additional characteristics though not conditions of establishment. Near universal popular membership of a church, as in the case of the Church of Sweden, is one; but when that Church ceased to be the established church of the country on 1 January 2000, the large-scale membership persisted – thereby indicating it was not a character peculiar to establishment.<sup>10</sup> The connections have been usually founded on a trail of legislation which identifies the following: a church (a denomination) by name, the nature of the links between the church and the state, the nature of the obligations upon the people towards the church, and the nature of the obligations owed by the church to the people. This has also created the singular church as a legal entity owning property, most often a very considerable amount of property, comprising churches, manses, other buildings, burial grounds, and other tracts of land. In some nations, like Ireland, the state-church connection between 1937 and the 1973 was laid down as a clause in a national constitution,<sup>11</sup> and in many countries there are or have been church taxes

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<sup>9</sup> For a guide to models of state churches, see Edward J Eberle, *Church and State in Western Society: Established Church, Cooperation and Separation* (Farnham, Ashgate, 2011).

<sup>10</sup> From 1686 to 1860, Swedish citizens were compelled to belong to the Church. From 1860-1951, a citizen had to belong to a church. Even when they could leave all churches after 1951, the unaffiliated had to pay a 'dissenters' tax'. Frank Cranmer, 'The Church of Sweden and the unravelling of establishment', *Ecclesiastical Law Journal* vol. 5 (2000), pp. 417-30 at pp. 417, 419, 421.

<sup>11</sup> Article 44.1 of the 1937 Constitution acknowledged the 'special position' of the Catholic Church in Ireland; this was removed in 1973. However, this did little to change the strong influence the Church had acquired in various realms of the state. Ireland is also distinctive, possibly unique, in modern times in that it has had two established churches: the (protestant) Church of Ireland (which in 1800 was united with the Church of England, and remained in that status until 1871, followed by the Roman Catholic Church 1937-1973).

owed by the people to the church (either directly or indirectly through lay patrons who have had legal ownership of parts of the church's fabric or management), to which there may have been added or substituted state financial subventions. In Protestant nations, the head of state may be ascribed in law a special status in the church (as in the Church of England, of which the monarch is "the Supreme Governor"). Likewise, and this is an important point, where there used to be an established church, there is customarily an identifiable legislative process which caused disestablishment; this is evident in the disestablishment of the Church of Ireland by the Irish Church Act of 1869, and the Church of England in Wales and Monmouthshire by the Welsh Church Act 1914 (which took effect in 1919-20, creating the Church in Wales).

### **2.1.2 The peculiar case of Scotland**

In regard to Scotland, there is a peculiar difficulty in identifying the way in which a single denomination has held the status of the established church. This difficulty arises, firstly, because all of the legislation relating to what we now refer to as the Church of Scotland did not, until after the Union of 1707, use that title. As far as we can ascertain, the title "Church of Scotland" was not used prior to the Union. As a result, there is a problem defining what precisely those working on the Union Agreement in 1707 thought was established by law. It is technically and ecclesiastically a serious problem: the Scottish Episcopal Church in effect claims to be the successor of the pre-Glorious Revolution Church, while the Free Church of Scotland claims to be the true Presbyterian "Church of Scotland". The Church of Scotland itself may be aware of the ambiguity of its own place in relation to the historical Protestant Church in Scotland, as in the Articles Declaratory of the 1920s where it had to firmly insist that it was "in historical continuity with the Church of Scotland which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union of 1707". So in a way what we are dealing with is that the present day Church of Scotland as we know it claims to be heir to the Reformation era Church, the Reformed Church as it was in 1592, and the Church as it was in 1707, and that claim appears to be accepted by the British state, or at least countenanced by the monarchy. So, things are not at all straightforward. As a result, much legislation before, and some after, the Union

referred not to a church but to “religion”, and to “Protestant” or “Presbyterian”, and to “Church Government”, though there are references to “laws establishing the Protestant religion”. This may or may not be a significant point, to which we return below. The Confession of Faith Act 1690 had other phrases, such as “do hereby revive, ratify and perpetually confirm all laws, statutes and acts of parliament made... for the maintenance and preservation of the true reformed Protestant religion and for the true church of Christ within this kingdom”; “the Protestant religion and presbyterian government now established”; and “that all the said presbyterian ministers have and shall have right to the maintenance, rights and other privileges by law provided to the ministers of Christ's church within this kingdom”. In this way, coded phrases of the period identifying Presbyterian church government were not perpetual monikers of a single Church of Scotland. More clear-cut references in the Act of Security 1706 to “the church of this kingdom, as now by law established”, and in the Union with England Act 1707, to the “Church of this Kingdom as now by Law established”,<sup>12</sup> is as close as we get to a clear statement of establishment status in the early eighteenth century.

The second difficulty is that there is no single Act of the pre-1707 Scottish parliament, the post 1707 Westminster or the post 1997 Scottish Parliament, which defines the nature of the link between church and state. Even the Act of Union dwells upon specifying the ecclesiastical regime for Scotland, and its freedom from interference by the forthcoming united legislature, and not the detailed nature of the link between a church and the state.

Third, there is no representation by right for officers of the Church of Scotland within the government or legislature of the United Kingdom or of that of Scotland. Fourth, there is now, in the 2010s, no privileged financial position for the Church of Scotland as compared to other denominations; the Church gets access to building and similar grants in competition with other churches and owners of historic property, but there is no tax or subvention given in acknowledgment of a special ecclesiastical status. Fifth, those privileges which the Church of Scotland now receives in law are, in nearly all

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<sup>12</sup> Union with England Act 1707 c.7, s. XXV.

cases, shared with all or some other denominations; this, then, indicates not an established church but a more widespread form of special place for religion in government.

There is another dimension to this question addressed in this chapter. This concerns the presumptions of establishment that are evident in ecclesiastical and state ritual, in royal appointments related to the church, and in principles embedded in not merely the post Reformation Church but in the medieval (Roman Catholic) church in Scotland.

The result is that there is considerable disagreement between authorities on whether the Church of Scotland is established. There is even a long-lasting disagreement on this issue amongst academics and office bearers within the Church of Scotland. For this reason, it is important for us to lay out what published opinions there are on this issue. These relate to the history of the Church and its changing status between the sixteenth and the twentieth centuries. Before that, however, the next section briefly outlines some of the key historical phases through which Scottish Protestantism has passed since the Reformation.

## **2.2 The establishment legacy from sixteenth and seventeenth-century Scotland**

Since the earliest years of the Scottish Reformation of 1560, the Protestant parish churches of Scotland have been governed in religious matters by systems of government at district, regional or national (Scottish) level. During the Reformation era, this comprised a hybrid system of kirk sessions, superintendents, commissioners, reforming bishops and general assembly. This developed into the mixed systems of Presbyterianism co-existing uncomfortably with the Episcopal government promoted with intermittent success by the British Stewarts during the seventeenth century. Following this, a Presbyterian hierarchy of church courts has governed the parish system in religious matters since the Glorious Revolution of 1689-90. Whilst these developments did not necessarily imply centralised control, they signalled a unifying

element in the institutional life of Scottish Protestantism and gave meaning to the term “Church of Scotland”.

If the period of Stewart Episcopalianism is briefly examined, then the idea of an established Church of Scotland during this phase seems coherent and difficult to dismiss. Of the three estates of the pre-Reformation Scots Parliament, the principle of a spiritual estate comprising of bishops and abbots survived the Reformation, despite undergoing considerable alterations. In respect of bishops, they retained their places in parliament after the Reformation. As bishops died, they were succeeded usually by clergy of the reformed church, occasionally by lay titulars, and those holders of bishoprics, whatever their ecclesiastical status, sat in parliament as part of the spiritual estate. By the time the office of bishop was first abolished in the established church, in 1638, the general assembly had lost its taste for parliamentary representation, and the clerical estate came to an end for the time being, to be restored again from 1661 to 1689.<sup>13</sup> In this, the seventeenth-century Church of Scotland enjoyed a degree of direct representation in the Scots Parliament, which representation betokens establishment. Parliamentary representation was not to be a feature of Presbyterianism following the Glorious Revolution, and in that sense a relative degree of disestablishment as to direct parliamentary representation may be said to have been a hallmark of later seventeenth-century Presbyterianism.

Stewart bishops in the Scottish Church were also appointed as to title and attendant revenues by the crown, although ordination was of course a religious matter, although one initially performed by Anglican bishops at Westminster.<sup>14</sup> Royal appointment is another clear hallmark of establishment, but again the final abolition of episcopacy in the Scottish Church during the Glorious Revolution witnessed an end of this hallmark in favour of “diocesan” level church government being administered solely by Presbyteries comprised of parochial ministers and elders; again, disestablishment at national level is suggested.

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<sup>13</sup> Gordon Donaldson, *Scotland: James V to James VII* (Edinburgh, Oliver & Boyd, 1971), p. 277.

<sup>14</sup> *Ibid.*, p. 206.

The meeting of general assemblies of the ministry of the Scottish Church was also from time to time subject to royal control. The General Assembly Act (1592) stated that the sovereign or their commissioner had the right to appoint when general assemblies were convened. During a period of increased royal control over the Scottish Church by James VI and Charles I, there were no general assemblies in Scotland from 1618 to 1638. The 1638 assembly abolished Episcopal government in the Scottish Church during the covenanting revolution, to be restored in 1661, only to be abolished again in 1689. Whilst royal control over general assemblies again suggests a form of establishment, the fully fledged Presbyterian polity of the mid seventeenth-century and of the era of the Glorious Revolution contained within it a direct rejection of royal control over religious matters in the church through the agency of episcopacy. This can be seen as a form of rejection of establishment in respect of the religious government of the faith, doctrines and liturgy of the Church of Scotland, with an attendant loss of the establishment privileges enjoyed by the Stewart episcopate.

When discussing what the “Established Church of Scotland” was from the era of the Glorious Revolution to the early twentieth century, a distinction between the parochial and supra-parochial Church of Scotland ought to be made. At the supra-parochial level, the hierarchy of Presbyterian church courts by which “the worship, discipline and government of the church of this kingdom, as now by law established” were regulated actually represented the assertion of the will of the Scottish Church over and against the Episcopalian establishment promoted by the House of Stewart, and as such represented a type of supra-parochial disestablishment. It is not at all clear that Presbyterian church government was “by law established”; rather it seems that this system of church government was long fought for by the presbyterian party within the Church of Scotland, often in direct conflict with the Episcopalian establishment, from which it appears that Presbyterianism was a kind of rejection of establishment in favour of dis-established self government, which self-government was recognised in law, and indemnified against alteration by the British Parliament in 1707.

A clear division of Church and State is suggested. At the parochial level, the Church of Scotland clearly continued to enjoy many features of establishment and preferential endowment, in what has been referred to as system of individual established “parish states”. In this, if the term established is to be used in relation to the pre-1929 Church of Scotland, then its meaning ought to be understood in relation to the parish system, and not to the supra-parochial system of presbytery (district), synod (region) and general assembly (nation) by which the worship and discipline of the Church was governed. As we see below, the Presbyterian character of the Church of Scotland was recognised in law, and was protected against state encroachment by the Treaty of Union. Yet, it represented the desire of Presbyterianism to be free from any form of establishment which involved state or royal interference in the religious life of the Church. Thus, paradoxically perhaps, Church establishment was conceived as being free from the state's establishment. The details of this arrangement are reviewed later in this chapter.

### **2.3 Opinions on the existence of the Established Church of Scotland.**

The central issue in disagreement in most of the literature concerning the status of the Church of Scotland is what precisely happened to it in the 1920s. Over that decade, the reunification of the vast bulk of Scottish Presbyterians was in prospect, taking the form of the union of the Church of Scotland with the United Free Church of Scotland (UFC), two denominations then of about equal size. The union was concluded in October 1929 with the UFC, minus a very small remnant of its clergy and members who “stayed out”,<sup>15</sup> being absorbed into the Church of Scotland. The UFC would only agree to the union if the established status of the Church of Scotland was ended. Negotiation over this issue was complex, as powerful forces within the Church of Scotland sought to retain as much as possible of the Kirk’s privileged position in the ranks of Scottish denominations. The result was Westminster legislation, still in force today, which left “wriggle” room for people on both sides to claim some measure of victory. This “wriggle room” is the cause of much of today’s uncertainty about the establishment status of the Church of Scotland in 2016.

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<sup>15</sup> What was initially called the United Free Church Continuing still exists today (now without the ‘Continuing’).

All authorities agree that prior to the 1920s, the status of the Church of Scotland is ambiguous; this ambiguity led one to retreat from attempting to define “establishment” in the case of this Church, and from trying to deduce any rules, concessions or principles of law pertaining to it.<sup>16</sup> But the attempt must be made. On the one hand, the legislation is clear that since the Scottish Reformation of 1560, the Scottish Parliament and the Treaty of Union legislation prioritises the removal of papal authority over Scotland and the establishment of the Protestant religion with a Presbyterian system of government. But at no juncture in all this legislation is the establishment defined, with the powers and relationship of church to state, or the relationship between church and people, specified clearly. As C R Munro, one-time professor of Constitutional Law at the University of Edinburgh, said in 1997, “in none of these instances is the term defined. In each the meaning is assumed, and the reference is to an existing state of affairs”.<sup>17</sup> In 2009, Bob Morris pointed to the paradox that claims to a special status for the Church of Scotland rest on the notion that the Church of Scotland Act 1921 was thought to guarantee a complete *separation* of that Church and the state (meaning that, unlike other denominations in Scotland, the Church's operation was immune to supervision by state or civil courts).<sup>18</sup> No legal authority provides a definition of establishment, and some English authorities assumed that the term only applied to the Church of England within the U.K.<sup>19</sup>

The idea that “establishment” was abandoned around the time of the Church of Scotland Act 1921, and associated legislation passed during the 1920s and 30s, is supported by the ecclesiastical historian J. H. S. Burleigh:

It was often asked while the Union [of 1929] was approaching whether the United Church would be an established or a disestablished Church, and the

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<sup>16</sup> Francis Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen, Aberdeen University Press, 1980), p. 148.

<sup>17</sup> C.R. Munro, ‘Does Scotland have an Established Church?’, *Ecclesiastical Law Journal* vol. 4 (1997), pp. 639-45, at p. 639.

<sup>18</sup> R.M. Morris, ‘Introduction’, p. 7.

<sup>19</sup> Munro, ‘Does Scotland have an Established Church?’ p. 644. *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 5, Constitutional Law, Section 6. ‘Church and State’ (Edinburgh, Butterworths Law, 1991).

only possible answer was that it would be neither, or perhaps that the question had little significance.<sup>20</sup>

An alternative view to Burleigh's understanding of the 1921 Church of Scotland Act has been recently been provided by another Principal of New College, David Fergusson:

those more voluntarist members of the United Free Church who happily assumed that something like disestablishment was taking place in the Church of Scotland Act [1921] were deceived. In a revealing letter, Lord Sands wrote to John White [one of the leading architects of church union in 1929] that "the privileged position of the national established church remains just where it was. It would be injudicious to tell them this and it is best to let them talk."<sup>21</sup>

While Ferguson maintains that "Scottish establishment" continues to be "signified by a series of provisions that have not historically been extended to other churches", he argues that the 1921 Acts provided a "negotiated freedom by which church and state may reconfigure their relative independence and relationship to one another".

Francis Lyall has also offered various conceptions of establishment in *Of Presbyters and Kings*. At the beginning of this work Lyall defined "establishment of religion" as "simply a state connection largely for ceremonial purposes, formally created by law".<sup>22</sup> At the end of the work he notes that "to talk of 'establishment' is to use a term which in other jurisdictions has connotations which we would not welcome." The most useful is expressed in the Report of the Group on Church, Community and State, Appendix One to the Report on *Anglican-Presbyterian Conversations*, 1966:

The fundamental essence of "establishment" consists simply in the recognition by the State of some particular religious body as the "State

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<sup>20</sup> J. H. S. Burleigh, *A Church History of Scotland* (Edinburgh, 1988), pp. 404-5.

<sup>21</sup> David Fergusson, *Church, State and Civil Society* (Cambridge, Cambridge University Press, 2004), p. 184.

<sup>22</sup> Lyall, *Of Presbyters and Kings* (1980), p. ix.

Church”, that is, as the body to which the State looks to act for it in matters of religion, and which it expects to consecrate great moments of national life by liturgical or official ministrations.

Lyall comments of this extract: “Establishment’ should mean no more. But even the existing ‘establishment’ may need review”.<sup>23</sup>

One final view on the problem of “establishment” has been offered by Frank Cramner, who has argued that the Church of Scotland “still bears some of the marks of establishment, even though it is a very different kind of establishment from that of the Church of England”. Cramner goes on to list five “marks” of establishment, namely (a) the Lord High Commissioner to the General Assembly; (b) the “special protection” given to the Church of Scotland “by the Treaty of Union”; (c) the Ecclesiastical Household in Scotland; (d) the special position of Church of Scotland ministers in respect of the Marriage (Scotland) Act 1977; (e) the freedom of Church of Scotland courts from judicial review.<sup>24</sup>

It should be noted that there were at one time more of these “marks of establishment” following 1929, such as the sole right of the parishes of the Church of Scotland to proclaim banns ahead of marriage solemnisations, and the disqualification of Church of Scotland ministers and Church of England clergy from sitting in the House of Commons,<sup>25</sup> but both these “marks” have perished with time. From this it would appear that “establishment” is itself a claim for the Church of Scotland which does not give rise to a fixed set of “marks”, but is rather a claim used to explain certain unique features of the Church of Scotland’s recognition in law and custom. As Francis Lyall has put it “sometimes the law is adapted to accord with a theory, and sometimes the theory is produced to justify the law”.<sup>26</sup>

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<sup>23</sup> Lyall, *Of Presbyters and Kings* (1980), p. 149.

<sup>24</sup> Frank Cramner, ‘Church State relations in the United Kingdom: a Westminster view’ in *Ecclesiastical Law Journal* (2001) 6(29), pp. 111-121, at pp. 116-117.

<sup>25</sup> R. King Murray, ‘The Constitutional Position of the Church of Scotland’ in *Public Law* (1958), pp. 155-162, at p. 161.

<sup>26</sup> Lyall, *Of Presbyters and Kings* (1980), p. 147.

### **2.3.1 Before the 1920s**

It seems as if the Presbyterian form of church government was initially legislated not by the Scottish parliament but by an Act of the General Assembly in 1592 that was merely reaffirmed by the Parliament in the century and more that followed.<sup>27</sup> It had to be variously reaffirmed because the British Stewarts kept trying to gain control over the Scottish Church by imposing Episcopal government on the Scottish Church. Thus in the early seventeenth-century James VI comprehensively revived Episcopal government in the Church. Episcopacy was then overthrown by the Presbyterian party from 1638. At the Restoration Charles II restored Episcopal government, which was then overthrown at the Glorious Revolution of 1688. So it seems to have been the case that the Scottish Church was divided as to its form of government for most of the seventeenth century, and the conflicts were bound up with the Presbyterians who sought independence from royal government, and the Episcopalians who were happy with a more Anglican settlement. So, each time Presbyterian government was reaffirmed, it amounted to a grudging acknowledgement by the monarchy that it would stop trying to dictate the form of church government the Scottish Church had, and leave it up to the Church to decide.

The Revolution Settlement of 1689-90 spoke about the same issues, but went no further in defining the nature of the church-state relationship, merely reaffirming Protestantism and Presbyterianism. Though the Confession of Faith Act 1690 is ambiguous, making no clear reference to “a church by law established”, some ecclesiastical authorities, including Burleigh, stated that the phrase originated in this period. In any event, it is the coded phrases which were then repeated more or less in the 1706-7 legislation surrounding the Union with England. Munro opines that all the 1560s-1590s legislation “may fairly be regarded as betokening establishment, for they dealt with relations between church and state in a way that recognised the special

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<sup>27</sup> Munro, 'Does Scotland have an Established Church?', p. 641.

status of the reformed kirk”,<sup>28</sup> whilst that of 1689-90 “may be regarded as the second foundation of the Church of Scotland and the *re-establishment* of the Church.” (italics original).<sup>29</sup> Likewise, Munro notes that the enactments at the time of the Union stipulated the status quo concerning “the Church of this kingdom as now by law established”, emphasising Protestantism and Presbyterianism as the form of worship and government.

If the phrase “established by law” is to have any meaning for Scotland, then it must be defined in relation to the 1560-1690 legislation, ambiguous as it may have been to the modern eye, much of which was incorporated into the Union Agreement. Certainly, we should acknowledge that the legislators, and the presbyterians in particular, were clear that the creation of an established Presbyterian polity to the Protestant church was what they intended. If this is granted, then we may talk about disestablishment from the Disruption of 1843 onwards (of which more in a moment), which makes present-day talk about the Church of Scotland as established appear rather thin, if not merely a residual legal and constitutional construct from the era of Establishment. However, it is not clear whether this established church was to be of a form that included centralised management and control in the manner of the Church of England. On the contrary, as we shall get to, there are grounds for seeing the establishment that they created as locating ecclesiastical management in a highly devolved manner in each of Scotland’s parishes.

A lot of attention has focused over the years upon the Patronage legislation 1712-1874 and the impact this had upon attitudes to establishment, if not on the established church itself. Patronage was the system whereby hereditary lay patrons in each of Scotland’s approximately 942 parishes had the right to appoint parish ministers. It was definitively reintroduced, after a period of confusion, in 1712 until its abolition in 1874; this led to the split of the Kirk into Moderates (who favoured it) and Evangelicals (who opposed it), most of whom left the Church either in individual parish disputes over patron-selected ministers, or at the Disruption of 18 May 1843, which led to the formation of the very large Free Church of Scotland. The Ten Years

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

Conflict over the issue in 1833-43, and the Disruption of 1843 that ended it, were to have profound consequences, creating a decision in the courts (concluded in the House of Lords) that the General Assembly of the Kirk could not abolish or disregard parliamentary legislation on patronage.

The patronage issue led a number of authorities to conclude that the court cases over the 1712-1874 period categorically showed that the Church of Scotland was subordinate to Parliament and the civil courts which enforced and adjudged upon Acts of Parliament.<sup>30</sup> But some have pointed to a drift after 1843 of Parliament, at the behest of the Church of Scotland, to clarify and essentially weaken any powers the Church might have over ordinary citizens. For in this area, as we shall see later in the chapter, the Church claimed into the nineteenth and even the twentieth century to have rights independent of civil courts to, for instance, summon ordinary citizens to appear as witnesses in ecclesiastical issues being heard in kirk sessions.<sup>31</sup> Munro, for one, argues that the Kirk was moving in the direction that the Free Church seceders of 1843 would have wanted, and that this was a sign of rapprochement underway in Scottish Presbyterianism.

Distinct in the literature, one of the present authors (Brown) has previously argued that the established state of the Church of Scotland did not exist as a single entity at any time after the Union of 1707. He argued that there was no single institution called the Church of Scotland which we could identify as characterised by owning property, having funds, employing people, or legally entitled to do anything within the Scottish legal system. On the contrary, Brown's argument was that what *was* established was the parish Church of Scotland in each of the 942 parishes, each with separate legal powers, taxation rights, employees and institutions like poor relief and parish schooling governed by Acts of both Scottish and Westminster parliaments, and by the creation of a complex set of individual conventions, often the outcome of legal cases between the minister, heritors (the landowners), the schoolmaster and the kirk session.

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<sup>30</sup> Harold Laski, *Studies in the Problem of Sovereignty* (orig. 1917, Abingdon, Oxon, Routledge, 2015), p. 113. Francis Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen, Aberdeen University Press, 1980), pp. 23-53.

<sup>31</sup> Andrew Herron, *Kirk by Divine Right: Church and State: Peaceful Co-existence* (Edinburgh, Saint Andrew Press, 1985), pp. 10, 13-14, 109.

The parish Churches also owned and managed the only legal graveyards in the country. The parish church was governed by two state-recognised courts, the Board of Heritors and the kirk session, each with powers and responsibilities, and each with a series of officials with state responsibilities – the kirk session clerk, the beadle, the minister, the school master and the clerk to the board of heritors. Brown argues that some of these powers were transferred – largely at the behest of the churches, and by their design – to state-managed institutions controlling the poor law in 1845 (the parochial boards, revised as parish councils in 1896) and controlling education in 1872 (the school boards, revised in 1919 as ad hoc education authorities, with powers transferred in 1929 to standard local authorities). In each of these state institutions there was effective ecclesiastical influence from various churches through appointment or popular election, lasting until 1929 when these functions were terminated and passed to other public bodies. In this way, Brown argues that there were 942 “established churches” in Scotland from at least the Union of 1707 until the 1920s. This case might be disputed, but essentially doesn't affect judgement on the legal position today.

### **2.3.2 The 1921 Declaratory Act**

This, then, leads the bulk of the attention of authorities to focus upon what happened in the 1920s. Most attention descends upon the Church of Scotland Act 1921, the so-called Declaratory Act, which is composed of a relatively short main Act and a series of attached or appended articles which were composed by the Church of Scotland.<sup>32</sup> Along with the Church of Scotland (Properties and Endowments) Act 1925, the Declaratory Act specifically signalled the freedom of the Church from the state's interference, but in the appendices there are statements of the Church's principles, including most importantly one in which it was declared of the Church of Scotland that:

"As a national Church representative of the Christian faith of the Scottish people it acknowledges its distinctive call and duty to bring the ordinances of

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<sup>32</sup> The process of composition of the Declaratory Act, which started in 1914, is dealt with in detail in Murray, *Freedom to Reform*, passim.

religion to the people in every parish of Scotland through a territorial ministry."

Interpretation of a sentence lies at the heart of most modern rhetoric and debate about the issues of establishment in Scotland. That interpretation varies significantly. To this, Munro responds by stating that: "Generally, it is fair to say that the Act may be regarded as a recognition by Parliament of the Church's constitution, rather than as a *conferment* of a constitution."<sup>33</sup> For Munro, the 1921 settlement was a "change of tone", but he goes on to argue that the church remained, and remains, established. He regards the 1921 Acts as "difficult to view" as a disestablishing measure. He says that the Act was "a recognition by the state of a concordat which allowed that the Church had its own sphere of jurisdiction" – in others an established sphere of jurisdiction, citing a 1995 court case which affirmed that the civil court had been effectively deprived by the 1921 Act of the right to interfere in the suspension of minister of the Church.<sup>34</sup> Munro concludes that "in a variety of ways the Church of Scotland has official recognition and a different status from other churches, and meets the requirements of his own working definition of 'establishment'." But because of the 1921 Act, he regards it as "an interesting example for a 'lighter' form of establishment". On the basis of this he quotes Sir Thomas Taylor that it is "a Church that is both established and free".<sup>35</sup> This sentiment has had a strong influence in parts of the Church of Scotland, though notably less so in the Highland and Hebrides elements of the kirk where Free Church anti-establishment sentiments introduced via the Union of 1929 are strongest.

A variation on this narrative has been developed by Marjory A MacLean. Following in the tradition of Andrew Herron, she has evolved a detailed historical account of the thinking on the established status of the Church of Scotland from the point of view of the Kirk's own theological and legal minds. Her account of the issue is focussed on the question of the Church's spiritual independence from the powers of the state. Much of this revolves around the concept of "the two kingdoms" – the idea, first

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<sup>33</sup> Munro, 'Does Scotland have an Established Church?', p. 644.

<sup>34</sup> Ibid. pp. 643-4, including fn 18.

<sup>35</sup> Ibid. p. 645.

developed by Luther, that there is a kingdom of the monarch (the state) and a kingdom of God (namely the church) – which she describes as changing in ecclesiastical thought from the sixteenth to the nineteenth centuries. Key to her analysis is the way in which the Declaratory Act of 1921 contained a “conceptual trick”, whereby the separate legal powers to the Church acquired at the Reformation of the 1560s, was not to be regarded as *a grant* from the civil state (the Scottish Parliament) – a grant, which if recognised theologically, would acknowledge that the Kirk was beholden to the state for its freedom, thereby undermining the concept – but was merely *protection* of them. By thus satisfying the establishment-minded Church of Scotland and the anti-establishment-minded United Free Church, the church union of 1929 could proceed with both parties satisfied, leaving the Kirk with its spiritual freedom intact and notionally untouchable by the state. MacLean concludes that though the Kirk cannot be regarded today as being established, it is still unique for its spiritual freedom.<sup>36</sup>

There are various problems with interpretations arising from the 1921 Act. First, it is not clear that the idea of a unique “spiritual freedom” for the Church of Scotland has been determined in law. A case could be argued that “spiritual freedom” might be regarded as a right which any church, religious association or individual holds under general human rights, or under rights of clubs and associations to determine their own rules and to operate internally by them. Second, leading Church of Scotland commentators like Andrew Herron and Marjory MacLean (each at separate times holding office as clerk and depute clerk to the General Assembly) have asserted that the 1921 Act legislated the Church as Scotland as “the National Church” (usually, as here, rendered with a capital letter for National and including the definite article).<sup>37</sup> This interpretation has been disputed by Douglas Murray and Callum Brown, who each pointed to the wording of the Act’s appendix as “a national Church” - note the capitalisation as well as the indefinite article - and argued that this clearly signalled that the word “national” indicated a geographical mission of the church, not a

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<sup>36</sup> Marjory A MacLean, *The Crown Right of the Redeemer: The Spiritual Freedom of the Church of Scotland* (Edinburgh, Saint Andrew Press, 2009), esp. pp. 109-10, 124-5.

<sup>37</sup>, Marjory A. MacLean, "Church and State in Scotland: The Articles Declaratory", *Theology in Scotland* vol. xvi (2009), pp. 5-14 at p. 1. Herron, *Kirk by Divine Right*, p. 109.

constitutional status.<sup>38</sup> Moreover, from the manner and wording of Article III as a whole from which the phrase “a national Church” comes, it seems difficult to contend that this was intended to be a statement of establishment either by the Church or by Parliament.<sup>39</sup> Third, as MacLean notes, the Church itself has the right to amend the Articles, demonstrating that they are not an enactment by Parliament so much as “the constitution of the Church of Scotland in matters spiritual”.<sup>40</sup> Certainly, much legal opinion between 1921 and the present, as quoted by Morris, shows that many commentators thought “establishment” had been effectively removed in word and in law by the Act.<sup>41</sup> Fourth, and most importantly perhaps, the interpretation of the 1921 Act has been clarified by recent legal judgement in the Percy / Douglas case discussed below at Chapter 2.6.5. and by MacLean.<sup>42</sup>

### 2.3.3 Other modern facets of establishment

Whilst most attention has fallen upon the 1921 Act, Callum Brown has previously drawn attention to the oft-forgotten other pieces of legislation of 1925 and 1933, together with reform of local government that occurred in 1929.<sup>43</sup> Brown points to how this group of legislation ended “the local parish state”, or the 942 established churches as he called them. They collectively abolished Boards of Heritors (the state-enacted committees of landowners in each parish which previously managed church taxation, and provision of the church, manse, glebe and parish school), enacted the dissolving of church taxes (principally the teinds), abolished *ad hoc* education authorities and parish councils (upon which kirk and other church clergy had been significant members since the middle decades of the nineteenth century), and

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<sup>38</sup> Douglas Murray, *Freedom to Reform: The 'Articles Declaratory' of the Church of Scotland 1921* (Edinburgh, T&T Clarke, 1993), p. 4; Callum G. Brown, ‘The Myth of the Established Church’, in James Kirk (ed.), *The Scottish Churches and the Union Parliament, 1707-1999* (Edinburgh, Scottish Church History Society, 2001), 48-74 at p. 71

<sup>39</sup> Article III. From the wording of this Article as a whole, it seems difficult to contend that this was intended to be a statement of establishment either by the Church or Parliament.

<sup>40</sup> *Ibid.*, p. 6fn4. R.M. Morris, “Establishment in Scotland”, in Morris (ed.), *Church and State*, p. 81.

<sup>41</sup> *Ibid.*, pp. 83-7.

<sup>42</sup> See MacLean, *Crown Rights*, pp. 179-214.

<sup>43</sup> Brown, *Myth*, p. 71.

nationalised Church of Scotland graveyards, tendering them to the ownership of Scottish local authorities.

So, in Brown's argument, the Church of Scotland of today was only formally constituted in the 1920s; pre-Union legislation was concerned with privileging Protestantism over Catholicism. Yet, Brown has been the first to admit of the power of “the myth of the established church” in the Scottish imagination since the Reformation, and notably within much of the Church of Scotland. The myth remains strong in certain branches of the Church, though by no means in all of them (notably in the Highland and Islands where the United Free Church element that re-joined the kirk in 1929 was, and remains, anti-establishment in desire and interpretation of the Church's status), and in parts of the Scottish nationalist intellectual movement.<sup>44</sup> However, the mythology is by no means universal in the nationalist community. Tom Nairn famously saw the Church as an obstacle to independence, claiming that “Scotland will not be free until the last Kirk minister is strangled with the last copy of the Sunday Post”.<sup>45</sup>

On a different dimension, ritual has been part of the way by which establishment status has been ascribed to the Church of Scotland. This includes the rituals surrounding the annual general assembly in May (at which the monarch or his/her representative Lord High Commissioner is in attendance), the appointment of royal chaplains in Scotland (who appear in the order of precedence), and at the opening of local authority sessions (traditionally opened by a “kirking of the council” in a local parish church, but from the mid twentieth century often going on ecumenical rotation). There is also attention drawn by some to the role of the Church of Scotland in the ritual of coronation; but, as Bob Morris has observed, at the 1953 coronation of Elizabeth II (and I of Scotland) “a small, virtually undetectable, role was found for the Moderator of the General Assembly of the Church of Scotland (and a role so tiny that it created intense controversy with the Kirk at the time)”.<sup>46</sup> Still, the mythology is

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<sup>44</sup> William Storrar, *Scottish Identity: A Christian Vision* (London, Hansel Press, 1990); Lindsay Paterson, *The Autonomy of Modern Scotland* (Edinburgh, Edinburgh University Press, 1994).

<sup>45</sup> Tom Nairn, quoted in *The Observer* 3 October 1999.

<sup>46</sup> Bob Morris, ‘The future of church establishment’, *Ecclesiastical Law Journal* vol. 1 (2010), pp. 214-18 at p. 216.

updated in such events, appearing to mollify regional ecclesiastical allegiances, and to recognise to some extent the multi-faith character of Britain. Yet, it is difficult to see such pageant as conferring an “establishment” status to the Church of Scotland as it does to the Church of England, whose role in the Coronation is based on a legislative and constitutional history of much stronger pedigree. Notwithstanding, the Church of Scotland does have a series of connections to the civil state embedded in law. But, as we shall see in the remainder of this chapter, these partly are derived from connections that might rightly be regarded as having lapsed through disuse over a very long period, or, in some cases, by the enactment of very recent provisions conferring privileges or status not upon the Church of Scotland alone but upon other denominations too.

#### **2.3.4 Complexity of Church of Scotland status**

The view that the Church of Scotland remains established is vexed by problems of defining what “established” meant or means in a Scottish context, so much so that it has been recently referred to as a matter of taste.<sup>47</sup> If this historically coherent Church, which is purported to have existed since its reformation in 1560, is *a priori* held to be perpetually established by virtue of the Union Agreement of 1707, then howsoever the legal position of the Church of Scotland deteriorates, is altered or reformed, the new legal position itself defines what establishment means in Scotland. If the assertion found in the Union agreement that there was a “Church in this kingdom by law established” is accepted, and if the “national” Church of Scotland is held to be its heir, a further problem is encountered in that it is difficult to maintain that the principle of establishment is fixed, and that the principle dictates various statutory provisions. Rather, “establishment” appears at best to be a shorthand way of referring to a collection of legal provisions which change over time. The problem with this view is that the principle of establishment is mutable, and has come to mean whatever the legal position of the “national” Church of Scotland is. The obvious problem from this perspective is that the principle of establishment is not objective, and may either change beyond all recognition, or become almost meaningless to the point that it is rendered obsolete, which, in some views, it has already become.

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<sup>47</sup> Matjory A. MacLean, ‘Church and State in Scotland: The Articles Declaratory’ in *Theology in Scotland*, XVI.1 (2009), 5-14, at 6.

The result is a highly complex series of powers and provisions relating to the Church of Scotland and its status within the state. Indeed, in the sections that follow, the chapter proceeds to examine other provisions in detail. Its status as the Established Church of Scotland is now rarely asserted by anyone, in the Church or outside, and its pre-eminent position as the leading church is both considerably weakened and, in ecumenical times, rarely asserted either. This in large part reflects the fact that, though the Church remains the largest denomination in Scotland, it is only marginally so, accounting in 2003 for 40 per cent of churchgoers (compared to 35 per cent for the Catholic Church),<sup>48</sup> and, at the 2011 Census, only 32.44 per cent of those Scots who identify themselves with it (overtaken by those of “no religion” at 36.65 per cent of adults).<sup>49</sup> The Church's legal position today is most often attributed to the 1921 Act, but, equally, the failings of that Act have given rise to calls for altering its provisions in a direction that can only be described as enhancing the Church status as a voluntary organisation. As Marjory MacLean has observed, “The written constitution of the Church of Scotland is gradually desiccating: its usefulness is waning and the power of its terms is gradually becoming risible.”<sup>50</sup>

Notwithstanding issues to do with the established status of the Church of Scotland, other provisions associated with the Church exist in law and the legal heritage that still have impact today. To these this Report now turns.

## **2.4 Historical Statutes and the Church of Scotland: The Place of Scottish Protestantism in the constituting documents of the United Kingdom of Great Britain**

The constituting documents of the United Kingdom of Great Britain, being the Union of the Kingdoms of England and Scotland created by Acts of the [Scottish](#) and [English](#)

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<sup>48</sup> Peter Brierley, *Turning the Tide: The Challenge Ahead: Report of the 2002 Scottish Church Census* (London, Christian Research, 2003), p. 16.

<sup>49</sup> Census 2011, Table KS209SCb.

<sup>50</sup> MacLean, *Crown Rights*, p. 214.

Parliaments in 1707, contained various provisions in respect of Scottish Protestantism, Presbyterianism and “the worship, discipline and government of the church of this kingdom, as now by law established”. These provisions in effect embedded a series of statutes enacted by the pre-Union Scots Parliament between 1560 to 1690 in favour of Scottish Protestantism into the Union Agreement, and formed the substantial basis of the legal understanding that the Church of Scotland existed as a unitary institution and was the “Established” Church in Scotland. It is argued below that this term nevertheless needs to be treated with considerable care: “establishment” is not a term of art in Scots law, and historical analysis of the constitution of the old “Established” Church of Scotland suggests that it was in fact a hybrid of disestablished Presbyterian government and established “parish states”. This historical “Established” Church of Scotland can be considered to have existed in law between 1707 and the 1920s, at which point, following a series of church divisions within Scottish Presbyterianism during the eighteenth and nineteenth centuries, the “Established” Church of Scotland adopted a formal constitution which purposefully avoided any mention of the term “Established”. This was intentionally done, as in 1921 the “Established” Church of Scotland desired to unite with the United Free Church, which rejected the principles of establishment and endowment of the Church by the State. Following the disestablishment of the financial fabric of the “parish states” of the “Established” Church of Scotland from 1925, the two Churches united in 1929, thereby forming the present-day Church of Scotland. The 1921 constitution adopted by the old “Established” Church of Scotland remains the official constitution of the present-day Church of Scotland. This constitution asserts the claim that the present-day Church of Scotland is:

a national Church representative of the Christian Faith of the Scottish people...in historical continuity with the Church of Scotland which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union of 1707.

This section of the chapter therefore seeks to understand what statutory provisions are thereby claimed to apply to the Church of Scotland formed in 1929 before considering to what extent such statutory provisions are still held to be in force, and seeking to

ascertain the practical consequences of such provisions for the present-day Church of Scotland. This involves an unusual level of historical analysis for a report concerning the place of religion in law in Scotland today, but such an approach is necessitated by the historical dominance of Protestantism in Scotland since the 1560s.

At the time of the Anglo-Scottish Union of 1707, a “fundamental and essential Condition of any Treaty of Union” with England from the Scottish side was the incorporation of the **Protestant Religion and Presbyterian Church Act (1706)**, also called the **Act of Security (1706)**, into the Acts of the Scottish and English Parliaments by which the Treaty of Union was ratified. This was with a view to preventing the predominantly English Members of the British Parliament from undermining the Presbyterian settlement in Scotland. As such, when the pre-Union Scottish Parliament passed the **Act ratifying and approving the Treaty of Union of the two kingdoms of Scotland and England (1707)** - also known as the **Union with England Act (1707)** - it contained the following provision:

And that the said estates of parliament have agreed to and approve of the said articles of union, with some additions and explanations as is contained in the articles hereafter inserted. And likewise, her majesty, with advice and consent of the estates of parliament, resolving to establish the Protestant religion and presbyterian church government within this kingdom, has passed in this session of parliament an act entitled, act for securing of the Protestant religion and presbyterian church government, which, by the tenor thereof, is appointed to be inserted in any act ratifying the treaty and expressly declared to be a fundamental and essential condition of the said treaty or union in all time coming.<sup>51</sup>

The full text of the **Union with England Act (1707)** together with **Act of Security (1706)** may be viewed online [here](#).<sup>52</sup> The main point to note here is that the **Act of**

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<sup>51</sup> *RPS*, 1706/10/257 ; cf <http://www.legislation.gov.uk/aosp/1707/7/introduction>. The **Act of Security (1706)** follows the last article of the Treaty of Union (that is, article 25).

<sup>52</sup>

[http://www.rps.ac.uk/search.php?action=fetch\\_jump&filename=anne\\_ms&jump=anne\\_t1706\\_10\\_257\\_d6\\_trans&type=ms&fragment=m1706\\_10\\_257\\_d6\\_ms](http://www.rps.ac.uk/search.php?action=fetch_jump&filename=anne_ms&jump=anne_t1706_10_257_d6_trans&type=ms&fragment=m1706_10_257_d6_ms)

**Security (1706)** itself ratified an earlier Act of the pre-Union Scots Parliament, namely the “...fifth act of the first parliament of King William and Queen Mary entituled, act ratifieing the Confession of Faith and settling presbyterian church government...”. This was the **Act Ratifying the Confession of Faith and Settling Presbyterian Church Government (1690)**, the full text of which may be viewed [here](#).<sup>53</sup>

This 1690 Act ratified and accepted the Westminster Confession of Faith as a true confession of the Protestant faith in Scotland, and, moreover, “revived, renewed and confirmed” the “114th act, James VI, parliament 12th in the year 1592, entitled, ratification of the liberty of the true kirk etc.” This 1592 Act was the **Act for Abolishing of the Acts Contrary to the True Religion (1592)** – also known as the **General Assembly Act (1592)** – the full text of which may be viewed [here](#).<sup>54</sup>

The **General Assembly Act 1592** in turn ratified and approved:

all liberties, privileges, immunities and fredomes quhatsumevir gevin and grantit be his hienes [James VI], his regentis in his name, or ony of his predicessouris, to the trew and hally kirk presentlie establishit within this realme, and declared in the first act of his highness’s parliament on 20 October 1579, and all and whatsoever acts of parliament and statutes made of before by his highness and his regents regarding the liberty and freedom of the said kirk, and specially the first act of parliament held at Edinburgh, 24 October 1581, with the whole particular acts therein mentioned, which shall be as sufficient as if the same were herein expressed, and all other acts of parliament made since in favour of the true kirk.

The “first act of his highness’s parliament on 20 October 1579,” was the **Church Act**

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[http://www.rps.ac.uk/search.php?action=fetch\\_jump&filename=william\\_and\\_mary\\_ms&jump=william\\_and\\_mary\\_t1690\\_4\\_43\\_d7\\_trans&type=ms&fragment=m1690\\_4\\_43\\_d7\\_ms](http://www.rps.ac.uk/search.php?action=fetch_jump&filename=william_and_mary_ms&jump=william_and_mary_t1690_4_43_d7_trans&type=ms&fragment=m1690_4_43_d7_ms)

<sup>54</sup>

[http://www.rps.ac.uk/search.php?action=fetch\\_jump&filename=jamesvi\\_ms&jump=jamesvi\\_t1592\\_4\\_26\\_d7\\_trans&type=ms&fragment=m1592\\_4\\_26\\_d7\\_ms](http://www.rps.ac.uk/search.php?action=fetch_jump&filename=jamesvi_ms&jump=jamesvi_t1592_4_26_d7_trans&type=ms&fragment=m1592_4_26_d7_ms)

(1579), the full text of which may be viewed [here](#).<sup>55</sup>

The “first act of parliament held at Edinburgh, 24 October 1581,” was the **Church Act (1581)**, the full text of which may be viewed [here](#).<sup>56</sup>

The **Church Act (1579)** in turn ratified and approved:

all and whatsoever acts and statutes made of before by his highness, with advice [of his] regents in his own reign or his predecessors, concerning the freedom and liberty of the true kirk of God and religion now presently professed within this realm, and especially ratifies and approves the sixth act of his highness’s parliament held in the first year of his highness’s reign, entitled “Concerning the true and holy kirk and of those that are declared not to be of the same,”

namely the **Church Act (1567)**, the full text of which may be viewed [here](#).<sup>57</sup>

The **Church Act (1581)** in turn ratified a great many earlier Acts of the Scottish Parliament passed in favour of the Protestant Religion in Scotland, which are cited in the following text:

Our sovereign lord, with advice of his three estates and whole body of this present parliament, has ratified and approved and, by the tenor hereof, ratifies and approves all and whatsoever acts of parliament, statutes and constitutions passed and made of before, agreeable to God’s word, for maintenance of the liberty of the true kirk of God and religion now presently professed within this realm and purity thereof, and specially the act made in the reign of [*Mary*], the queen, his dearest mother, in the parliament held at Edinburgh on 19 April

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[http://www.rps.ac.uk/search.php?action=fetch\\_jump&filename=jamesvi\\_ms&jump=jamesvi\\_t1579\\_10\\_21\\_d7\\_trans&type=ms&fragment=m1579\\_10\\_21\\_d7\\_ms](http://www.rps.ac.uk/search.php?action=fetch_jump&filename=jamesvi_ms&jump=jamesvi_t1579_10_21_d7_trans&type=ms&fragment=m1579_10_21_d7_ms)

<sup>56</sup>

[http://www.rps.ac.uk/search.php?action=fetch\\_jump&filename=jamesvi\\_ms&jump=jamesvi\\_t1581\\_10\\_20\\_d6\\_trans&type=ms&fragment=m1581\\_10\\_20\\_d6\\_ms](http://www.rps.ac.uk/search.php?action=fetch_jump&filename=jamesvi_ms&jump=jamesvi_t1581_10_20_d6_trans&type=ms&fragment=m1581_10_20_d6_ms)

<sup>57</sup> <http://www.rps.ac.uk/trans/A1567/12/5>

1567 concerning the quashing, annulling and abrogating of all laws, acts and constitutions, canon, civil and municipal, with other constitutions contrary to the religion now professed within this realm,<sup>58</sup> and the acts likewise after following made in diverse parliaments held since his highness's coronation, namely, the acts concerning the abolishing of the Pope and his usurped authority;<sup>59</sup> concerning the annulling of the acts of parliament made against God's word and maintenance of idolatry in any times past;<sup>60</sup> the Confession of the Faith professed by the Protestants of Scotland;<sup>61</sup> concerning the mass abolished and punishing of all that hears or says the same;<sup>62</sup> concerning the true and holy kirk and of them that are declared not to be of the same;<sup>63</sup> concerning the admission of them that shall be presented to benefices, having cure of ministry;<sup>64</sup> concerning the king's oath to be given at his coronation;<sup>65</sup> concerning them that should bear public office hereafter;<sup>66</sup> concerning thirds of benefices granted in the month of December 1561, for sustaining of the ministry and other affairs of the prince;<sup>67</sup> concerning them that shall be teachers of the youth in schools;<sup>68</sup> concerning the jurisdiction of the kirk;<sup>69</sup> concerning the disposition of provostries, prebendaries and chaplainries to bursaries to be founded in colleges;<sup>70</sup> concerning the filthy vice of fornication and punishment of the same;<sup>71</sup> concerning them that commit incest;<sup>72</sup> concerning lawful marriage of the own blood in degrees not forbidden by

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<sup>58</sup> Act Concerning Religion (1567) (*RPS*, [1567/4/6](#)).

<sup>59</sup> Papal Jurisdiction Act (1567) (*RPS*, [A1567/12/1](#)).

<sup>60</sup> Repeal of Acts in Support of Papacy Act (1567) (*RPS*, [A1567/12/2](#)).

<sup>61</sup> The Confession of Faith Act (1567) (*RPS*, [A1567/12/3](#)).

<sup>62</sup> Abolition of Mass Act (1567) (*RPS*, [A1567/12/4](#)).

<sup>63</sup> Church Act (1567) (*RPS*, [A1567/12/5](#)).

<sup>64</sup> Thirds of Benefices Act (1567) (*RPS*, [A1567/12/6](#)).

<sup>65</sup> Coronation Oath Act (1567) (*RPS*, [A1567/12/7](#)).

<sup>66</sup> Holders of Public Office Act (1567) (*RPS*, [A1567/12/8](#)).

<sup>67</sup> Ministers Act (1567) (*RPS*, [A1567/12/9](#)).

<sup>68</sup> School Teachers Act (1567) (*RPS*, [A1567/12/10](#)).

<sup>69</sup> Church Jurisdiction Act (1567) (*RPS*, [A1567/12/11](#)).

<sup>70</sup> College Bursaries Act (1567) (*RPS*, [A1567/12/12](#)).

<sup>71</sup> Fornication Act (1567) (*RPS*, [A1567/12/13](#)).

<sup>72</sup> Incest Act (1567) (*RPS*, [A1567/12/14](#)).

God's word;<sup>73</sup> ratification and approbation of the acts and statutes made of before concerning the freedom and liberty of the true kirk of God;<sup>74</sup> concerning the true and holy kirk, that the adversaries of Christ's evangel shall not enjoy the patrimony of the kirk;<sup>75</sup> concerning the disobedience which shall be received to our sovereign lord's mercy and pardon;<sup>76</sup> the explanation of the act made concerning manses and glebes;<sup>77</sup> concerning purchasing of the Pope's bulls or gifts of the queen, our sovereign lord's mother;<sup>78</sup> approbation of the act made concerning the disposition of benefices to the ministers of Christ's evangel;<sup>79</sup> concerning the reparation of parish kirks;<sup>80</sup> the ratification of the liberty of the true kirk of God and religion,<sup>81</sup> that the glebe of the ministers and readers shall be free of teinds;<sup>82</sup> concerning the true and holy kirk and of them that are declared not to be of the same;<sup>83</sup> concerning the jurisdiction of the kirk,<sup>84</sup> discharging of markets and labouring on Sundays and playing or drinking in time of sermon;<sup>85</sup> concerning the youth and others beyond sea suspected to have declined from the true religion;<sup>86</sup> that householders have bibles and psalm books;<sup>87</sup> for punishment of strong and idle beggars and relief of the poor and impotent;<sup>88</sup> and declares the said acts, and every one of them, and all other acts of parliament made in favour of the true religion since the said reformation, to have effect in all points after the form

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<sup>73</sup> Marriage Act (1567) (*RPS*, [A1567/12/15](#)).

<sup>74</sup> Church Act (1571) (*RPS*, [1571/8/3](#)).

<sup>75</sup> Church Property Act (1573) (*RPS*, [A1573/1/4](#))

<sup>76</sup> Pardon to Rebels Act (1573) (*RPS*, [A1573/1/5](#))

<sup>77</sup> Manses and Glebes Act (1573) (*RPS*, [A1573/1/6](#))

<sup>78</sup> Act anent Bulls Fraudulently Obtained (1573) (*RPS*, [A1573/1/10](#))

<sup>79</sup> Benefices Act (1573) (*RPS*, [A1573/1/11](#))

<sup>80</sup> Parish Church Act (1573) (*RPS*, [A1573/1/13](#))

<sup>81</sup> Church Act (1578) (*RPS*, [1578/7/3](#))

<sup>82</sup> Glebes Act (1578) (*RPS*, [1578/7/6](#))

<sup>83</sup> Church Act (1579) (*RPS*, [1579/10/21](#))

<sup>84</sup> Church Jurisdiction Act (1579) (*RPS*, [1579/10/22](#))

<sup>85</sup> Sundays Act (1579) (*RPS*, [1579/10/23](#))

<sup>86</sup> Converts to Papacy Act (1579) (*RPS*, [1579/10/24](#))

<sup>87</sup> Bibles Act (1579) (*RPS*, [1579/10/25](#))

<sup>88</sup> Beggars and Poor Act (1579) (*RPS*, [1579/10/27](#))

and tenor thereof.<sup>89</sup>

Of the Acts ratified by the **Church Act (1581)** it may be noted that:

- (i) the Papal Jurisdiction Act (1567) ratified the Papal Jurisdiction Act (1560);
- (ii) the Repeal of Acts in Support of Papacy Act (1567) ratified the Abolition of Idolatry Act (1560);
- (iii) the Confession of Faith Act (1567) ratified the Confession of Faith Act (1560);
- (iv) Abolition of Mass Act (1567) ratified the Abolition of Mass Act (1560).

From this it may be concluded that numerous statutes enacted by the pre-Union Scots Parliament in favour of the Protestant religion and the Church of Scotland, including all the extant Acts of the Reformation Parliament of August 1560, were indirectly incorporated into the **Union with England Act (1707)**, and as such formed part of the constituting documents of the United Kingdom of Great Britain.

Those historical Scottish Acts were:

- |   |                                     |
|---|-------------------------------------|
| 1. Confession of Faith Act (1560)                 | (RPS, <a href="#">A1560/8/3</a> )   |
| 2. Papal Jurisdiction Act (1560)                  | (RPS, <a href="#">A1560/8/4</a> )   |
| 3. Abolition of Idolatry Act (1560)               | (RPS, <a href="#">A1560/8/5</a> )   |
| 4. Abolition of Mass Act (1560)                   | (RPS, <a href="#">A1560/8/6</a> )   |
| 5. Act Concerning Religion (1567)                 | (RPS, <a href="#">1567/4/6</a> )    |
| 6. Papal Jurisdiction Act (1567)                  | (RPS, <a href="#">A1567/12/1</a> )  |
| 7. Repeal of Acts in Support of Papacy Act (1567) | (RPS, <a href="#">A1567/12/2</a> )  |
| 8. The Confession of Faith Act (1567)             | (RPS, <a href="#">A1567/12/3</a> )  |
| 9. Abolition of Mass Act (1567)                   | (RPS, <a href="#">A1567/12/4</a> )  |
| 10. Church Act (1567)                             | (RPS, <a href="#">A1567/12/5</a> ). |
| 11. Thirds of Benefices Act (1567)                | (RPS, <a href="#">A1567/12/6</a> ). |
| 12. Coronation Oath Act (1567)                    | (RPS, <a href="#">A1567/12/7</a> ). |
| 13. Holders of Public Office Act (1567)           | (RPS, <a href="#">A1567/12/8</a> ). |

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<sup>89</sup> RPS, [1581/10/20](#).

14. Ministers Act (1567)	(RPS, <a href="#">A1567/12/9</a> ).
15. School Teachers Act (1567)	(RPS, <a href="#">A1567/12/10</a> ).
16. Church Jurisdiction Act (1567)	(RPS, <a href="#">A1567/12/11</a> ).
17. College Bursaries Act (1567)	(RPS, <a href="#">A1567/12/12</a> ).
18. Fornication Act (1567)	(RPS, <a href="#">A1567/12/13</a> ).
19. Incest Act (1567)	(RPS, <a href="#">A1567/12/14</a> ).
20. Marriage Act (1567)	(RPS, <a href="#">A1567/12/15</a> ).
21. Church Act (1571)	(RPS, <a href="#">1571/8/3</a> ).
22. Church Property Act (1573)	(RPS, <a href="#">A1573/1/4</a> )
23. Pardon to Rebels Act (1573)	(RPS, <a href="#">A1573/1/5</a> )
24. Manses and Glebes Act (1573)	(RPS, <a href="#">A1573/1/6</a> )
25. Act anent Bulls Fraudulently Obtained (1573)	(RPS, <a href="#">A1573/1/10</a> )
26. Benefices Act (1573)	(RPS, <a href="#">A1573/1/11</a> )
27. Parish Church Act (1573)	(RPS, <a href="#">A1573/1/13</a> )
28. Church Act (1578)	(RPS, <a href="#">1578/7/3</a> )
29. Glebes Act (1578)	(RPS, <a href="#">1578/7/6</a> )
30. Church Act (1579)	(RPS, <a href="#">1579/10/21</a> )
31. Church Jurisdiction Act (1579)	(RPS, <a href="#">1579/10/22</a> )
32. Sundays Act (1579)	(RPS, <a href="#">1579/10/23</a> )
33. Converts to Papacy Act (1579)	(RPS, <a href="#">1579/10/24</a> )
34. Bibles Act (1579)	(RPS, <a href="#">1579/10/25</a> )
35. Beggars and Poor Act (1579)	(RPS, <a href="#">1579/10/27</a> )
36. Church Act (1581)	(RPS, <a href="#">1581/10/20</a> )
37. General Assembly Act (1592)	(RPS, <a href="#">1592/4/26</a> )
38. Act Ratifying the Confession of Faith and Settling Presbyterian Church Government (1690)	(RPS, <a href="#">1690/4/43</a> )
39. Act of Security (1706)	(RPS, <a href="#">1706/10/251</a> )

There were, of course, various other statutory provisions made in favour of Scottish Protestantism not expressly ratified by the **Act of Security (1706)**, such as the **Act for Settling the Quiet and Peace of the Church (1693)** – also called the **Ministers Act (1693)** – which enjoined the Scottish Privy Council and “all other magistrates, judges and officers of justice give all due assistance for making the sentences of the church

and judicatures thereof to be obeyed”.<sup>90</sup> And in addition Article II of the Treaty of Union itself limited the line of succession to the British Crown to the Protestant heirs of the body of Queen Anne, whom failing, the Protestant heirs of the body of Sophia, Electress of Hanover, thereby granting a general protection against Catholicism to the Protestant Reformed religion within the United Kingdom of Great Britain.

From the 39 statutes of the pre-Union Scottish Parliament incorporated into the Union Agreement, a reasonable understanding of what was meant by the “true Protestant religion” in Scotland “as established by the laws of this kingdom”<sup>91</sup> may be sketched at the time of the Union.

The Scots Confession of Faith and the Westminster Confession of Faith were acknowledged in law as a true statement of the Protestant religion in Scotland. Papal jurisdiction was abrogated, the Mass and other Catholic sacraments outlawed, and episcopal government within the Scottish Church abolished in favour of Presbyterianism.

By virtue of the Church Act (1567) “the reformed kirks of this realm” were declared “to be the only true and holy kirk of Jesus Christ within this realm”, and by the Coronation Oath Act (1567) the sovereign was obliged to swear to “maintain the true religion of Jesus Christ, [and] the preaching of his holy word and due and right administration of the sacraments now received and preached within this realm”. The Church Jurisdiction Act (1567), in reference to “the true kirk and immaculate spouse of Jesus Christ”, declared there to be:

no other face of kirk nor other face of religion than is presently, by the favour of God, established within this realm; and that there be no other jurisdiction ecclesiastical acknowledged within this realm other than that which is, and shall be, within the same kirk.

The Church Act (1579) declared:

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<sup>90</sup> *RPS*, [1693/4/89](#).

<sup>91</sup> This phrase being used in the **Act of Security (1706)**.

the ministers of the blessed evangel of Jesus Christ, whom God of his mercy has now raised up amongst us, or hereafter shall raise, agreeing with them that now live in doctrine and administration of the sacraments, and the people of this realm that professes Jesus Christ as he is now offered in his evangel, and do communicate with the holy sacraments as in the reformed kirks of this realm are publicly administered, according to the Confession of the Faith, to be the only true and holy kirk of Jesus Christ within this realm.

In respect of endowments, various of these statutes made provisions in respect of the medieval benefice system to provide ministers with benefices and to fund scholarships for candidates for the ministry in Scotland's universities. The Church Property Act (1573) made provision for the levying of a local tax for the repair and maintenance of parish churches.

By virtue of the Holders of Public Office Act (1567) only those persons who professed "the purity of religion and doctrine now presently established" were to be admitted to public office. The Act of Security (1706) ordained that all future sovereigns of Great Britain must:

swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion with the government, worship, discipline, right and privileges of this church as above established by the laws of this kingdom, in prosecution of the Claim of Right.

The [Claim of Right \(1689\)](#) was the Scottish equivalent of the English [Bill of Rights \(1688/9\)](#), whereby Roman Catholics were expressly disqualified from the line of succession to the Scottish and English, and, following the Union, British crowns. The application of this religious test to the line of succession had been confirmed by the English [Act of Settlement \(1700\)](#), which 1700 Act had been incorporated into Article II of the Treaty of Union.

By virtue of the School Teachers Act (1567), only those persons who had been tried

by the “superintendents or visitors of the kirk” were to be admitted to charges within Scotland’s schools and universities. The Act of Security (1706) went further, and ordained that all

professors, principals, regents, masters or others bearing office in any university, college or school within this kingdom...shall acknowledge and profess and shall subscribe to the foresaid Confession of Faith as the confession of their faith, and that they will practise and conform themselves to the worship presently in use in this church, and submit themselves to the government and discipline thereof...

By virtue of the Converts to Papacy Act (1579), students passing abroad to study had to be licenced so to proceed, and were to be examined as to their continued adherence “to the true and Christian religion preached and by law established within this realm” upon their return.

The Sundays Act (1579) imposed various Sabbatarian measures concerning Sunday trading, and provided for the punishment of those persons who wilfully failed to attend services in parish kirks on Sundays. The Bibles Act (1579) ordained that all persons within the kingdom enjoying a specified level of wealth were “to have a bible and psalm book in vulgar language in their houses for the better instruction of themselves and their families in the knowledge of God”.

This sketch of historical legislation concerning Scottish Protestantism and the Church, or indeed ‘kirks’, in Scotland following the Reformation provides a reasonable outline of the types of privileges enjoyed in law by the official religion in Scotland at the time of the Anglo-Scottish Union in 1707. Various questions now fall to be considered – has legislation bound up with the Treaty of Union been repealed in the past, and may it still be repealed today? Can various statutory provisions made in favour of Scottish Protestantism be considered to have fallen in desuetude (i.e. to have ceased to be law) without having been formally repealed? And what today remains of this statutory legacy in Scots law?

## 2.5 Repeal and Desuetude (or disuse) of historical Scottish Acts

### 2.5.1 Desuetude

Generally speaking, Acts of the pre-Union Scottish Parliament may fall into desuetude, and as such may cease to be a source of Scots law without being formally repealed.<sup>92</sup> Nevertheless, Acts of the pre-Union Scottish Parliament embedded into the constituting documents of the United Kingdom of Great Britain in 1707 fall into a special category of historical Scottish statutes which may not fall into desuetude, but rather require to be repealed by the British Parliament. This exemption to the general rule of desuetude arises from the fact that the Scottish **Union with England Act (1707)** was subsequently ratified by the pre-Union English Parliament, which brought that Act, and the historical Scottish Acts ratified by the same, within the purview of the English constitutional tradition. Acts of the pre-Union English Parliament are not subject to desuetude, which is a feature of Scots, but not English, law, but rather remain in force until such time as they are repealed.<sup>93</sup> The extent to which the Scottish and English Acts by which the Treaty of Union was ratified in 1707 may be repealed by the British Parliament is the subject of dispute. The Scottish constitutional tradition tends towards the view that the constituting documents of the United Kingdom of Great Britain limit the sovereignty of the British Parliament, which as such may not repeal aspects of the **Union with England Act (1707)** and Acts ratified therein.<sup>94</sup> The English constitutional tradition tends toward the view that the sovereignty of the British Parliament is unlimited, as was the sovereignty of the pre-Union English

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<sup>92</sup> “A statute may also be impliedly repealed by falling into desuetude, with the result that if appealed to, the courts will decline to give effect to it. This rule, probably, is only applicable to Scots Acts; at least there is no case where a statute passed since 1707 has been held to have fallen into desuetude, and no analogous rule is recognised in England.” (Gloag and Henderson: *The Law of Scotland*, 13<sup>th</sup> edition, ed. H. L. MacQueen and Lord Eassie, 1.34).

<sup>93</sup> “...it has never been doubted that the legislation of the United Kingdom Parliament is like that of the English Parliament in that desuetude has no bearing upon its validity.” (*Stair Memorial Encyclopaedia*, vol. 22, part 1(3)(c), para. 133).

<sup>94</sup> For example see T. B. Smith’s contribution to the *Stair Memorial Encyclopaedia*, volume 5, *Fundamental Law*, in the original 1987 edition; see also David M. Walker, ‘The Union and the Law’ in *The Journal of the Law Society of Scotland*, 18 June 2007. For further discussion of the Scottish view see Michael Upton, ‘Marriage vows of the elephant: the Constitution of 1707’ in *Law Quarterly Review* (1989), 105 (Jan), 79-103, esp. at p. 79 where references are provided for the ideas of the three Scottish law Professors, T. B. Smith, J. D. B. Mitchell and D. N. MacCormick.

Parliament.<sup>95</sup> This second view appears to have prevailed in practice, in that some aspects of the Union Agreement of 1707 have been expressly repealed by the British Parliament.

### 2.5.2 Oaths

A further potential source of constitutional difficulty in repealing aspects of the Union Agreement, or aspects of the religious settlement within the United Kingdom, attaches to the accession oath and coronation oath taken by the British sovereign, or the oath of office taken by a Regent. The sovereign's accession oath is thought to be no bar, as the Irish Church Act 1869 and the Catholic Emancipation Act 1829 are held to demonstrate that the aspect of this oath "protecting ecclesiastical interests is without legal importance".<sup>96</sup> On the other hand Regents are expressly prohibited by statute from assenting "to any Bill for changing the order of succession to the Crown or for repealing or altering an Act of the fifth year of the reign of Queen Anne made in Scotland entitled 'An Act for Securing the Protestant Religion and Presbyterian Church Government'".<sup>97</sup> No such prohibition attached to the sovereign, as per the repeal of certain aspects of this Act of Security 1706 by the Universities (Scotland) Act 1853 discussed in 2.5.3 below.

The sovereign's accession oath concerns the Protestant succession to the British throne, and runs:

I [monarch's name] do solemnly and sincerely in the presence of God profess, testify and declare that I am a faithful Protestant, and that I will, according to the true intent of the enactments which secure the Protestant succession to the Throne of my Realm, uphold and maintain the said enactments to the best of

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<sup>95</sup> This distinction was famously noted by Lord President Cooper in *MacCormick v. Lord Advocate* (1953 S.L.T. 255), in which he expressed the opinion that "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law...Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done."

<sup>96</sup> Lyall, *Of Presbyters and Kings*, p. 80, n. 215.

<sup>97</sup> Regency Act 1937, c. 16, s. 4(2).

my powers according to law.<sup>98</sup>

The sovereign is also required at his or her accession, by virtue of the Act of Security 1706 to:

swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion with the government, worship, discipline, right and priviledges of this church as above established by the laws of this kingdom [of Scotland], in prosecution of the Claim of Right.<sup>99</sup>

The sovereign's coronation oath, as taken in 1953, ran:

*Archbishop.* Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel? Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law? Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England? And will you preserve unto the Bishops and Clergy of England, and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them? *Queen.* All this I promise to do.<sup>100</sup>

It will be noted that the coronation oath does not refer to the Church of Scotland as such. The full constitutional significance of these oaths is difficult to determine, although it should be noted that it has been recently argued that they may prohibit the sovereign from assenting to a Bill which seeks to abolish the Protestant succession to the British throne. This principle has been explicitly raised in the House of Lords as recently as 2013, by Lord James of Blackheath in respect of the Succession to the

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<sup>98</sup> Accession Declaration Act 1910.

<sup>99</sup> Act of Security 1706. For further details concerning these oaths see House of Commons Library Standard Note SN/PC/00435 <http://www.parliament.uk/briefing-papers/SN00435/the-coronation-oath>

<sup>100</sup> <http://www.royal.gov.uk/ImagesandBroadcasts/Historic%20speeches%20and%20broadcasts/CoronationOath2June1953.aspx>

Crown Act 2013.<sup>101</sup> This 2013 Act avoided removing the religious test governing the succession to the British Crown as per the Act of Settlement (1700) embedded into Article II of the Treaty of Union, presumably because of the implications for the Church of England: until such time as the Church of England itself moves to be disestablished, it is difficult to see how the sovereign can be expected to assent to a bill which undermines the coronation oath in respect of the Church of England. The position in relation to any “established” status claimed by the “national” Church of Scotland is far more nebulous and difficult to determine.

### **2.5.3 Repeal of aspects of the Union Agreement**

The best known example of the British Parliament repealing an aspect of the Union Agreement is to be found in the **Universities (Scotland) Act 1853, c. 89, s.1** whereby it was enacted that:

It shall not be necessary for any person who shall have been or shall be elected, presented, or provided to the office of professor, regent, master, or other office in any of the universities or colleges in Scotland, such office not being that of principal or a chair of theology, to make and subscribe the acknowledgment or declaration mentioned in an Act passed in the fourth session of the first Parliament held in Scotland by her Majesty Queen Anne, intituled “Act for Securing the Protestant religion and Presbyterian Church Government.”

In this the requirement for professors etc at Scotland’s four ancient universities to subscribe the Westminster Confession of Faith before a Presbytery prior to admission to university office as contained in the **Act of Security (1706)** was for the most part set aside, seemingly with a minimum of constitutional fuss.

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<sup>101</sup> “...we are being given a delegation of the prerogative of the Crown, which puts the burden on us to decide whether this is in breach of the coronation oath. I submit that it is, and therefore that any noble Lord who votes for the Bill now should walk through the Lobby and out of the front door and should never return, because we will all have automatically disqualified ourselves under our oath of allegiance to support the monarch in the discharge of their obligations under the coronation oath.” <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130214-0001.htm> ; see under 1.46pm.

A second example may be found in respect of the 1706 **Act of Security**'s stipulation that any person bearing office in a school in Scotland should subscribe the Westminster Confession of Faith and submit themselves to the government and discipline of the Church of Scotland. This provision reinforced a similar provision contained in the **Act for settling the quiet and peace of the church (1693)** (*RPS*, [1693/4/89](#)), which declared that "all schoolmasters and teachers of youth in schools are and shall be liable to the trial, judgment and censure of the presbyteries of the bounds for their sufficiency, qualifications and deportment in the said office." While the 1693 Act formed no part of the Union Agreement, the principle of the Church of Scotland's right to apply a religious test to those to be appointed as schoolteachers, and the requirement that such persons submit themselves to the jurisdiction of the Kirk, was protected by the **Act of Security (1706)**. Nevertheless, the **Parochial and Burgh Schoolmasters (Scotland) Act 1861, s. 9**:

abolished the right of Presbyteries to examine teachers, and gave their functions to Boards of Examiners appointed by the Courts of the Scottish Universities. Section 12 [of the 1861 Act] abolished the requirement of subscription of the [Westminster] Confession [of Faith], and replaced it with a simple declaration to be made by the parochial school teacher that he would never attempt to subvert Westminster doctrines or the Church of Scotland. Burgh schoolmasters did not even have to undertake such an obligation.<sup>102</sup>

Subsequently the **Education (Scotland) Act 1872, c.62, s. 23**, abolished the jurisdiction of presbyteries or other church courts over any public school in Scotland,<sup>103</sup> all parochial schools having been nationalised by the same section of the 1872 Act. At the same time "the requirement of the declaration under s.12 of the 1861 Act vanished".<sup>104</sup> In this, the abolition of the jurisdiction of the courts of the Church of Scotland in respect of Scottish schools, together with the repeal of the

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<sup>102</sup> Francis Lyall, *Of Presbyters and Kings* (1980), p. 117.

<sup>103</sup> "all jurisdiction, power, and authority possessed or exercised by presbyteries of other church courts with respect to any public schools in Scotland are hereby abolished."

<sup>104</sup> Francis Lyall, *Of Presbyters and Kings* (1980), p. 118.

statutory requirement for schoolteachers to subscribe the Westminster Confession of Faith would appear to have been an example of the British Parliament repealing an aspect of the **Act of Security (1706)**, albeit not so clear an example as provided by the **Universities (Scotland) Act 1853, c. 89, s.1**.

A third, and perhaps most far ranging, example of the repeal of legislation protected by the Union Agreement is to be found in the **Statute Law Revision (Scotland) Act 1906, c.38**, which repealed any mention of **Church Act (1581)** from the **General Assembly Act 1592**.<sup>105</sup> This apparently minor alteration to the 1592 Act meant that 30 of the 31 historical Acts directly ratified by the **Church Act (1581)**, together with the four extant Acts of the Reformation Parliament ratified by several of the said 30 Acts, ceased to form a part of the Union Agreement, and as such became ordinary historical Scottish Acts capable of falling into desuetude. Only the **Church Act (1567)** continued to form part of the Union Agreement, as this had been ratified not only by the **Church Act (1581)**, but also by the **Church Act (1579)**.

A final example of the sovereignty of the British Parliament in respect of the Treaty of Union concerns two Acts passed in 1711, both of which are considered to have been contrary to the Act of Security. These are the Scottish Episcopalians Act 1711, which granted toleration to a church outside of the official Presbyterian Church of Scotland, and the Church Patronage (Scotland) Act 1711.<sup>106</sup> The former remains in force, while the latter was repealed by the Church Patronage (Scotland) Act 1874 following the deeply divisive effect of lay patronage in the “Established” Church of Scotland at the time of the Disruption.

The effect of the removal of the ratification of the **Church Act (1581)** from the **General Assembly Act 1592** may be observed in *Brown v. Magistrates of Edinburgh* (1931 S.L.T. 456), wherein the Lord Ordinary entered into a detailed discussion of the **Statute Law Revision (Scotland) Act 1906**, historical Scottish Acts concerning the

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<sup>105</sup> According to the amended version of the **General Assembly Act 1592** provided at <http://www.legislation.gov.uk/aosp/1592/8/paragraph/p1>, although the 1906 Act has not been consulted.

<sup>106</sup> R. King Murray, ‘The Constitutional Position of the Church of Scotland’ in *Public Law* (1958), pp. 155-162, at pp. 159-160.

Sabbath, and desuetude. In *Brown*, it was held that the **Sunday Act 1579** had fallen into at least partial desuetude, particularly in respect of the punishment of those persons who wilfully failed to attend services in the parish kirks of the Church of Scotland on Sundays.

#### **2.5.4 The status of Historical Scottish Acts**

From the third example above, only the following statutes continue to be incorporated into the constituting documents of the United Kingdom of Great Britain, all others therefore being capable of falling into desuetude:

- 10. Church Act (1567)
- 30. Church Act (1579)
- 37. General Assembly Act (1592)
- 38. Act Ratifying the Confession of Faith and Settling Presbyterian Church Government (1690)
- 39. Act of Security (1706)

The *Records of the Parliament of Scotland* website, maintained by the University of St Andrews, maintains, with the assistance of the Scottish Law Commission, a list of those Acts of the pre-Union Scottish Parliament which are still in force, for which see [here](#).<sup>107</sup>

Of the 39 Acts listed above, the following are still deemed to be in force (hyperlinks to the most recent versions of these Acts have been provided where different from those found on the *RPS* website):

- 1. Confession of Faith Act (1560)
- 2. Papal Jurisdiction Act (1560)
- [10. Church Act (1567) - not stated explicitly, but see 30. below]
- 12. Coronation Oath Act (1567)
- 16. [Church Jurisdiction Act \(1567\)](#)

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<sup>107</sup> [http://www.rps.ac.uk/static/statutes\\_inforce.html](http://www.rps.ac.uk/static/statutes_inforce.html)

- 30. Church Act (1579) (which includes the text of the Church Act (1567))
- 31. [Church Jurisdiction Act \(1579\)](#)
- 37. [General Assembly Act \(1592\)](#), as amended.
- 38. [Act Ratifying the Confession of Faith and Settling Presbyterian Church Government \(1690\)](#)
- 39. [Act of Security \(1706\)](#)

Of these, only items 10, 30, 37, 38, and 39 are at present incapable of falling into desuetude, but rather would need to be directly repealed by the British legislature, although simply repealing direct mention of item 38 in item 39 would render all the others capable of falling into desuetude. It ought to be noted that various parts of items 10, 31, 37, 38 and 39 have already been repealed by the Statute Law Revision (Scotland) Act 1906 (c. 38).<sup>108</sup> In addition, the **Union with England Act 1707** of course remains in force, and as such the succession to the British Crown is still governed by a religious test in favour of Protestantism.

It therefore follows that, at the present time, there remains only a rump of statutory provisions in favour of Scottish Protestantism and the “the worship, discipline and government of the church of this kingdom, as now by law established”, when compared to the time of the Union. While the constitutional and legal construct of the “Established” Church of Scotland has its critics, it is certainly the case that the present-day Church of Scotland asserts in its 1921 constitution (i.e. the Articles Declaratory) that it is in continuity with the Church “for whose security provision was made in the Treaty of Union of 1707”. To what extent those statutes still incorporated into the Union Agreement continue to have anything more than constitutional, rather than practical significance, and to what extent those other historical Scottish Acts considered still to be in force have in fact fallen into desuetude, is a point of some interest. What is also of interest is the extent to which the present-day Church of Scotland has laid claim to the benefits bestowed by any such Acts, and to what extent such a claim is reflected in its current position within Scots law and the British constitution.

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<sup>108</sup> According to the versions provided at [www.legislation.gov.uk](http://www.legislation.gov.uk)

## 2.6 Presbyterian re-union and the status of the present-day Church of Scotland

The Church of Scotland Act 1921 was primarily concerned with paving the way to the reunification of the vast majority of presbyterians in one denomination. It followed a difficult case of reunion, and was designed to obviate major legal problems. The previous case was in 1900 when the United Presbyterian Church, which rejected the principle of “establishment” and supported dis-endowment of the state church, united with the Free Church of Scotland whose constitution upheld the principle that it was the duty of the state to “maintain and support an establishment of religion”. At that union, a small remnant of the Free Church of Scotland (located mostly in the Highlands and Hebrides) laid claim to the entire endowments of the predecessor Free Church of Scotland, which were held in trust, on the ground that the remnant remained faithful to the establishment principle as found in the Free Church’s constitution. This claim was tested before the Court of Session in 1902 and in the House of Lords in 1904,<sup>109</sup> the House of Lords finding in favour of the residual Free Church of Scotland. This led to the bizarre situation of a tiny denomination , comprising only 24 Free Church ministers, was given ownership of the massive property portfolio - churches, church halls, manses, and church college - taken by the large United Free Church (with around 1,076 ministers).<sup>110</sup> The House of Lords came to this manifestly unjust conclusion by virtue of the principle that church property followed those who kept to the same church constitution. Very unusually, parliament was obliged to intervene in 1905 to overturn this judgement and make provision for a Commission to allocate the endowments of the Free Church on a more equitable footing.<sup>111</sup>

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<sup>109</sup> *Bannatyne and Others (General Assembly of the Free Church) v Baron Overtoun and Others* (i.e. The Free Church Case), (1904) 12 S.L.T. 297.

<sup>110</sup> T. M. Taylor, ‘Church and State in Scotland’ in *Juridical Review* 23 (1957), pp. 121-137, 129ff.

<sup>111</sup> By virtue of a Commission appointed by the Church (Scotland) Act 1905. On this case, see Allan Neil, *The Free Church Case* (William Hodge, Glasgow and Edinburgh, 1904); Alexander Stewart and J Kennedy Cameron, *The Free Church of Scotland: The Crisis of 1900* (Edinburgh, Knox Press, 1910, 1989); Kenneth R Ross, *Church and Creed in Scotland: Free Church Case, 1900-04, and Its Origins* (Edinburgh, Rutherford House, 1988); and F.A. Cranmer, ‘Christian Doctrine and Judicial Review: the Free Church Case Revisited’, *Ecclesiastical Law Journal* 6 (2002), pp. 203–216.

So, the Church of Scotland Act 1921 was part of the process of ensuring the same did not happen again. The "Established" Church of Scotland intended to dis-endow and in effect disestablish its parish system in the run up to re-union with the United Free Church in 1929, and it was necessary to transfer the endowments, revenues, and properties of each Church of Scotland parish from the statutory Boards of Heritors of each parish to the Church of Scotland General Trustees. This meant giving the Church of Scotland a clear, lawful and amendable constitution for the first time.

Hence, the Church of Scotland Act 1921 does not betoken establishment, but ought rather to be understood both in respect of Scottish trust law and in respect of the negotiations surrounding 1920's plans of Presbyterian re-union. That said, the legislature did not object to the tenor of the Articles Declaratory, nor are these Articles to be understood by reference to historical legislation, the 1921 Act enacting that:

any statute and law affecting the Church of Scotland in matters spiritual in present in force...shall be construed in conformity [with the Declaratory Articles] and in subordination thereto, and all such statutes and law in so far as they are inconsistent with the Declaratory Articles are hereby repealed and declared to be of no effect.

The acknowledgement as lawful of the constitution of the old "Established" Church of Scotland by the UK legislature does not necessarily infer that parliament accepts the tenor of the statements contained in the constitution as either law, or as binding upon the British State. Rather, in acknowledging the Articles Declaratory of the constitution as lawful, the constitution of the Church of Scotland and the right of the general assembly to alter the same, is put beyond legal challenge within the context of trust law. The problem in the Free Church case of 1904 was that the Free Church of Scotland had no mechanism by which it could abandon its commitment to the principle of "establishment" ahead of union with the United Free Church in 1900, with the, at the time, dire consequences that the property held in trust for the Free Church of Scotland could not be diverted to the use of the United Free Church into

which the vast majority of the ministers and members of the Free Church of Scotland had been united.

### **2.6.1 Property of the Church of Scotland**

The need, then, for the constitution of the old “Established” Church of Scotland to be both lawful and capable of alteration required little explanation in 1921. Having adopted this constitution, and with a view to entering into a union with the United Free Church, which still rejected the establishment principle, it was necessary for the material and financial fabric of the parishes of the old “Established” Church of Scotland to be extricated from the control of boards of heritors, the court of teinds, and Scottish civil ecclesiastical law. In order to achieve this end, in 1921 Parliament confirmed a Provisional Order issued by the Secretary of State for Scotland in 1899 by which the Church of Scotland General Trustees had been incorporated. Parliament then enacted the [Church of Scotland \(Properties and Endowments\) Act 1925](#), which made provision for all ecclesiastical property held in trust for congregations by parochial heritors, including church buildings, manses, and glebe lands,<sup>112</sup> to be transferred to the Church of Scotland General Trustees.<sup>113</sup> This process was overseen by Scottish Ecclesiastical Commissioners, appointed by the 1925 Act, whose decisions were both final and indeed enjoyed the force of statute. At the same time the link between stipend and teinds was broken.<sup>114</sup> Through this programme of reform, the Church of Scotland was effectively disestablished in respect of property and endowments, and became entirely independent of direct lay control in such matters. The subsequent transfer of such parochial assets came in time to render obsolete the

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<sup>112</sup> Historically, glebe lands were four Scots acres of land in the immediate vicinity of the manse and parish church which the parish minister either farmed or leased out. Following their transfer to the General Trustees, glebe lands tended to be sold, the capital from such sales being invested for income, thus in effect converting glebe lands into perpetual endowments.

<sup>113</sup> “The ecclesiastical buildings belonging to congregations are held for them by trustees. These may be the General Trustees, or local trustees...Buildings formerly vested in the heritors were transferred to the General Trustees, set up under the Church of Scotland (Properties and Endowments) Act, 1925. Other congregations have an option to transfer their buildings from local trustees to the General Trustees...” (Weatherhead, *Constitution and Laws*, p. 141).

<sup>114</sup> Black and Christie state that the Church of Scotland (Property and Endowments) Act (1925) meant that teinds were no longer linked to ministers’ stipends, and that as such teinds were no longer the province of ecclesiastical law (despite their ecclesiastical providence) and were rather “merely...a particular estate in land...but which, were it still exists as a separate estate, will for the future be merely a sum payable to a titular... whose enjoyment of the estate will no longer be qualified by any reference to duties towards the Church”.<sup>114</sup> This in effect meant that teinds became nothing more than a title to certain revenues, which revenues were no longer to be burdened by any stipend.

function of heritors and the court of teinds,<sup>115</sup> and was to lead to the eventual abolition of teinds<sup>116</sup> and the desuetude of the entire branch of Scots law by which parochial finances had been governed.<sup>117</sup>

Through this process, the old “Established” Church of Scotland obtained direct control over its own material fabric and finances, as the expense of the established parochial states of the old Church of Scotland.<sup>118</sup> Such a programme of parochial disestablishment was presumably deemed to be a justified measure against the prospect of full union with the United Free Church, which was brought to pass in 1929. So, in effect, the old “Established” Church of Scotland, in adopting the constitution set forth in the Church of Scotland 1921 Act, became “a national church” and during the course of the 1920s fell heir to a portion of the property and financial endowments of the old parish states of the “Established” Church, the remainder going largely to local authorities. This Church then united with the United Free Church, and thereby formed the present-day Church of Scotland, whose constitution still consists of that set forth in the Church of Scotland Act 1921. In so doing, despite the confusions this chapter has discussed, the United Free Church was led sufficiently to believe that they were in 1929 rejoining a now-disestablished Church of Scotland.

## 2.6.2 Royal recognition of the present day Church of Scotland

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<sup>115</sup> The Court of Teinds still technically exists, because it is the Court of Session (“since the Act of 1707 the Court of Teinds is nothing but the Court of Session under another name” (Stair Memorial Encyclopaedia, volume 6, 4.2.921, *per* Lord Kinnear in 1900)), but it is difficult to see how it could still have any business which might competently be brought before it.

<sup>116</sup> Teinds were abolished by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, section 56 (1): “The provisions of Part 3 [anent the extinction of feuduties] of this Act shall apply as regards ground annual, skat, teind, stipend, standard charge, dry multures...”

<sup>117</sup> There has been a natural and precipitous decline in interest among Scots lawyers in ecclesiastical law since the publication of William George Black’s and James Robertson Christie’s *The Parochial Ecclesiastical Law of Scotland as modified by the Church of Scotland Acts 1921 and 1925* (Edinburgh: Wm Hodge and Company, 1928) because of the consequences of the Church of Scotland (Property and Endowments) Act (1925). As a result of the 1925 Act all historical financial links between the Church of Scotland, heritors, and teinds have been broken, as a result of which ecclesiastical parochial law has effectively ceased to be a unique branch of Scots civil law relating to the financial affairs of the Church of Scotland. Rather, the finances of the Church of Scotland are now ultimately under the control of the General Assembly of the Church of Scotland.

<sup>118</sup> Callum G. Brown, ‘The Myth of the Established Church’ in *The Scottish Churches and the Union Parliament, 1707-1999*, ed. James Kirk (Edinburgh, Scottish Church History Society, 2001), pp. 48-74.

The present-day Church of Scotland therefore clearly inherited much of the property and financial endowments of the old parish states of the “Established” Church. What else, then, did it inherit from the old “Established” Church? The argument implicitly put forward by those who argue that the present-day Church of Scotland has fallen heir to the historical Scottish legislation passed in favour of Reformed Protestantism is that the claim advanced in the Church’s constitution to be “...in historical continuity with the Church of Scotland which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union of 1707” is valid, and that as such any provisions made in law in favour of the “Church of Scotland” since 1560 onwards have been inherited by the present-day Church of Scotland.

The historical continuity of the post-1929 Church of Scotland with the earlier “Established” Church of Scotland was countenanced by the British monarchy. The British sovereign continues to appoint a Lord High Commissioner to the General Assembly of the Church of Scotland,<sup>119</sup> and in 2000 the Prince of Wales, acting as Lord High Commissioner, remarked that the office was a “symbol of the long history which has bound together Church and Sovereign for nearly 450 years”.<sup>120</sup> The British sovereign also appoints an Ecclesiastical Household in Scotland, which consists of the Dean of the Chapel Royal, the Dean of the Order of the Thistle (both of which offices are in the gift of the Crown<sup>121</sup>), ten Chaplains in Ordinary, and a Domestic Chaplain at Balmoral, all of whom are appointed out of the ministry of the Church of Scotland.<sup>122</sup> The British sovereign worships in the Church of Scotland when in Scotland, particularly when resident at Balmoral. When the general assembly is in session, the Lord High Commissioner ranks in the General Precedence in Scotland after The Prince Philip, Duke of Edinburgh, as is to be expected of a person directly representing the person of the sovereign. The Moderator of the General Assembly of

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<sup>119</sup> The Lord High Commissioner receives an allowance out of moneys provided by Parliament as determined by Scottish Ministers by virtue of the Lord High Commissioner (Church of Scotland) Act 1974.

<sup>120</sup> Fergusson, *Church, State and Civil Society*, p. 183.

<sup>121</sup> *Stair Memorial Encyclopaedia*, volume 3, 1.3.1151 anent Ecclesiastical Dignitaries

<sup>122</sup> For which see *Burke’s Landed Gentry of Great Britain*, 19th edn (Delaware: Burke’s Peerage and Gentry LLC, 2001), vol. 1, The Kingdom in Scotland, p. lxxiv.

the Church of Scotland also ranks in the General Precedence, after the Lord Chancellor of Great Britain, and above the Keeper of the Great Seal of Scotland, which office is vested in the First Minister.<sup>123</sup> In this, there are clearly ongoing relations between the British monarchy and the Church of Scotland: such relations provide the Church of Scotland with unique royal acknowledgment and recognition by the head of the British State, but it is not clear that they amount to a form of establishment. Indeed, it can be argued that the functions of the Lord High Commissioner embody a division of Church and State in Scotland,<sup>124</sup> while the other arrangements between the sovereign and the ministry of the Church of Scotland can be argued to be a matter of ongoing custom and to some extent a reflection of the Protestant faith of the sovereign, rather than signifying an established status enjoyed by the Church of Scotland. Unlike the Church of England, the Church of Scotland enjoys no formal relations with the Houses of Parliament and the British Government, and nor for that matter does it enjoy any formal relations with the Scottish Parliament or the Scottish Government. In this regard, the Church of Scotland enjoys unique recognition by the Crown.

### **2.6.3 Historical legislation**

As already noted, the present-day Church of Scotland lays claim in its constitution to be in historical continuity with the Church whose “liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union in 1707”. This has been understood to mean that historical Scottish Acts passed in favour of the historical Church of Scotland apply to the present-day Church of Scotland and, as such, various statutory provisions originating from a period when the Church of Scotland could be argued to have been more recognisably established are understood to still be in force today. The Church of Scotland’s own constitution may be presumed to make reference to the General Assembly Act 1592 and the Act of Security appended to the Treaty of Union in 1707. Other historical Scottish Acts which are either embedded directly or indirectly into the Act of Security, or are presently deemed to still be in force, have been discussed and listed above in Section 2.4. The question, then, is what

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<sup>123</sup> *Burke’s Landed Gentry of Great Britain*, 19th edn (Delaware, Burke’s Peerage and Gentry LLC, 2001), vol. 1, p. lx.

<sup>124</sup> Weatherhead, *Constitution and Laws*, p. 189.

is the substance of the consequences of these statutory provisions, and do they amount to establishment?

To begin with, let us consider the Scots Confession of Faith Act 1560 and the Confession of Faith Act 1690. The latter is directly cited in the Act of Security, while the former is still held to be in force. As to a statement of the official Protestant religion of the Kingdom of Scotland, or of the Kingdom of Great Britain in Scotland, both Acts may be taken as definitive. While the Westminster Confession of Faith has historically underpinned the common law offence of blasphemy in Scotland,<sup>125</sup> and while they accord with the general tenor of the sovereign's coronation oath to "maintain in the United Kingdom the Protestant Reformed Religion established by law", it is not clear that they are exclusively in favour of the present-day Church of Scotland. The constitution of the Church of Scotland makes no reference to the Scots Confession of Faith, but in Article II declares:

The principal subordinate standard of the Church of Scotland is the Westminster Confession of Faith approved by the General Assembly of 1647, containing the sum and substance of the Faith of the Reformed Church.

Nevertheless, the constitution of the Church of Scotland allows the General Assembly to interpret the Westminster Confession of Faith. For example 1986 Act 5 of the General Assembly declared that the Church of Scotland no longer affirmed various anti-Catholic clauses of the Westminster Confession of Faith, disassociating itself from the same, and no longer requiring its office bearers to believe them.<sup>126</sup> That the relevant sections of the Confession of Faith Act 1690 have not accordingly been repealed suggest that there is no direct link between the 1690 Act and the present-day Church of Scotland. Indeed the 1690 Act could be understood as favouring the beliefs of those Presbyterian churches in Scotland which still adhere to the Westminster Confession of Faith more fully, such as the Free Presbyterian Church of Scotland, the governing Synod of which in the 1980s famously "excommunicated" the then Lord

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<sup>125</sup> See separate chapter 6 on Blasphemy.

<sup>126</sup> [http://www.churchofscotland.org.uk/data/assets/pdf\\_file/0014/1823/1986\\_act\\_05.pdf](http://www.churchofscotland.org.uk/data/assets/pdf_file/0014/1823/1986_act_05.pdf)

Chancellor of Great Britain, The Lord Mackay of Clashfern, for having attended requiem Masses for two deceased colleagues.

#### **2.6.4 Church government**

Next, we may turn to those statutory provisions which historically have been enacted by the pre-Union Scots Parliament in order to provide security for the Presbyterian government of the historical Church of Scotland. This legislation has usually been enacted against the background of a perceived threat of Episcopal government being imposed upon the Church of Scotland by either the Stewart monarchs of Scotland and England, or by the British Parliament. These Acts include the General Assembly Act 1592, the Confession of Faith Act 1690 and the Act of Security 1706. The 1592 Act formally approved for the first time the Presbyterian government of the Church of Scotland. The Act referred to the “trew and hally kirk presentlie establishit within this realme”, but appeared to accept that General Assemblies were “appoyntit be the said kirk” that synods and provincial assemblies were “haldin be the said kirk and ministrie” and that presbyteries and kirk session were “appointit be the said kirk”; the ecclesiastical jurisdiction of this hierarchy of church courts was also set forth in detail following agreement reached between ministers of the Kirk and James VI. The 1690 Act expressed the intention of parliament “to settle and secure the true Protestant religion...and also the Government of Christ’s Church within this Nation”, confirmed the abolition of episcopal government, “ratified and established” the Westminster Confession of Faith, and “ratified and confirmed” the “Government of the Church by kirk sessions, presbyteries, provincially synods and Generall assemblies” as ratified by the General Assembly Act 1592. The 1690 Act went on to declare that “the Church Government be established in the hands of and exercised by these presbyterian ministers...”. In both the 1592 Act and the 1690 Act it is clear that the Presbyterian courts of the Church of Scotland did not enjoy any direct jurisdiction in respect of the temporal wealth of the Church, but rather enjoyed an ecclesiastical jurisdiction consisting of the right to suspend and depose ministers, to discipline the moral lives of parishioners, and to uphold sound preaching and the proper administration of the sacraments, and so forth. Both these Acts tend to suggest that presbyterian church government was the choice of the Church of Scotland itself, and that statutory recognition of Presbyterianism was a means of attempting to limit state interference

through Episcopal government. The Act of Security, however, did not reflect this view, and adopted a narrative suggestive of the establishment of presbyterian church government within the Church of Scotland by statute. This Act began by stating that the Commissioners for the Treaty of Union should not consider “alteration of the worship, discipline or government of the Church of this Kingdom as now by law established”, before going on to “establish and confirm the said true Protestant religion and the worship, discipline, and government of this Church, to continue without any alteration to the people of this land in all succeeding generations”. In this the Act of Security has been understood as establishing the Church of Scotland, including its presbyterian government, *de novo* in 1707.<sup>127</sup> While the language used in the Act of Security may have been a novelty, and while it may have reflected the influence of the English commissioners, it was law, and insofar as it described the “church of this kingdom” as established by law, including its presbyterian supra-parochial government, it provided full justification for the succeeding description of the Church of Scotland as the Established Church of Scotland before Scottish courts and the House of Lords. It has been suggested above (at section 2.2) that the presbyterian church government which was chosen by the Scottish Church in 1689 in preference to the established episcopalian hierarchy of the British Stewarts represented a kind of disestablishment; but if the Union Agreement established presbyterianism *de novo* in 1707, then it became cogent for Scots law to hold the Church of Scotland entirely to have been established, whatever the historical realities of seventeenth-century Scottish church history tending against that view.

Yet, if the Union Agreement is to be understood as establishing General Assembly, Synod, Presbytery and Kirk Session as the polity of the Church of Scotland, and if the present-day Church of Scotland claims to be the successor Church to the Church for whose security provision was made in 1707, it would follow that the present-day Church of Scotland cannot alter its own polity without recourse to parliament. This however, is patently not the case. The constitution of the Church of Scotland as contained in the Church of Scotland Act 1921 plainly states that:

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<sup>127</sup> R. King Murray, ‘The Constitutional Position of the Church of Scotland’ in *Public Law* (1958), pp. 155-162, at p. 159.

the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, [and] receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including...the constitution and membership of its Courts...Recognition by the civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone... (Article IV).

The right of the Church of Scotland to alter its government without recourse to parliament was demonstrated in 1992 when the General Assembly abolished Synods.<sup>128</sup> As Weatherhead has noted, since Synods are specifically mentioned in the Act of Security, it was wondered at the time of the General Assembly's abolition of Synods "whether Parliament would have to be asked to amend [the Act of Security], but the Church took the view that the terms of the 1921 Act made this unnecessary".<sup>129</sup>

The 1992 abolition of Synods raises the following problem for those who would still argue that the present-day Church of Scotland is established. If the government of the Church of Scotland is held to have been established by law in 1707, then by law must it be reformed. If this view is maintained, then it would have to be argued either that the General Assembly acted *ultra vires* in abolishing Synods contrary to the Act of Security, or that the constitution of the Church of Scotland permits the General Assembly to alter the government of that Church without recourse to parliament, and that legislative Acts of the General Assembly thereby have the power to over-ride the sovereignty of the British Parliament, and to *de facto* amend, repeal, and alter fundamental aspects of the Union Agreement in respect of the Act of Security.

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<sup>128</sup> As per Act of the General Assembly, V, 1992 (Weatherhead, *Constitution and Laws* (1997), p. 54).

<sup>129</sup> Weatherhead, *Constitution and Laws*, p. 17.

The simpler view is more historically coherent, namely that Presbyterianism represented a rejection of established Episcopalian government in the Church of Scotland, and the interference of royal government and parliament in the religious life of the Church which this entailed. From this perspective, statutory recognition of Presbyterianism was a device by which the civil power acknowledged the right of the Church of Scotland to appoint its own system of government for the regulation of the religious life of the Church. Statutory recognition of ecclesiastical autonomy and independence is clearly not statutory establishment of church government.

Notwithstanding the peculiarities of statutory language employed in the Act of Security, the intention of that Act was either to limit the sovereignty of the British Parliament in respect of the Church of Scotland, or to acknowledge that there was an inherent limit to the sovereignty of parliament within the Kingdom of Great Britain in Scotland. The former is a more English view of sovereignty, the latter accords more with the Scottish constitutional tradition. The Scottish view appears to predominate in the constitution of the Church of Scotland, wherein the appointment of the government of the Church of Scotland is held to be divine (Article IV), while the authority of the “civil magistrate”, that is to say secular or temporal government, is held to be a matter of “divine appointment” also. These are very old categories of constitutional thought, which vest absolute sovereignty neither in the State, nor the Church, but in Christ, who apportions his sovereign authority to both the State and the Church in different measure according to their differing qualities and purpose. Such thoughts would have been readily understood in late-medieval and early modern Scotland, and contradict the Anglican tradition of vesting both secular and spiritual authority in the person of the sovereign. At this point the peculiarities of joining two distinct medieval sovereign kingdoms, both with their own distinct constitutional traditions and Protestant settlements in a single United Kingdom, begin to become apparent. The enigma of the Church of Scotland may lie in the fact that it has been an historical hybrid of establishment and a rejection of establishment embedded within an independent constitutional tradition itself conjoined into a hybrid with another constitutional tradition which emphasised the principle of the unlimited sovereignty of the State. In practice, this appears to mean that historical Scottish Acts concerning the Presbyterian government of the Church of Scotland bind or limit or admit the limitations of the State from interfering in the government of the Church of Scotland,

but thereby do not limit the capacity of the Church of Scotland to alter its own polity and government.

This view is given further weight by the opinion of a former Principal Clerk of the General Assembly, James Weatherhead, in his *Constitution and Laws of the Church of Scotland* as published by the Church of Scotland's Board of Practice and Procedure in 1997. There, Weatherhead, having drawn the basic legal distinction between fundamental and expedient law, suggests that Presbyterian church government could fall within the latter category, and therefore be altered by the Church: "In church terms, it could be argued that a basic rule is that a Church must have some sort of discipline; but whether this is presbyterian or episcopal is a choice of expediency".<sup>130</sup> This at least suggests that the General Assembly could theoretically re-adopt Episcopal government within the Church of Scotland, and the example of the abolition of Synods without recourse to Parliament at least suggests that such a move would in theory not be de-barred by the Act of Security. In this, statutory recognition of the government of the Church of Scotland cannot be said to have established the government of the Church of Scotland, but to have recognised the right of the Church to be sovereign in such matters.

In conclusion, the Articles Declaratory of 1921 appear to be in agreement with the tenor of Acts of the pre-Union Scots Parliament in acknowledging church government to be a matter for the Church of Scotland, not parliament, whatever the intervening legal and constitutional constructs generated by the phrasing of the Act of Security. In this, can it be argued that the "national" Church of Scotland enjoys any particular practical advantages in law when compared to voluntary associations? One salient example would be the government of the Roman Catholic Church in Scotland, which is not subject to alteration by the British State, despite the fact that this form of church government apparently directly contravenes the Papal Jurisdiction Act of 1560, which is supposed to still be in force.<sup>131</sup>

## **2.6.5 Church courts**

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<sup>130</sup> Weatherhead, *Constitution and Laws*, p. 7.

<sup>131</sup> For a brief comment on which see Lyall, *Of Presbyters and Kings* (1980), p. 87.

This brings the discussion on to the next of the historical statutory legacies enjoyed by the Church of Scotland by virtue of its claim to be in continuity with the Church of Scotland as found standing within Scotland in 1560, 1592 and 1707. The ecclesiastical jurisdiction of the Church of Scotland has enjoyed statutory recognition since the passage of the Church Jurisdiction Act in 1567. The statutory provisions contained in the 1567 Act were repeated in the Church Jurisdiction Act 1579, and both Acts are still held to be in force. Both Acts stated that the pre-Union Scots Parliament had

declared and granted jurisdiction to the kirk, which consists and stands in preaching of the true word of Jesus Christ, correction of manners and administration of holy sacraments, and declares that there is no other face of a kirk nor other face of religion than is presently, by the favour of God, established within this realm, and that there be no other jurisdiction ecclesiastical acknowledged within this realm other than that which is, and shall be within the same kirk, or that which flows therefrom....

While these Acts have been taken as acknowledging the ecclesiastical jurisdiction of the courts of the Church of Scotland, neither Act defined the extent and scope of that jurisdiction, but rather appointed commissions to consider and report on “what other special points or clauses should pertain to the jurisdiction, privilege and authority of the said kirk.” Neither commission appears to have reached a determination in these matters and, as such, the full scope of the ecclesiastical jurisdiction of the courts of the Church of Scotland was not defined by statute.

The General Assembly Act 1592 did not add significantly to the statutory definition of the jurisdiction of the courts of the Church of Scotland. Nevertheless, the 1592 Act clearly stated the system of courts to which the ecclesiastical jurisdiction pertained, namely General Assembly, Synod (Provincial Assembly), Presbytery and Kirk Session – an important development as the 1567 Act could not have referred to presbyteries, no such court existing within the Church of Scotland at that time. As to the ecclesiastical jurisdiction, the 1592 Act stated that Synods, or Provincial Assemblies, had the power to depose office bearers within the Church, and also

exercised the collective jurisdiction of the elders by which such Synods may happen to be constituted. Presbyteries were to ensure that kirks were kept in good order, were to correct the lives of “naughty and ungodly persons” and had the power of excommunication. The jurisdiction of the eldership of the Church was also defined, as consisting of ensuring that the word of God was purely preached, the sacraments rightly administered and discipline maintained. Kirk Sessions enjoyed “power and jurisdiction in their own congregations in matters ecclesiastical”, which may be taken to include the right to discipline the moral lives of parishioners. The jurisdiction of the Presbyterian Church of Scotland in respect of taking trial of ministers and removing them from office was confirmed by the Confession of Faith Act 1690.

The Act of Security 1706 added significantly to the jurisdiction of Presbyteries, in that all “professors, principalls, regents, masters or others bearing office, in any university, colledge or school within this kingdom” were obliged as a condition of office to “practise and conform themselves to the worship presently in use in this church, and submit themselves to the government and discipline therof”. This in effect extended the disciplinary jurisdiction of church courts to all office holders in Scotland’s four ancient Universities, and also within all Scottish schools, although the latter could be argued to have been an aspect of Scots law since the School Teachers Act (1567).

The ecclesiastical jurisdiction of the hierarchy of Presbyterian church courts by which the religious life of the Church of Scotland was governed concerned spiritual, rather than temporal, matters. Nevertheless, the disciplinary jurisdiction of these courts extended well beyond the religious beliefs and moral lives of ministers, university office bearers, and parochial schoolmasters, and included the moral lives of parishioners. Correcting morals and addressing public scandals gave the courts of the Church a clear ecclesiastical jurisdiction over what would now be called the personal or private lives of Scots of comparable scope to the criminal and civil jurisdictions of the Scottish legal system. In this, the understanding that the courts of the Church of Scotland were part of the Scottish legal system must have given the idea of the “Established Church of Scotland” a substantial resonance in the minds of Scots, subject as they were to the moral discipline of that Church’s courts. Yet it may

nevertheless be wondered to what extent the courts of the Church of Scotland were part of the Scottish legal system by virtue of having been established by the State. As the position of the courts of the Catholic Church in Scotland prior to the Reformation demonstrate, an independent system of spiritual courts established by a Church could gain full recognition within the Scottish legal system and become part of the Scottish legal system while being entirely independent of both sovereign and parliament. Within the Presbyterian context, the status of the courts of the Church of Scotland is tied up with the status of the Presbyterian system of church government in Scotland – was it established by the Church and recognised by and protected against encroachment by the State, or was it established by the State *de novo* in 1707? This report tends towards the former, rather than the latter view.

The constitution of the Church of Scotland as per the Church of Scotland Act 1921 also tends to support the conception that the State recognises the government and jurisdiction of the Church of Scotland, but has not established it. Thus in Article IV it is stated that:

recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way effect the character of this government and jurisdiction as derived from the Divine Head of the Church alone...

The jurisdiction of the Presbyterian courts of the Church of Scotland still consists of an ecclesiastical jurisdiction which concerns “all matters of doctrine, worship, government, and discipline in the Church” (Article IV). Yet, in claiming succession to the historical Church of Scotland, it is not clear that any significant historical privileges are enjoyed by the present-day courts of the Church of Scotland.

The requirement for office holders in the four ancient Scottish Universities to submit themselves to the jurisdiction of the Church was abolished in 1853, while the jurisdiction of Presbyteries in respect of schools was abolished in 1872. Such reforms directly contravened provisions contained in the Act of Security 1706, and are

suggestive of a kind of disestablishment, or at the least a major derogation of the jurisdiction of the courts of the Church of Scotland. In addition, while the legislature acknowledges the disciplinary jurisdiction of the Church of Scotland, it does not define it, and as such it may be understood that the disciplinary jurisdiction of the Church of Scotland was and is dependent upon the laws and practice of the Church. At the present time, it certainly appears as though much of the historical disciplinary jurisdiction of the Church has fallen into desuetude, and is exercised only in the context of the trial by libel of ministers.

Nevertheless, there are some lingering aspects of the statutory recognition of the courts of the Church of Scotland. As “courts of the land”, the records and registers produced by the courts of the Church of Scotland are held to be *res extra commercium*, that is to say they cannot be bought and sold, but remain perpetually public records in the ownership of the Church. This principle was last demonstrated in *Presbytery of Edinburgh v University of Edinburgh* (1890, 28 S.L. Rep. 567)<sup>132</sup> and insofar as the courts of the present-day Church of Scotland succeeded to those of the old “Established” Church of Scotland the same principle may be presumed to apply. In a similar manner the Church of Scotland’s courts may petition sheriff courts to have their summonses enforced by warrant, although the principle was last demonstrated in *Presbytery of Lewis v. Fraser* (1874, 1 R. 888).<sup>133</sup> There can today be few, if any, circumstances in which a court of the Church of Scotland would have recourse to such measures, saving perhaps certain situations involving the trial of ministers by libel, although anecdotal evidence suggests that no such example has occurred in recent times.

In practical terms it may be wondered to what extent the courts of the Church of Scotland differ from the courts or tribunals of voluntary associations, particularly of other Presbyterian churches in Scotland. In respect of the latent right of the courts of the Church of Scotland to have their summonses enforced by the civil courts, it does

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<sup>132</sup> The compilers of this report are grateful to a doctoral candidate at the University of Strathclyde, Jonathan Brown, LLB, LL.M., for bringing this to their attention.

<sup>133</sup> Cf I.D. Macphail (ed.), *Sheriff Court Practice* (Edinburgh: Thomson/W. Green, 2006, *Third edition* ed. T. Welsh), 26.04; Weatherhead, *Constitution and Laws*, p. 44.

not appear to be a unique right compared to voluntary associations, in that it was stated *obiter* by Lord Ardmillan in *The Reverend the Presbytery of Lews v The Reverend Roderick Fraser*:

that the aid of the civil Court to enforce the attendance of witnesses may be given, and ought to be given, when craved and required, even in causes within Churches not established—that is, within a voluntarily constituted jurisdiction. This is well illustrated by the case of arbitration. The interposition by the civil Court to compel a witness to attend and depone before an arbiter has been frequently exercised, and authoritatively recognised. On this point there are decisions from time to time between 1690 and 1860, and the practice has been accordingly.<sup>134</sup>

In respect of the proceedings of a court or tribunal of a voluntary association, it is the case that Scottish civil courts

will not interfere with the judgments of an ecclesiastical tribunal, unless the tribunal has acted clearly beyond its constitution and has affected the civil rights and patrimonial interests of a church member, or its proceedings have been grossly irregular or contrary to natural justice.<sup>135</sup>

As such, Scottish civil courts are unwilling to interfere with the judgments of religious courts when those courts act in accordance with their own constitution and procedures, unless such courts act: (i) *ultra vires*, that is to say beyond the courts constituted powers; (ii) against natural justice, that is to say a person accused of some fault must be given fair notice of the charge made against them, together with an opportunity to offer a defence against the charge. In respect of ministers of religion, they usually subscribe to some sort of formula at the time of their ordination, to the effect that they accept the constitution and laws of the religious body in which they are to serve. This element of consent to religious constitutions and law, and the judicatories and “jurisdictions” to which they can give rise, can be extended to

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<sup>134</sup> (1874) 1R 888 at p. 894.

<sup>135</sup> Gloag and Henderson, *The Law of Scotland*, 13<sup>th</sup> edition, 47.04.

members of such religious bodies. This position has been summarised by the Lord Justice-Clerk, Lord Ross, in the Inner House decision *Brentnall v Free Presbyterian Church of Scotland* (1986 S.L.T. 471).

In the Church of Scotland, ministers can be considered to voluntarily submit themselves to the jurisdiction of the Church's courts in much the same way as occurs in some religious voluntary associations.<sup>136</sup> Ministers of the Church of Scotland are questioned prior to ordination or admission to a charge. The fourth question runs:

Do you acknowledge the Presbyterian Government of this Church to be agreeable to the Word of God; and do you promise to be subject in the Lord to this Presbytery and to the superior Courts of the Church, and to take your due part in the administration of its affairs?

The minister then signs a formula, which states among other heads that "I acknowledge the Presbyterian government of this Church to be agreeable to the Word of God, and promise that I will submit thereto and concur therewith." Elders in the Church of Scotland also sign the same formula, and while members do not subscribe to such formula, they are held to be subject to the law of the Church of Scotland by virtue of their having become members.<sup>137</sup>

In this, it is difficult to argue that the courts of the Church of Scotland enjoy jurisdiction over its ministers, elders and members on anything other than a voluntary basis, which appears to make them indistinguishable from religious voluntary associations. For example,

Scots law regards the judicatories of the Roman Catholic Church, like those of the other non-established churches, as having privative jurisdiction within the limits of their own constitution in questions affecting individual members.

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<sup>136</sup> Formula are certainly used in the Free Presbyterian Church of Scotland (as per *Brentnall v Free Presbyterian Church of Scotland* (1986, S.L.T., p. 471).

<sup>137</sup> Weatherhead, *Constitution and Laws*, 164-165, 10-11: cf James T. Cox's *Practice and Procedure in the Church of Scotland*, ed. D.F.M. MacDonald (Edinburgh: The Committee of General Administration of The Church of Scotland, 1976), p. 574).

Members are treated as persons who have voluntarily undertaken to submit themselves to, and to abide by, the constitution of the Church. The civil courts will interfere with the judgments of Church courts and tribunals only where the court or tribunal has acted beyond its constitution; or where its proceedings have been grossly irregular or contrary to natural justice; or where the judgment affects the civil rights or patrimonial interests of the member.<sup>138</sup>

Frank Cramner has stated that the courts of the Church of Scotland are unique in that their judgments are not subject to judicial review by the civil courts.<sup>139</sup> This view, however, is nevertheless contradicted by the *Stair Memorial Encyclopaedia* which states that the courts of the Church of Scotland “are themselves open to judicial review by the civil courts if they exceed their jurisdiction”.<sup>140</sup> This appears self-evident, in that should the courts of the Church of Scotland act beyond their powers, or act contrary to natural justice, it would be reasonable for the civil courts to intervene. Such a scenario is, however, highly unlikely. On the one hand, the courts of the Church of Scotland employ highly developed procedures which accord with the dictates of natural justice. On the other hand, the Church appoints its own procurators, often from among the judges of the Court of Session, who consider ecclesiastical cases before they are brought before the courts of the Church of Scotland, thereby guarding against the Church’s courts taking cognisance of matters falling outwith their competence, and thus consequently beyond their powers. Hence, there appears to be little or no practical difference between the courts of the Church of Scotland exercising their jurisdiction in matters spiritual, and the courts or tribunals of religious voluntary associations governing their own internal religious affairs. As to non-religious voluntary organisations, Gloag and Henderson, *The Law of Scotland, 13<sup>th</sup> edition*, 47.01 states that:

The court does not take any concern with the actions or resolutions of associations except for the following matters: the court’s exercise of their

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<sup>138</sup> *Stair Memorial Encyclopaedia*, volume 3, para 1658.

<sup>139</sup> Frank Cramner, ‘Church State relations in the United Kingdom: a Westminster view’ in *Ecclesiastical Law Journal* (2001) 6(29), pp. 111-121, at p. 117.

<sup>140</sup> *Stair Memorial Encyclopaedia*, 3.2.1505.

supervisory jurisdiction to review any ultra vires decisions and the court's right to provide a remedy for the loss of associations' members' patrimonial interests or civil rights (such as, for example, unwarranted loss of status or infringement of the requirements of natural justice). Unless these matters are involved, an action for determining questions between a member and the association will not be entertained.

In this, it does not appear that there is substantial, if any, difference between religious voluntary organisations and any other type of voluntary organisation, in that all voluntary organisations may in effect create their own jurisdictions in respect of the admission and expulsion of members and office holders. Religious voluntary organisations may perhaps be said to be unusual in that the older religions – i.e. Judaism, Islam, Roman Catholicism, Anglicanism and Presbyterianism – often create their own formal legal systems by virtue of their constitutions, but this is presumably open to any voluntary organisation to do if it so wished. In general it may be observed that non-religious voluntary organisations, such as clubs and societies, tend to admit and remove members and office holders at their Annual General Meetings.

The interaction between the spiritual and civil jurisdiction has been highlighted in a series of recent cases concerning the status of ministers and other clergy as office holders, employees or workers. This is a complex area of law not least because these are distinctions of status which can be very difficult to draw and to justify consistently in terms of general employment law, even without the added complications of a possibly separate spiritual jurisdiction. Traditionally, it has been accepted that members of the clergy are office holders rather than employees and, as a result, they are not governed by the normal rules of employment law.

A series of recent cases have questioned this assumption that ministers and other holders of ecclesiastical office are not employees or workers. Depending on the facts and circumstances of each individual case, they may be workers and possibly employees and as such entitled to benefit from relevant employment law. These cases have also raised the issue of distinction between civil and spiritual jurisdiction. The issues are not limited to the Church of Scotland although the leading case in Scotland

did indeed concern a minister of the Church of Scotland.<sup>141</sup> Other cases in other parts of the UK have highlighted, for example, the additional complications which may arise from internal organisation, structure and governance of different religious organisations.<sup>142</sup>

What is evident from these decisions is that distinctions can be drawn, in respect of a minister, between issues which fall within the jurisdiction of the church, or other organisation, and issues which fall within the civil jurisdiction. In the Scottish case of *Percy v Church of Scotland Board of National Mission*, which concerned a claim by a minister of sex discrimination, Lord Nicholls of Birkenhead explained the distinction as follows:

A sex discrimination claim would not be regarded as a spiritual matter even though it is based on the way the church authorities are alleged to have exercised their disciplinary jurisdiction. The reason why a sex discrimination claim would not be so regarded is that the foundation of the claim is a contract which, viewed objectively, the parties intended should create a legally-binding relationship. The rights and obligations created by such a contract are, of their nature, not spiritual matters. They are matters of a civil nature as envisaged by section 3. In respect of such matters the jurisdiction of the civil courts remains untouched.

This is not to usurp the Church's exclusive jurisdiction in the exercise of its disciplinary powers ... Rather it is to recognise ... that by entering into a contract of employment binding under the civil law the parties have deliberately left the sphere of matters spiritual in which the church courts have jurisdiction and have put themselves within the jurisdiction of the civil court ...<sup>143</sup>

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<sup>141</sup> *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73.

<sup>142</sup> There is an excellent summary and overview of these cases published by the Churches' Legislation Advisory Service, *Case law on Churches, Religion and Employment*, 2015: accessible at [http://www.churcheslegislation.org.uk/files/publications/Employment\\_of\\_church\\_workers\\_June\\_2015.pdf](http://www.churcheslegislation.org.uk/files/publications/Employment_of_church_workers_June_2015.pdf).

<sup>143</sup> *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, at paras 40-41.

In conclusion, the value of historical Scottish Acts concerning the ecclesiastical jurisdiction of the Church of Scotland may be questioned in view of the Church of Scotland Act 1921. The right of the Church of Scotland to govern its own religious affairs, to admit and remove members and to appoint and suspend office holders, cannot be said to be a privilege compared to the activities of voluntary associations, who are free to constitute their own courts should they so wish, and to deal with members and office holders within the confines of matters concerning internal government, so long as such dealings be in accordance with natural justice and do not conflict with other legislation (such as human rights or employment law) that may take precedence.

#### **2.6.6 The Church of Scotland and the four ancient Scottish Universities**

Relations between the “national” Church of Scotland and the four ancient Scottish Universities of St Andrews, Glasgow, Aberdeen, and Edinburgh represent a hybrid of the interests of the old “Established” Church and the “new” colleges of the Free Church and later United Free Church of Scotland. The Act of Security made provision for these four ancient universities to “continue within this Kingdom forever” and the influence of the Church of Scotland over these institutions was guaranteed by obliging office holders both to subscribe the Westminster Confession of Faith and to submit themselves to the jurisdiction of Presbyteries. To the general control of the religious and moral lives of those holding office within these universities may be added the fact that the ministry of the Church of Scotland received their academic training within these universities, which gave the Church of Scotland a special and particular interest in the chairs of divinity. Thus when the general requirement of the Act of Security in respect of office holders in the ancient universities was abolished by the Universities (Scotland) Act 1853, s.1, those offices relating to the training of the ministry were specifically exempted, “such office not being that of principal or a chair of theology”. Section 6 of the 1853 Act provided the following interpretation: “The words ‘chair of theology’ shall for the purposes of this Act mean the chairs of divinity, church history, or Biblical criticism, and Hebrew, in any of the said universities or colleges.” This position was confirmed by the Churches (Scotland) Act 1905, section 5 – which gave the right of prescribing the formula of subscription to be

used in respect of such chairs to the General Assembly – with the added detail that the office of Principal of St Mary’s College, St Andrews, was specifically covered by the provision.

For the part of the United Free Church, the colleges of New College, Edinburgh, Trinity College, Glasgow, and Christ’s College, Aberdeen were independently endowed theological colleges established in the first instance for the training of the ministry of the Free Church of Scotland. Following the union of the United Free Church of Scotland and the old “Established” Church of Scotland in 1929, these colleges were in effect absorbed into the Universities of Edinburgh, Glasgow and Aberdeen respectively.<sup>144</sup> The transfer of the old endowed colleges of the Free Church to the ancient universities was the subject of specific agreements between the “United” or “national” Church of Scotland and those universities: although the specific details of these processes and agreements have not been researched in detail here, it is suffice to say that the universities were not averse to obtaining libraries, property and endowments in return for a commitment to continue to make provision for the training of candidates for the ministry of the “united” Church of Scotland.

The on-going statutory provisions concerning subscription of the Westminster Confession of Faith in respect of the “chairs of theology” at the ancient universities were abolished by the [Universities \(Scotland\) Act 1932](#). The 1932 Act also transferred the sovereign’s right of appointment to the “chairs of theology” in the ancient Scottish universities to the courts of each respective University. Nevertheless, section 2(1)(a) of the 1932 Act prescribed that University Courts would make appointments to “any theological chair founded prior to the passing of this Act” upon the recommendation of boards of nomination, which boards would be “composed of representatives elected in equal numbers by the University Court and by or under the authority of the General Assembly [of the Church of Scotland] or otherwise in such manner as may be agreed on by the University Court and the General Assembly”. In section 6 of the 1932 Act, anent Interpretation of the Act, “theological chair” is defined as “the chair of any professor who for the time being is included as a

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<sup>144</sup> R. D. Kernohan, *Our Church: A Guide to the Church of Scotland* (Edinburgh, St Andrews Press, 1985), pp. 88-89.

professor in the faculty of theology or divinity in any of the Scottish Universities”. Francis Lyall notes that a modified agreement along the lines of this statute was reached between the courts of the Scottish Universities and the Church of Scotland in 1950-1, and was “registered in the Books of Council of Session on 28 March 1951”.<sup>145</sup>

In this the present-day position of the Church of Scotland in respect of the Universities of St Andrews, Glasgow, Aberdeen and Edinburgh can be seen as a hybrid of, on the one hand, the legacy of the endowed theological colleges of the Free Church of Scotland, and, on the other hand, the pre-1932 “chairs of theology” once governed by the Act of Security 1706, the Universities (Scotland) Act 1853 and the Churches (Scotland) Act 1905, but now governed by the Universities (Scotland) Act 1932 and by agreements reached between the Church of Scotland and the ancient universities. In this, the present-day Church of Scotland clearly enjoys various historical advantages in respect of the ancient universities, but it is arguable whether such ongoing advantages are a hallmark of establishment. Other denominations are free to enter into agreements with these universities, such as that currently enjoyed by the Roman Catholic Church and the University in Glasgow in respect of the training of teachers for employment in those denominational schools carried on in the interests of the Hierarchy of the Roman Catholic Church in Scotland.<sup>146</sup>

### **2.6.7 The Church of Scotland and Scottish state-funded schools**

The place of the Church of Scotland in respect of Scottish non-denominational schools in contemporary Scotland is discussed at length in Chapter 4 of this Report. Nevertheless, it may be noted here that while there remains a statutory obligation for non-denominational schools to provide “religious observance”, this requirement is broadly construed by the Scottish government, so as to allow a range of approaches to this obligation to occur in practice and, as such, the position of the Church of Scotland is in effect linked to the maintenance of ongoing local customs in its favour, which customs may be continued or modified at the discretion of headteachers. In this, non-denominational schools may have long-standing customary arrangements with local

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<sup>145</sup> Lyall, *Of Presbyters and Kings* (1980), pp. 122 & fn. 331.

<sup>146</sup> See Chapter 4 on Education.

parish ministers in respect of religious observance, and may appoint ministers as chaplains. But there are no statutory obligations placed upon non-denominational schools to appoint chaplains, nor to favour the ministry of the Church of Scotland in relation to religious observance. Nevertheless, Scotland's 32 local education authorities, by which non-denominational schools are run, do appoint advisory education committees and the Church of Scotland enjoys direct statutory recognition in respect of these education committees, by virtue of the Local Government (Scotland) Act 1973, s.124, whereby one place on each such committee is expressly reserved for a representative of the Church of Scotland as nominated by the General Assembly. Other denominations also enjoy places on these education committees, most notably the Catholic Church, although only the Church of Scotland enjoys a prescribed place on all such committees.<sup>147</sup>

This 1973 development appears at first to be an example of a new privilege or recognition extended to the Church of Scotland. However, the Local Government (Scotland) Act 1973 fundamentally re-organised local government in Scotland into new areas or regions, and also created the new education committees. In this, the position of the Church of Scotland in respect of non-denominational schools was granted exceptional and increased authority which had not held between 1929 and the 1973 Act.<sup>148</sup>

### **2.6.8 The Church of Scotland and Scottish Prisons**

Ministers or licentiates of the Church of Scotland are automatically appointed to all Scottish prisons. This provision is found at least as far back as the Prisons (Scotland) Act 1877, s.10, and is repeated in the Prisons (Scotland) Act 1952, s.3(2), and in the present [Prisons \(Scotland\) Act 1989, s. 3](#) (2): “The Secretary of State shall appoint to each prison a chaplain being a minister or licentiate of the Church of Scotland”.

Chaplains from other denominations may be appointed to Scottish prisons relative to

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<sup>147</sup> For which see the [Local Government \(Scotland\) Act 1973, s. 124](#)(4). The wording of section 124 was altered by the Local Government etc. (Scotland) Act 1994 c. 39 Pt I c.6 s.31, although little if any practical differences were thereby occasioned.

<sup>148</sup> The influence of the Church of Scotland remained *de facto* in place following the Education (Scotland) Act 1872 through the election of its representatives to dominate most statutory school boards 1873-1919 and Ad Hoc Education Authorities 1919-29. From 1919 to 1973, the churches had only advisory functions to Education Committees of Local Authorities.

the religious beliefs of prisoners, and such chaplains may have access only to those prisoners who are of the same religion.

The appointment of ministers or licentiates of the Church of Scotland to Scottish prisons mirrors similar arrangements in England and Wales, where priests of the Church of England are appointed to English prisons, and priests of the Church in Wales are appointed to Welsh prisons. In this there is a degree of ambiguity, in that while there can be no doubt that the Church of England is established, the Church in Wales was disestablished from 1914.<sup>149</sup> In this, the situation in Scotland is not necessarily conclusive evidence that the Church of Scotland enjoys establishment status, although it is clearly an aspect of the official recognition of the pre-1920s “Established” Church of Scotland which continues to be enjoyed by the “United” or “national” Church of Scotland.

### **2.6.9 The Church of Scotland and the Solemnisation of Regular Marriage**

The Church of Scotland enjoys unique recognition in the statutory regulations surrounding the contracting of regular marriage in Scotland. This unique status has been attributed to the “national church” status of the Church of Scotland by the Scottish Government as recently as 2014.<sup>150</sup> The historical reasons for the place of the Church of Scotland in the Marriage (Scotland) Act 1977 are discussed at more length in the section of this report concerning religion and marriage in Scotland. That the Church of Scotland continues to enjoy unique recognition is clear but, compared to the era when the only way in which marriage could be regularly solemnised in Scotland was for banns to be proclaimed in the parish churches of the old “Established” Church of Scotland, even when the marriage ceremony was to be conducted by a minister or priest of another denomination, the present-day situation does not clearly suggest establishment.

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<sup>149</sup> Frank Cramner, ‘Paying the Piper? Public Funding and Supervision of Religion in a Secularized Society’ in Francis Messner (ed.) *Public Funding of Religion in Europe* (Farnham: Ashgate, 2015), 171-198, at 191.

<sup>150</sup> “the Church of Scotland, reflecting its national church status, is authorised to solemnise opposite sex marriages through the Marriage (Scotland) Act 1977” (Marriage and Civil Partnership (Scotland) Act 2014, The Qualifying Requirements: An Initial Paper, para 9, <http://www.gov.scot/Topics/Justice/law/17867/samesex/qualifying-requirements-discussion-paper>).

## 2.7 Conclusions

The present-day statutory recognition of the Church of Scotland in respect of education committees, prisons and the solemnisation of marriage represents the continuation of customs and statutory provisions dating back at least to the nineteenth century. If a theory is required to explain such provisions, then it may be best to look no further than the constitution of the Church of Scotland as contained in the 1921 Act. Article VI sets forth a conception of the relation between Church and State each acting in their appointed spheres:

The Church and State owe mutual duties to each other, and acting in their respective spheres may signally promote each other's welfare. The Church and State have the right to determine each for itself all questions concerning the extent and the continuance of their mutual relations in the discharge of these duties and obligations arising therefrom.

While no part of the Articles Declaratory define the obligations of the State towards “the Church”, and while no such obligations, even generally conceived, are in any sense legally binding upon the State, the general construction of this Article is that it is really a matter for the Church of Scotland and the State to decide how they continue to regulate their ongoing relations. There appears to be no obvious legal impediment to the State ceasing to give particular recognition to the Church of Scotland and, indeed, it may be wondered why the current arrangements continue to be perpetuated in view of the declining influence of the Church of Scotland. On the one hand, the Church of Scotland understands its own predicament only too well, and the General Assembly has recently considered whether it is still appropriate for the Church of Scotland's constitution to continue to maintain that it “a national church representative of the Christian Faith of the Scottish people”.<sup>151</sup> On the other hand, it might reasonably be asked whether the somewhat miscellaneous collection of legal recognitions which the Church of Scotland presently enjoy really make any difference to its life and mission. The level of differentiation between the Church of Scotland

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<sup>151</sup> Fergusson, *Church, State and Civil Society*, 186; cf *The Report of the Special Commission Anent the Third Article Declaratory of the Constitution of the Church of Scotland in Matters Spiritual, 2010* ([http://www.churchofscotland.org.uk/\\_data/assets/pdf\\_file/0014/3470/ga10\\_reports\\_specarticle.pdf](http://www.churchofscotland.org.uk/_data/assets/pdf_file/0014/3470/ga10_reports_specarticle.pdf)).

and other denominations is often not great even in principle, and it could well be argued that the practical realities of how the Church of Scotland functions in law and society are no different to any other religious, or indeed belief, body in Scotland. Yet nevertheless, it remains the case that the “national” Church of Scotland continues to enjoy direct formal recognition by the British monarchy as the official Church in Scotland, and stands in a long line of organised Reformed Protestant religion in Scotland dating from the mid-sixteenth century - factors which are considered to give the Church of Scotland a degree of influence in Scotland. Those wishing to reform the place of Protestantism within the British constitution and the recognition of the Church of Scotland may find it to be a case of, on the one hand, pressing for the passage of a Statutory Revision Act which tackles various aspects of the Act of Security and, on the other, the more nebulous task of trying to disentangle formal relations between the monarchy and the Church of Scotland - an area of the constitution not obviously governed by written law.

# Chapter 3

## Marriage in Scots Law

### Chapter 3 Marriage

#### 3.1 Introduction

#### 3.2 Religious to civil

##### 3.2.1 Jurisdiction in matrimonial disputes

##### 3.2.2 Law making

##### 3.2.3 Legal definitions of marriage

#### 3.3 Solemnisation of marriage: historical contexts and twentieth century developments

##### 3.3.1 Regular and irregular marriage

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#### 3.5 Ceremony and consent: a doubt?

##### 3.5.1 Form and substance

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#### 3.6 Conclusions

### **3.1 Introduction**

From an historical perspective, the present day place of religion in Scots marriage law appears much diminished. Over the past century, there has been extensive reform and to a great extent the law relating to marriage is now set out in statute. In the recent reforms of marriage, particularly the extension of marriage to same sex couples,<sup>1</sup>

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<sup>1</sup> Marriage and Civil Partnership (Scotland) Act 2014.

there is a clear trend away from a religious to a secular relationship model. That is not to say, however, that religion is not still acknowledged within Scots marriage law both in respect of the regulations governing the solemnisation of valid regular marriage and, perhaps, in respect of the concept of matrimonial consent.

There has been such extensive reform of marriage law during the twentieth and now into the twenty first century that it may seem unnecessary to look at historical development. Key insights, however, can be gained from looking to the past and tracing the path of reform. While pre-nineteenth century developments are dealt with in relative haste, more space is given to nineteenth-century developments, and yet more space to twentieth- and twenty-first-century developments. Most of these developments are fairly straightforward. One such development concerns the laws governing regular marriage as Scotland passed from a nation dominated by one religion, firstly Catholicism, then Reformed Protestantism, to a nation with a plurality of religious beliefs, and now more recently non-religious systems of belief. Another major development, the triumph of regular over irregular marriage, also presents a fairly straightforward topic. More complexity is encountered around the issue of consenting *to* marriage, and the Scots common law definition of what marriage is: here the main problem surrounds the relative lack of statutory definitions.

This chapter will look at marriage from various perspectives. It begins by highlighting three aspects of marriage regulation in which the declining place of religion is relatively clear: jurisdiction in matrimonial disputes, law making in respect of marriage and legal meanings of marriage. During the twentieth century, the key focus of reform related to solemnisation of marriage and legal recognition, which is dealt with in the second section of this chapter. The Scots law of marriage is now principally concerned with the regulations governing the contracting of valid regular marriages, and some historical explanations as to how Scots law arrived at this position are variously offered. Finally, the chapter will conclude by focusing on the recent reforms of the twenty-first century.

## 3.2 Religious to civil

### 3.2.1 Jurisdiction in matrimonial disputes

Prior to the Scottish Reformation, the Catholic Church in Scotland, which was the established religion, enjoyed exclusive legal jurisdiction in all matters concerning the formation, regulation and dissolution of marriage, as well as all matters concerning legitimacy. This “spiritual” – as distinct from civil and criminal – jurisdiction of the Catholic Church, was enforced in Scotland through a system of Catholic church courts.<sup>2</sup> These courts formed an independent part of the legal system in Scotland, and were subject to Scottish episcopal and papal authority and jurisdiction. Thus any Scot who wished to have their marriage acknowledged as valid; to have a valid marriage annulled; to have their deserting spouse compelled to adhere; to be legally separated from their spouse or to have the status of their children in respect of legitimacy declared, had to bring legal proceedings before a Catholic church court.<sup>3</sup> Rights of appeal lay from courts of first instance to St Andrews or Glasgow, and from thence to Rome. Scottish civil and criminal courts were excluded from interfering with such matters, and indeed fully acknowledged the jurisdiction of the Catholic Church in matrimonial causes.

At the time of the Reformation, the matrimonial jurisdiction passed to both the early courts of the Church of Scotland and the Court of Session. From the latter, matrimonial jurisdiction was in effect transferred to newly erected Commissary Courts from 1563/4, and the matrimonial jurisdiction of the Church of Scotland was suppressed.<sup>4</sup> The jurisdiction of the Commissary Courts was variously regarded as royal, or civil, from the era of the Reformation to 1610, and again from 1638 to 1660. During the periods 1610 to 1638, and 1660 to 1689, the Commissary Courts were subject to the Scottish episcopate, and as such were seen as episcopal, or spiritual courts, somewhat akin to the ecclesiastical courts found south of the border. Yet with the Glorious Revolution and the final triumph of Presbyterianism over

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<sup>2</sup> For which see Simon Ollivant, *The Court of the Official in Pre-Reformation Scotland* (Edinburgh: The Stair Society, 1982).

<sup>3</sup> For the extant decisions of these church courts in matrimonial causes see *Liber Officialis Sancti Andree*, ed. Cosmo Innes (Edinburgh: Abbotsford Club, 1845).

<sup>4</sup> For a full account of which see Thomas Green, *The Consistorial Decisions of the Commissaries of Edinburgh, 1564 to 1576/7* (Edinburgh: The Stair Society, 2014).

Episcopalianism within the Church of Scotland, the matrimonial jurisdiction of the Commissary Courts became fixedly civil. The Commissary courts were deconstructed during the early to mid-nineteenth century, and their jurisdictions passed to sheriff courts and the Court of Session.<sup>5</sup> This remains the situation today and, as such, litigation concerning marriage is held by Scots law to be an exclusively civil matter, with no place given to religious jurisdictions in respect of marriage.

There is nevertheless some acknowledgement given to the fact that a married couple may be seeking a divorce before a Scottish civil court and a religious court at the same time, insofar as the Family Law (Scotland) Act 2006, section 15, inserted a new section ([section 3A into the Divorce \(Scotland\) Act 1976](#)), by which Scottish civil courts were authorised to assist divorce proceedings before them upon application, in cases where a party to such a case was capable of removing a religious impediment to remarriage on the part of the applicant. That is to say, for example, should a Jewish man be pursuing his wife before a Scottish civil court for divorce under Scots law, but will not present his wife with a bill of divorce in accordance with Jewish law, the Scottish civil court may postpone decree of divorce until such time as the husband presents his wife with a religious bill of divorce.

### **3.2.2 Law making**

Prior to the Reformation the Canon law of marriage of the Catholic Church was the marriage law of Scotland, in respect of the formation, regulation and dissolution of marriage, and in respect of legitimacy. The majority of the marriage law was therefore directly legislated by virtue of papal legislative competence, usually manifested through final judgments, or decretals, of the bishops of Rome in matrimonial causes. Papal jurisdiction was rejected in Scots law by the Papal Jurisdiction Act 1560, [as ratified in 1567](#), which Act still remains part of the statute law of Scotland. In this, Catholicism is unique in that it is the only religion in Scotland whose jurisdiction is expressly prohibited by statute from every being formally recognised in Scots law, in the way in which the jurisdiction of the Church of Scotland is still recognised.

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<sup>5</sup> For a brief account of which see *Guide to the National Archives of Scotland* (Edinburgh: The Stationary Office & The Stair Society, 1996), p. 154.

Following the Reformation, while much marriage law in Scotland remained the pre-Tridentine Canon law of the medieval church by virtue of the case law of the Commissary Courts, the Scottish Parliament assumed legislative competence in respect of marriage law in Scotland for the first time. Initially, Parliament limited itself to incorporating what early Scottish Protestants held to be the “law of God” directly into Scottish marriage law (for which see the [Marriage Act 1567](#)). While this statutory acknowledgment of the “law of God” in Scots marriage law no longer applies, it may be noted that the [Incest Act of 1567](#), which incorporated the 18<sup>th</sup> chapter of the book of Leviticus into Scots criminal law, remained in force in Scotland until 1986,<sup>6</sup> and has been interpreted and enforced by the High Court of Justiciary as recently as 2008.<sup>7</sup>

It may be argued that the Scottish Parliament first assumed full direct legislative competence in respect of Scottish marriage law while enacting the [Divorce for Malicious Desertion Act 1573](#). While the statute was couched in religious language of a general nature, no attempt was made simply to acknowledge the “law of God” as being the law of Scotland, but rather Parliament in effect prescribed the law.<sup>8</sup> Yet despite the development of the competence of Parliament in respect of Scots marriage law during the era of the Reformation, much of the marriage law of Scotland continued to be based upon case law, which case law retained many aspects of the pre-Reformation Canon law of marriage. In this, Scottish marriage law was an admixture of Canon law, the “law of God” and some Scottish statute law for much of the modern age in Scotland, and as such both medieval theological ideas about marriage (although formally rejected) as well as Protestant understandings of marriage based on scripture, found direct expression in the law of marriage in Scotland from the Reformation until the twentieth-century.<sup>9</sup> Nevertheless, with the

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<sup>6</sup> The Incest Act 1567 was repealed by the Incest and Related Offences (Scotland) Act 1986, which was itself repealed by the Criminal Justice and Licensing (Scotland) Act 2010 asp13. Nevertheless, between 1986 and 2010, the Criminal Law (Consolidation) (Scotland) Act 1995, section 1, defined incest in terms of a table of incestuous relations, and is still in force today.

<sup>7</sup> For which see *HM Advocate v. L* (2008), 2009 S.L.T. 127, 2009 S.C.L. 311. The case involved the Incest Act 1567 because the incest in the case had occurred prior to 1986.

<sup>8</sup> See Green, *Court of the Commissaries of Edinburgh* (2010), 143 ff; Green, *Consistorial Decisions* (2014), xlv, lxii ff.

<sup>9</sup> For a recent discussion of which see Thomas Green, ‘The Sources of early Scots Consistorial Law: Reflections on Law, Authority and Jurisdiction during the Scottish Reformation’ in A. Mark Godfrey

expansion of the legislative activity of the British Parliament during the nineteenth and twentieth centuries,<sup>10</sup> marriage law in Scotland was systematically purged of its Canon law and Scottish Protestant elements and today it would be difficult to argue that any vestiges of either Catholic or Protestant theology and belief still find direct correlation in Scots law in respect of matters like the duties and obligations of conjugal relations – such as the historical requirement of adherence – or in the area of the cases involving sham marriages indicating that participation in a valid marriage ceremony is not sufficient in and of itself to form a valid marriage, but rather the exchange of matrimonial consent, or consent to enter into marriage, is required.<sup>11</sup> This raises the problem for Scots law of what is understood by “matrimonial consent” as it is not a concept which has been considered in recent times but rather falls back on definitions of marriage drawn from the Scottish institutional writers, or later authorities such as Lord Fraser. Their definitions were clearly influenced by historical, and therefore in part religious, definitions of husband and wife.

The authority and eventual dominance of statute law in respect of Scots marriage law raises the question of the degree of influence of religious bodies, particularly the Church of Scotland, upon the legislature. In the post-Reformation period, the Church of Scotland often held its General Assemblies immediately prior to the assembly of the three estates in parliament so as to exert maximum influence over that legislature. Legislation such as the Marriage Act 1567 was a direct result of Protestant influence over the pre-Union Scots Parliament. Such indirect influence over Scots marriage law proved to be an enduring feature of the Protestant ascendancy in Scotland: eighteenth- and nineteenth-century attempts to abolish irregular marriage in Scots law floundered at least in part due to the opposition of the Church of Scotland to such reforms.<sup>12</sup> In more recent times, however, it has been argued that:

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(ed.), *Law and Authority in British Legal History* (Cambridge: Cambridge University Press, 2016), [chapter 6].

<sup>10</sup> In respect of Scots marriage law “The process of statutory reform, begun in the nineteenth century, has been carried on and extended by the Scottish Law Commission and now the Scottish Executive to the extent that the law relating to marriage is almost entirely contained within legislation.” (Jane Mair, ‘A Modern Marriage?’ in *Edinburgh Law Review*, 10(3), pp. 333-351, at p. 333).

<sup>11</sup> Discussed further below at 3.5.

<sup>12</sup> Brian Dempsey, ‘Making the Gretna Blacksmith Redundant: Who Worried, Who Spoke, Who was Heard on the Abolition of Irregular Marriage in Scotland’ in *The Journal of Legal History* (2009) 30.1 pp. 23-52, 28-29.

the views of the Kirk, in Assembly or otherwise, carry no more greater weight than any other minority pressure group, and perhaps much less. The Kirk is known to be weaker than its formal statistics of membership might suggest, and its internal organisation is not such as to permit it to reflect broad opinion within Scotland any more.<sup>13</sup>

The general decline of the Church of Scotland over the Scottish legislature post devolution would appear to be confirmed in respect of recent reforms in Scottish marriage law: the introduction of marriage between persons of the same sex was opposed by the Church of Scotland – as well for that matter as numerous other religious bodies in Scotland – but such opposition proved insufficient for the purposes of preventing such reform. Rather, the opposition of religious bodies to such reform had the limited effect of introducing a number of procedural complications and “safeguards” into Scots law in respect of the solemnisation of marriages between persons of the same sex in religious and belief ceremonies. Yet on the other hand, it might be argued that the influence of religious groups is not entirely absent from the political progress: the original proposals concerning the reduction of the periods of non-cohabitation for divorce to six months with consent and one year without consent contained in the Family Law (Scotland) Bill introduced at Holyrood in 2005, were subsequently amended to one year without consent and two years with consent following strong opposition from various religious groups and individuals.<sup>14</sup>

### **3.2.3 Legal definitions of marriage**

In respect of the definition of marriage in Scots law, it would be difficult to argue that religion continues to influence how marriage is understood in law. That is to say, it is difficult to see how religious beliefs and doctrines still influence the Scots law definition of marriage as an objective concept, and the consequences of such a concept in terms of who may contract marriage, how marriages may be ended through

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<sup>13</sup> Francis Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen: Aberdeen University Press, 1980), p. 115.

<sup>14</sup> For detailed analysis of these issues see E Gillan, *Influencing Family Policy in Post-Devolution Scotland*, unpublished PhD thesis, University of Edinburgh (2008), available at <https://www.era.lib.ed.ac.uk/handle/1842/2584>; J Mair, “Belief in Marriage” (2014) 5 International Journal of the Jurisprudence of the Family 63.

divorce, and so forth. For example, during the Catholic ascendancy in Scotland, the law forbade divorce and remarriage as would now be understood, on the ground that marriage was a sacrament of the Church, and thus subject to theological considerations which dictated that a validly contracted marriage could only be terminated by death.<sup>15</sup> Even when divorce and remarriage, as might be understood today, was introduced into Scots law during the Reformation, the only grounds of divorce were adultery and malicious desertion, and both these grounds were fault-based grounds.<sup>16</sup> The basic doctrine that divorce could only proceed on the basis of the fault of one of the contracting parties to a marriage was finally removed from Scots law by the Divorce (Scotland) Act 1976, which made irremediable breakdown of marriage the sole ground for divorce.<sup>17</sup> Other features of historical Scottish marriage law which could be argued to have been founded on religious considerations, such as the principles of adherence and legitimacy, have also been removed.<sup>18</sup> In this, it might be argued that Scots law long compelled married couples to cohabit, because it held married couples to their marriage promises and held it to be in the public interest to avoid scandal by compelling husband and wife to cohabit, unless there were grounds for separation, such as cruelty, or for divorce. Likewise the principle of the legitimacy of issue could also be argued to have had strong religious

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<sup>15</sup> For the pre-Reformation law of marriage in Scotland see generally *William Hay's Lectures on Marriage*, trans. & ed. John C. Barry (Edinburgh, The Stair Society, 1967).

<sup>16</sup> Divorce on the ground of adultery was introduced into Scots law by the courts of the Church of Scotland during the period 1559 to 1563 (Green, *Court of the Commissaries of Edinburgh* (2010), 114 ff). Divorce for malicious desertion was introduced into Scots law by the Divorce for Malicious Desertion Act 1573 (*RPS*, A1573/4/2). These two faults remained the only grounds for divorce in Scotland until the Divorce (Scotland) Act 1938, which added the grounds of cruelty, incurable insanity, sodomy and bestiality.

<sup>17</sup> [Divorce \(Scotland\) Act 1976, section 1](#). Adultery ceased to be a fault, and became a means, along with unreasonable behaviour and non-cohabitation, by which irremediable breakdown of marriage could be established.

<sup>18</sup> Actions for adherence were finally abolished by the [Law Reform \(Husband and Wife\) \(Scotland\) Act 1984, section 2 \(1\)](#): "No spouse shall be entitled to apply for a decree from any court in Scotland ordaining the other spouse to adhere". All children were declared to be legitimate in Scots law regardless of the circumstances of their birth by the [Law Reform \(Parent and Child\) \(Scotland\) Act 1986, section 1](#): "The fact that a person's parents are not or have not been married to one another shall be left out of account in establishing the legal relationship between the person and any other person; and accordingly any such relationship shall have effect as if the parents were or had been married to one another." This subsection has been amended by the [Family Law \(Scotland\) Act 2006, s. 21](#) so as to now read: "No person whose status is governed by Scots law shall be illegitimate; and accordingly the fact that a person's parents are not or have not been married to each other shall be left out of account in - (a) determining the person's legal status; or (b) establishing the legal relationship between the person and any other person."

underpinnings, in that all extra-marital sexual intercourse was deprecated as immoral and sinful, from which it followed that the issue of such relations should not enjoy all the benefits of issue born within marriage. It may also be noted that the traditional law of property in respect of marriage has been thoroughly reformed, so that marriage now has few automatic consequences for the property rights of husbands and wives.<sup>19</sup>

In all these respects it is difficult to see any correlation between Catholic or Scottish Protestant belief and doctrine and current Scots marriage law, which indicates that the Scots common law of marriage has been systematically reformed during the course of the twentieth century by statute so as to remove all vestiges of such correlations. Within this context, it could be argued that Scots law's long insistence that same-sex couples were impeded from contracting marriage was the final vestige of both historical Catholic and Scottish Protestant influence over Scots law, and that this too has now been reformed.

### **3.3 Solemnisation of marriage: historical contexts and twentieth and twenty-first century developments**

The Scots law of marriage is now principally concerned with the processes by which marriage may be validly contracted in Scotland.<sup>20</sup> In this, Scots law is intimately involved in regulating the formation of valid regular marriages. But what marriage actually means in terms of the behaviour of married couples is not now closely defined in Scots law and, as such, what marriage actually entails in terms of conjugal behaviour now appears to be an increasingly private matter, left almost entirely at the discretion of married couples themselves. In this respect Scots law no longer regulates matters such as the cohabitation of a couple, their sexual relations,<sup>21</sup> and the pooling

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<sup>19</sup> The principle that marriage in itself has no effect on the property or legal capacity of spouses is set out in [s. 24 of the Family Law \(Scotland\) Act 1985](#). For the reform of the historical Scots law position of communal property between husband and wife with the right of administration vested in the husband, see Jane Mair, 'A Modern Marriage?' in *Edinburgh Law Review*, 10(3), pp. 333-351, 335 ff.

<sup>20</sup> "Contemporary family legislation principally regulates the process of formation and then retreats until the point when marriage comes to an end, through death or divorce" (Jane Mair, 'A Modern Marriage?' in *Edinburgh Law Review*, 10(3), pp. 333-351, at p. 333).

<sup>21</sup> Sexual relations were not closely regulated in Scots law, although Lord Fraser held the essence of desertion to be 'wilful abstinence' (Fraser, *Treatise on Husband and Wife* (1876-8), ii, 1209).

of resources and assets. Only at the point at which a marriage is determined to have irretrievably broken down do questions of property come clearly into view, and here there is now a degree of congruence in the way Scots law treats both married couples and cohabiting couples who have lived “as if they were husband and wife”,<sup>22</sup> although the rights of cohabiting couples remain a very limited version of the rights granted to spouses and civil partners.

### **3.3.1 Regular and irregular marriage**

From an historical perspective, the present-day emphasis in Scots law on the regular formation of marriage appears almost a novelty. Solemnisation of regular marriage has of course been a feature of marriage law in Scotland since the medieval period, but it is only since 2006 that regularly solemnising a marriage has been the only way to contract marriage in Scotland. From 1215, the Canon law, in conformity with canon 51 of the Fourth Lateran Council of the Catholic Church, prescribed that all marriages throughout western Christendom ought to be contracted regularly, and entered into with due solemnity *in facie ecclesiae*, or as the Scots had it, *in the face of holy kirk*. What this meant in practice is that from 1215, Scots intending to marry were to give in their names to the priest, or priests, of the parish, or parishes, in which the parties were domiciled, so that the couple’s banns might be proclaimed on three separate Sundays, at a time when the parishioners of the parish or parishes in question might have prior intimation of a couple’s intention to marry. The due proclamation of banns was the essential feature of the contracting of a regular marriage, following which a couple exchanged promises of marriage in the present tense (*sponsalia per verba de praesenti*) in the “face of the church” with due solemnity. Regular solemnisation of marriage ordinarily took the form of an exchange of promises before a priest in the presence of at least some of the parishioners from the parish or parishes in which a couple was domiciled. The precise location of such solemnisation of regular marriage was not prescribed, and while there is much evidence of such ceremonies taking place within churches, it was a common custom among the Scots to marry at the door of their local parish church. In general, the pattern of regular marriage introduced into Scotland from 1215 still resonates with the current Scots law

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<sup>22</sup> [Family Law \(Scotland\) Act, 2006, s. 25\(1\)\(a\)](#).

procedures for contracting regular marriage. Although the proclamation of banns was discontinued in Scots law by the [Marriage \(Scotland\) Act 1977, section 3\(1\)](#) - which prescribed that all couples intending to marry in Scotland submit a notice of intention to marry to a district registrar - the basic function of both the proclamation of banns and the submission of a notice of intention to marry is the same, namely to take all reasonable steps to determine whether or not some impediment to an intended marriage exists before it is contracted.

The role of the priest as celebrant of regular marriages during the Catholic ascendancy continued after the Reformation, with the role of celebrant in regular marriages falling to the ministry of the Church of Scotland. Between the Reformation and 1834, regular marriage could only be contracted in the Church of Scotland. Bearing in mind that civil marriage was only introduced into Scotland by the Marriage (Scotland) Act 1939,<sup>23</sup> it might be wondered how couples not belonging to the established Church married between 1560 and 1834.

The answer is relatively straightforward in that, despite the insistence of the Fourth Lateran Council that couples marry regularly, Canon law continued to acknowledge two other ways in which marriage might be contracted. These forms of marriage were designated irregular marriages, and could be formed in two ways. The first was by declaration *per verba de praesenti*. The exchange of promises of marriage in the present tense between a couple (i.e. “I take you to be my wife” etc) resulted in the contracting of marriage, wheresoever such promises were exchanged. There was no need for any religious element whatsoever, and indeed no need for witnesses to be present. The second form of irregular marriage was marriage by engagement with subsequent sexual intercourse (*sponsalia per verba de futuro cum copula subsequente*). In this, the promises of future marriage, exchanged by a couple at the time of their engagement (i.e. “I will take you to be my wife” etc), were deemed to have become words of the present tense at the moment an engaged couple had sexual intercourse. Again, engagements did not need to have any religious content, and did not need to be entered into before witnesses, although witnesses were of course

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<sup>23</sup> This 1939 Act is not presently available at [www.legislation.gov.uk](http://www.legislation.gov.uk).

preferable. Both of these forms of irregular marriage were abolished by the Council of Trent in 1563 but, since the Scottish Reformation began in 1559, the reforms of Trent were never introduced into Scotland via the Canon law. Rather, Scots marriage law retained the “pre-Tridentine” Canon law irregular marriages until abolished by the Marriage (Scotland) Act 1939. Not only did Scots law long retain Canon law irregular marriages but, at some point prior to the early nineteenth century, Scots law also developed a further native category of irregular marriage, namely marriage by cohabitation with habit and repute, which is discussed presently in more detail.

So, despite the exclusive privilege of the Church of Scotland between the Reformation and 1834 as the only body entitled to solemnise regular marriages, all other types of marriage services held outside the established Church nevertheless gave rise to technically legally valid, albeit irregular, marriages. Although legally valid, such religious marriage services held outwith the established Church were subject to severe penalties, particularly for Roman Catholics, by virtue of the [Act Against Clandestine and Unlawful Marriages 1661](#) and the [Act Against Clandestine and Irregular Marriages 1698](#). This is because in both pre-Tridentine Canon law and in post-Reformation Scots law, the exchange of consent between the couple contracting marriage was the essential element in the formation of a valid marriage, whether regular or irregular. The anomaly of limiting the contracting of regular marriages to the Church of Scotland was remedied by the Marriage (Scotland) Act 1834 (4 & 5 W. 4, c. 28),<sup>24</sup> the long title of which was “An Act to amend the Laws relative to Marriages celebrated by Roman Catholic Priests and Ministers not of the Established Church in Scotland”, section 2 reading:

It shall be lawful to all persons in Scotland, after due proclamation of banns there, to be married by priests or ministers not of the Established Church, and also for such priests or ministers to celebrate marriages, without being subject to any punishment, pains, or penalty whatever; any thing in the said recited Acts,<sup>25</sup> or in any other Acts or Parliament, to the contrary notwithstanding.

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<sup>24</sup> This 1834 Act is not presently available online.

<sup>25</sup> Namely the Act Against Clandestine and Unlawful Marriages 1661 (*RPS*, [1661/1/302](#)), which prescribed that “no marriage be celebrated but according to the laudable order and constitution of this

Yet despite the introduction of tolerance for the priests and ministers of non-established churches in Scotland in 1834, so that the same might solemnise marriage without fear of any form of punishment, it still remained the case that regularity required the prior proclamation of banns. The anomaly here is that even after the 1834 Act, banns could only be proclaimed in the Church of Scotland, and not in any other church. Given that there was no civil procedure in Scotland by which the legal effect of the proclamation of banns might be replicated until the Marriage Notice (Scotland) Act 1878,<sup>26</sup> between 1834 and 1878 any couple wishing to marry regularly outwith the Church of Scotland still had to have their banns proclaimed in the Church of Scotland.<sup>27</sup>

The 1878 Act introduced a civil procedure of marriage notices into Scots law for the first time. The procedure was simple and inexpensive, and consisted of a couple wishing to marry submitting a notice of intention to marry to the registrar of the parish or district in which they lived (or two such notices to two respective registrars if resident in different parishes or districts) together with the sum of 1s-6d. The registrar then entered the particulars contained in the notice in a marriage notice book kept for that purpose, and publicly displayed a corresponding notice of the intended marriage.<sup>28</sup> If no objections to the intended marriage were submitted during the subsequent seven days, the registrar was to issue a “registrar’s certificate” in respect of the intended marriage upon the payment of a fee of 1s.<sup>29</sup> Such certificates were to be “of the same force and effect as a certificate granted by a session clerk...of the due

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kirk, and by such persons as are by the authority of this kirk warranted to celebrate the same”, with heavy pecuniary pains attached to all those who presumed to contract marriage in ceremonies conducted by celebrants not of the Church of Scotland, and with the penalty of perpetual banishment attached to such celebrants, and the Act Against Clandestine and Irregular Marriages 1698 (*RPS*, [1698/7/114](#)), of similar tenor.

<sup>26</sup> This 1878 Act is not presently available online.

<sup>27</sup> As noted in the *Report of the Departmental Committee Appointed to Enquire into the Law of Scotland Relating to the Constitution of Marriage* (London: HMSO, 1937), p. 6, section (4) in which the Morison Committee recommended that the law be altered so as to permit the proclamations of banns outwith the Church of Scotland, a recommendation not adopted by the legislature.

<sup>28</sup> Marriage Notice (Scotland) Act 1878, sections 7 and 8.

<sup>29</sup> Marriage Notice (Scotland) Act 1878, section 9.

proclamation of banns of marriage”.<sup>30</sup> Section 11 of the Act declared that “a certificate from a session clerk of the due publication of banns, and a registrar’s certificate granted under this act, shall be of equal authority in authorising a minister, clergyman, or priest in Scotland to celebrate a regular marriage, and such marriages may be celebrated upon the production either or a certificate...of due proclamation of banns, or of a registrar’s certificate” provided that “no minister of the Church of Scotland shall be obliged to celebrate a marriage not proceeded by due proclamation of banns”. Nevertheless, regular marriages could still only be contracted in a religious ceremony until 1940. This meant that any couple who wished to marry in Scotland outwith the context of a religious ceremony had to contract an irregular marriage.

The 1878 Act was a best attempt at encouraging regular marriage in Scotland, within the context of various previous failed attempts to abolish irregular marriage in Scotland. At the time of the abolition of irregular marriage in England by the Marriage Act 1753 (Lord Hardwicke’s Act), there was some move to abolish such marriages north of the border, although the Marriage (Scotland) Bill of 1755 to that effect made no progress at Westminster. There were further attempts to abolish irregular marriage in Scotland during the 1840s through the introduction of various Bills, all of which failed, there being strong opposition from the Church of Scotland. In 1868 a Royal Commission on the laws and registration of marriage in the United Kingdom “recommended the abolition of irregular marriage in Scotland and the introduction of marriage by civil registrars” but this too failed to gain traction.<sup>31</sup> In view of the apparent impasse in attempts to abolish irregular marriages in Scotland, the legislature adopted the alternative strategy by which couples might be encouraged to contract marriage regularly in Scotland via the Marriage Notice (Scotland) Act 1878, as already discussed. Indeed, the full title of the 1878 Act was “An Act to Encourage Regular Marriages in Scotland”.

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<sup>30</sup> Marriage Notice (Scotland) Act 1878, section 6.

<sup>31</sup> See Brian Dempsey, ‘Making the Gretna Blacksmith Redundant: Who Worried, Who Spoke, Who was Heard on the Abolition of Irregular Marriage in Scotland’ in *The Journal of Legal History* (2009) 30.1 pp. 23-52, from p. 27.

While the two forms of irregular marriage retained in post-Reformation Scotland from medieval Canon law were abolished by the Marriage (Scotland) Act 1939, as has been briefly noted above Scots law had developed its own unique form of irregular marriage at some point between the Reformation and the early nineteenth century.<sup>32</sup> This was known as marriage by cohabitation with habit and repute (i.e. of marriage) and was abolished by the [Family Law \(Scotland\) Act 2006, section 3](#). Nevertheless, it is still possible for all three types of irregular marriage to be of some bearing on cases involving historical irregular marriages, although instances of the two Canon law types are now rare.<sup>33</sup> The long survival of irregular forms of marriage in Scots law directly suggests that Scots law has always regarded marriage as an objective concept which is ultimately independent of the ceremonies surrounding the contracting of regular marriages.

The 1937 Report of the Departmental Committee Appointed to Enquire into the Law of Scotland Relating to the Constitution of Marriage (“The Morison Report”) recommended that the native Scots irregular marriage of marriage by cohabitation with habit and repute ought to be abolished along with marriage by declaration and marriage by engagement with subsequent copulation,<sup>34</sup> but in the event only the last two were abolished by the Marriage (Scotland) Act 1939. But the main point in hand arising from the 1939 Act in respect of understanding the current day Scots law of the contracting of marriage is the fact that the abolition of the two principal forms of irregular marriage in Scotland brought with it the problem of how couples not belonging to either the Church of Scotland or any of the other religious bodies which had been recognised from 1834 onwards as being able to celebrate regular marriages, might marry regularly. The solution contained in the 1939 Act was to introduce into Scots law for the first time a civil procedure by which Scots could marry regularly.

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<sup>32</sup> The development of this aspect of Scots consistorial law is still not known in detail: certainly it was not known during the era of the Reformation, but was certainly the law of Scotland by the early nineteenth century (Green, *Consistorial Decisions* (2014), pp. xlix-1).

<sup>33</sup> Provision is still made for these marriages, if contracted before 1940, in the [Marriage \(Scotland\) Act 1977, s.21](#).

<sup>34</sup> *Report of the Departmental Committee Appointed to Enquire into the Law of Scotland Relating to the Constitution of Marriage* (London: HMSO, 1937), p. 16, recommendation IV. It is possible that the recommendation to abolish ‘marriage by habit and repute’ was not accepted because the Report had not clearly distinguished marriage by cohabitation with habit and repute from the legal presumption in favour of an irregular marriage by habit and repute (i.e. see p. 12, section 5(d)).

### 3.3.2 The Marriage (Scotland) Act 1939: civil registration

The 1939 Act<sup>35</sup> came into force on 1 July 1940, at which point regular marriages could be either contracted as per the law hitherto in force, that is to say in a ceremony conducted by the Church of Scotland or in a ceremony conducted by another recognised religious body, or in a new form of civil registration conducted by a registrar appointed by the Registrar General for Scotland. Yet a noteworthy feature of 1939 Act is that it nowhere used the term “civil marriage”. This is particularly striking, as the Morison Report had used the phrase “new form of regular civil marriage”<sup>36</sup>, while section (8) of the Report - “Provisions for a New Civil Marriage” – recommended “the institution of a civil form of marriage which should have, before the law, an equal status with regular marriages as at present constituted”.<sup>37</sup>

The key points of the Marriage (Scotland) Act 1939 were:

Section 1(1): “Any two persons who desire to be married to each other in Scotland, may contract a marriage in the office of an authorised registrar in accordance with the following provisions:

- (i) on production to an authorised registrar of valid certificates of due publication under the Marriage Notice (Scotland) Act 1878, of notice of the intended marriage, or of a valid certificate of such publication, applicable to both parties, the registrar shall supply a copy of the First Schedule to this Act [in effect a marriage certificate], and shall, so far as possible, fill up the same according to the information supplied by the parties to the best of their knowledge and belief;
- (ii) the persons shall thereafter, in the presence of the registrar and of two persons of the age of sixteen years and upwards as witnesses, declare that they know of no legal impediment to their marriage, and that they accept each other as husband and wife:

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<sup>35</sup> As already noted above, this 1939 Act is not presently available online.

<sup>36</sup> *Report of the Departmental Committee Appointed to Enquire into the Law of Scotland Relating to the Constitution of Marriage* (London: HMSO, 1937), p. 13, section (6).

<sup>37</sup> *Report of the Departmental Committee Appointed to Enquire into the Law of Scotland Relating to the Constitution of Marriage* (London: HMSO, 1937), p. 14, section (8).

(iii) the registrar shall then complete the filling up of the copy of the aforesaid Schedule and it shall be signed by the parties, the registrar and the witnesses.”

Section 1(4): “Any marriage contracted in accordance with the foregoing provisions of this section shall, unless there be a legal impediment thereto, be a valid and regular marriage in all respects”

Section 5: “No irregular marriage by declaration *de presenti* [sic] or by promise *subsequente copula* contracted after the commencement of this Act shall be valid.”

In this, it appears that the 1939 Act did not seek to create the new category of “civil” as opposed to “religious” marriage, but rather was still concerned with the principal distinction made in marriage law in Scotland from 1215 to the Second World War, namely the distinction between “regular” and “irregular” marriage. Rather, the civil/religious distinction appears to have been between religious ceremonies and civil ceremonies, both of which were lawful contexts for the solemnisation of regular marriage. And within the context of the intention of Parliament not to abolish marriage by cohabitation with habit and repute, it is clear that Scots law continued to lay some stress on the fact that it was still consent which made marriage, and not outward ceremony or procedure. In this it might be argued that Scots law continues to hold marriage to be formed by consent alone, but that, since the abolition of marriage by cohabitation with habit and repute in 2006, it will only acknowledge those instances of matrimonial consent which occur within the regulatory framework created by positive law in the interests of clarity and order. From this perspective, reference to the categories of civil and religious marriage in any substantial sense is misleading: in Scots law it is the case that there is fundamentally only valid regular marriage.

Both civil and religious procedures concerning prior public intimation of intention to marry were retained by Scots law after 1939, and remained in place until the abolition

of the proclamation of banns and the reform of the civil procedures governing the lawful registration of marriages in Scotland by the Marriage (Scotland) Act 1977.<sup>38</sup>

### **3.3.3 The Marriage (Scotland) Act 1977: religious or civil marriage**

From 1977 the only procedure by which the regular marriage requirement of prior intimation of marriage can be achieved has been a civil procedure. This civil procedure is still governed by the 1977 Act as amended, [sections 3 to 6](#), and [15](#), and consists in effect of the submission of a notice of intention to marry to a district registrar, the engrossing of the same into a marriage notice book and list of intended marriages, the public display of a list of intended marriages, due time (now 28 days) for formal objections to an intended marriage to be received, and, failing objections, the issuing of a Marriage Schedule. For marriages which are to be solemnised in a religious, or from 2014, religious or belief ceremony, the Marriage Schedule must specify the time and place of the intended ceremony, and any deviation from these particulars necessitates the issuing of a new Schedule. A marriage having been solemnised in a religious or belief ceremony, the Marriage Schedule is signed by the parties to the marriage, the two witnesses to the exchange of consent, and the celebrant, and returned to the issuing registrar within three days for registration.

The Marriage (Scotland) Act 1977, as originally enacted, introduced into statutory language, possibly for the first time, an explicit reference to “religious” and “civil” marriage. Thus [sections 9 to 16 fell under the heading “religious marriages”, while sections 17 to 20 fell under the heading “civil marriages”](#). Yet a consideration of the text of the Act makes it clear that what was being distinguished were religious and civil ceremonies. Section 8 (1) of the Act makes it clear that “A marriage may be solemnised by and only by: (a) [the four categories of celebrants approved in respect

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<sup>38</sup> Although the proclamation of banns in the Church of Scotland were abolished in respect of Scots marriages by the [Marriage \(Scotland\) Act 1977, section 27](#), banns may still be proclaimed in respect of any persons usually resident in Scotland who requires the banns to be proclaimed in order to be married outwith Scotland (Frank Cranmer, "Calling the banns in Scotland: a curiosity for canon law anoraks" in *Law & Religion UK*, 14 August 2012, <http://www.lawandreligionuk.com/2012/08/14/calling-the-banns-in-scotland-a-curiosity-for-canon-law-anoraks/>). Although this procedure is therefore still possible, the Church of England recommends that a common marriage licence be obtained in such cases, rather than having the banns proclaimed in a parish church of the Church of Scotland (Frank Cranmer, "Calling the banns in Scotland? – on reflection, maybe not" in *Law & Religion UK*, 16 January 2015, <http://www.lawandreligionuk.com/2015/01/16/calling-the-banns-in-scotland-on-reflection-maybe-not/>)

of religious ceremonies]; or (b) a person who is a district registrar or assistant registrar appointed under section 17 of this Act.” Section 8(2) then goes on to define how a marriage solemnised in a religious ceremony as mentioned in section 8(1)(a) is to be referred to, namely a “religious marriage” and how a marriage solemnised in a civil ceremony as per section 8(1)(b) is to be referred to, namely a “civil marriage”. As such, in the 1977 Act as originally enacted, these terms are merely a form of shorthand, which refer not to some fundamental distinction within the context of regular marriage, but rather to the differing quality of the ceremonies used.

In this, regardless of the type of ceremony used to solemnise marriage, it would appear that Parliament intended it to be understood that in Scots law there is only “marriage” but that it may be solemnised in either a religious or civil ceremony. This is surely the case, for if Scots law meant something deeper by ‘civil’ and ‘religious’ marriage, then it might be expected that Scots law would also distinguish between ‘civil’ and ‘religious’ divorce. This is clearly not the case for, if it were, the Scottish courts would be obliged to divorce couples who had contracted a ‘civil’ marriage according to Scots law, and those who had contracted a ‘religious’ marriage according to the law of the religion in question. In practice, even if some couples who marry in a religious ceremony are of the opinion that their interaction with the state surrounding the solemnisation of their marriage is simply a matter of paper work, and that it is their own faith’s beliefs and laws about marriage which are of significance, and that, in the event of marital difficulties or breakdown, it is to the tribunals and laws of their own religion that they will turn in the first instance, it is simply not the case that Scottish courts would countenance religious law in place of Scots law, although religious law can influence considerations about consent in specific circumstances.<sup>39</sup>

It ought to be noted that the same approach to defining “religious marriage” and “civil marriage” is retained in the 1977 Act, as amended by the Marriage and Civil Partnership (Scotland) Act 2014, but with the obvious reform in respect of “belief marriage”. Thus section 8 (2)(a) and (b) of the 1977 Act now in effect reads “a marriage solemnised by an approved celebrant is referred to as a “*religious or belief*

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<sup>39</sup> See further the discussion below concerning matrimonial consent.

*marriage*”; a marriage solemnised by an authorised registrar is referred to as a “*civil marriage*”.”<sup>40</sup> But stress is still laid upon the fact that what is being solemnized is “marriage”, regardless of the ceremony being used.

### **3.4 Twenty-first century developments**

The Marriage and Civil Partnership (Scotland) Act 2014 introduced three notable reforms into Scots law, namely (i) the replacement of the category of ‘religious ceremonies’ with a new category of ‘religious or belief ceremonies’; (ii) extended the range of ceremonies within which civil partnerships might be validly contracted, by permitting civil partnerships to be entered into in religious or belief ceremonies, in addition to the traditional civil ceremony; and (iii) introduced same-sex marriage.

#### **3.4.1 Religious or belief ceremonies**

The Scots law distinction between solemnisation of regular marriage in either a religious or a civil ceremony, both being governed by civil procedures, has been significantly altered by replacing ‘religious’ ceremonies with ‘religious or belief’ ceremonies. In this sense, there are not three categories of ceremony, namely ‘civil’, ‘religious’ and ‘belief’, but rather two, namely ‘civil’ and ‘religious or belief’, although continued recognition of the Church of Scotland’s ceremonies in their own right may suggest a latent survival of the older category of ‘religious’ marriage. Nevertheless, it must still be understood that regardless of whether a couple solemnise marriage in a ‘religious or belief’ or a ‘civil’ ceremony, they consent to the same thing in Scots law, namely an objective concept of marriage as defined by Scots common law.

The recognition and introduction of religion or belief ceremonies in Scots law may be readily explained. The Marriage (Scotland) Act 1977 made various provisions by which religious bodies could register with the state as ‘approved bodies’ for the

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<sup>40</sup> At the present time, July 2015, the latest version of the 1977 Act available on [www.legislation.gov.uk](http://www.legislation.gov.uk) has not been updated to incorporate the amendments and reforms introduced by the 2014 Act.

purposes of solemnising marriages in religious ceremonies, or by which religious bodies could nominate individual celebrants to act on their behalf. Such ‘authorisation’ by the Registrar General for Scotland could be on a permanent or a temporary basis. In 2005 the then Humanist Society of Scotland (now Humanist Society Scotland) petitioned the Registrar General under the provisions of the 1977 Act for temporary authorisation for their named celebrants to solemnise marriages. Although Scots law at that time only recognised religious and civil ceremonies, the Humanist Society of Scotland successfully argued that, although not a body holding religious beliefs, it was nevertheless a body of people with shared beliefs who met together regularly for the promotion of the same, and that as such they ought to be treated equally with religious bodies and authorised by the Registrar General for certain of their named members to lawfully solemnise regular marriages in humanist ceremonies. The Registrar General granted this request but since he was not authorised to alter Scots law in respect of the distinction between civil and religious ceremonies, but was authorised only to grant or deny requests from previously unauthorised groups to be so authorised, humanist celebrants were designated as ‘religious celebrants.’ So between 2005 and the Marriage and Civil Partnership (Scotland) Act 2014, non-religious belief bodies began to lawfully solemnise marriages in what Scots law designated religious ceremonies. This anomaly has now been remedied by the 2014 Act, which has replaced the old category of religious ceremonies with the new category of religious or belief ceremonies.

### **3.4.2 Civil partnership ceremonies**

In respect of reforms introduced into the Civil Partnership Act 2004 by the 2014 Act, it is curious to note that while civil partnerships have not been extended to opposite-sex couples,<sup>41</sup> which may be considered as a failure to follow through the logical dictates of the equality imperative, the range of contexts in which civil partnerships may be validly entered into has been expanded so as to include religious or belief ceremonies.<sup>42</sup> The apparent transferal of state functions to religious and belief bodies in respect of the registration of civil partnerships appears to be an odd precedent to

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<sup>41</sup> At the time of writing, the Scottish government was consulting on whether to reform the law relating to civil partnership.

<sup>42</sup> i.e. see the Civil Partnership Act 2004, ss. 85 and 93A

have set but it was one which appears to have been driven by equality and choice.<sup>43</sup> Be that as it may, it has no effect upon Scots marriage law, and indeed, just as it may be argued that marriage is marriage in Scots law regardless of the ceremony used, civil partnerships will remain civil partnerships in Scots law regardless of the ceremony used.

When civil partnerships were first introduced into Scots law by the Civil Partnership Act 2004, their principal purpose was to provide same-sex couples with a mechanism by which they could obtain almost all of the legal aspects of marriage, without actually being married. This curious arrangement was reached in part because of continued opposition, particularly among religious bodies, to the principle of same-sex marriage. As such, civil partnerships were in effect a compromise, which on the one hand granted rights similar to marriage to same-sex couples, while attempting to maintain some kind of differentiation between such unions and marriage as it then stood in law, even although the dividing line between the two types of union was more a matter of semantics than of substantial legal differences.<sup>44</sup>

Any consensus which existed around the arrangements reached in 2004 in respect of civil partnerships appears to have subsequently broken down. On the one hand there was a growing desire for the state to grant equality to same-sex couples by making provision for the solemnisation of regular same-sex marriages. On the other hand, there were a number of religious bodies within Scotland (e.g. the Religious Society of Friends and the United Reform Church), whose religious beliefs led them to support same-sex marriage. Within this context, Scots law was in effect prohibiting these religious groups from following their own beliefs in respect of same-sex marriage, by prohibiting such groups from facilitating the lawful solemnisation of regular same-sex marriages in religious ceremonies, since any marriage contracted in Scotland between persons of the same-sex was then in law void *ab initio*.

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<sup>43</sup> This alteration appears to have come about on the ground that it increased freedom and choice, while those opposed to it were not in favour of the dividing line between religious and civil ceremonies being altered (according to the [SPICe briefing paper concerning the Marriage and Civil Partnership \(Scotland\) Bill](#), although it should be noted that the comments found on page 22 on this aspect of the legislation are brief).

<sup>44</sup> Although there were some differences between marriage and civil partnerships, particularly in respect of pensions.

### 3.4.3 Same sex marriage

In respect of marriage between persons of the same sex, the Marriage and Civil Partnership (Scotland) Act 2014 reformed Scots law so as to remove the requirement that couples contracting marriage must be of the opposite sex. For policy reasons, Parliament decided to introduce a high degree of elaboration into the procedures set out in the Marriage (Scotland) Act 1977 in respect of religious ceremonies or rather, to be exact, to religious or belief ceremonies as introduced by the 2014 Act. While the four main procedures contained in the 1977 Act by which bodies and celebrants, other than civil registrars, might be authorised to conduct ceremonies in which marriages could be regularly solemnised, were retained, a repeated distinction between “marriage between persons of different sexes” and “marriage between persons of the same sex” has been made.

Section 8 of the Marriage (Scotland) Act 1977, as amended by the 2014 Act,<sup>45</sup> therefore appears fairly complex and, in effect, splits or duplicates the four old procedures into two parallel sets of procedures, one relating to “marriage between persons of different sexes” and the other to “marriage between persons of the same sex”.

The first of the old procedures is still relatively straight forward, in that in respect of “marriage between persons of the different sexes”, the ministers (with the new addition of deacons) of the Church of Scotland continue to enjoy the inherent capacity, enjoyed since the Reformation, to solemnise regular marriages [s. 8(1)(a)(i)]. Then, in respect of “marriage between persons of the same sex”, the Church of Scotland is not mentioned in the corresponding subsections of section 8 where it would presumably have appeared [see s. 8(1B)(a)(i)], because the Church of Scotland presently maintains its historical position that marriage may be solemnised only between persons of the opposite sex.

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<sup>45</sup> At the time of writing, i.e. August 2015, these amendments have yet to be incorporated into the 1977 Act on [www.legislation.gov.uk](http://www.legislation.gov.uk), and as such no hyperlinks have been added to the text.

The second of the old procedures concerns celebrants of approved religious, and now religious or belief, bodies, and the old procedure has been split into two parallel procedures, “marriage between persons of different sexes” being dealt with under s. 8(1)(a)(ii), and “marriage between persons of the same sex” being dealt with under s. 8(1B)(a)(i).<sup>46</sup> Religious or belief bodies not already approved under these subsections may petition Scottish ministers to be so approved under s. 8 (1A) in respect of “marriage between persons of different sexes”, and under s. 8 (1C) in respect of “marriage between persons of the same sex”. In effect such bodies already authorised to solemnise marriage between persons of different sexes must specifically and in addition apply to be authorised to solemnise marriages between persons of the same sex.

The third of the old procedures concerns the nomination of members of religious, and now belief, bodies not approved under the foregoing subsections, to be approved and registered as celebrants, as per s. 9 of the Act, either under the provisions of s. 9 (1) for “marriage between persons of different sexes”, or s. 9 (1A) for “marriage between persons of the same sex”.

The fourth of the old procedures concerns the temporary authorisation of persons belonging to a religious or belief body to solemnise marriage, as per s. 12 of the Act, under which section authorisation may be granted in relation to “only marriages between persons of the different sexes” “only marriages between persons of the same sex”, or both.

Despite this relative procedural complexity, it does not appear that the legislature wished to introduce any distinction into Scots law in respect of the objective definition of marriage in Scots law, but rather introduced the distinction between marriage between persons of differing sexes and marriage between persons of the same sex within the strict confines of the procedures regulating the contracting valid regular marriages, in much the same way as the distinction between ‘civil’ and ‘religious or belief’ can be understood as pertaining only to the manner of ceremonies

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<sup>46</sup> The failure of correspondence between the roman numerals being occasioned by the absence of the Church of Scotland from the same-sex marriage procedure as already noted.

in which regular marriages are contracted, rather than making a distinction within the objective definition of marriage in Scots law.

This observation may perhaps be confirmed by section 17 of the 1977 Act, in that it remains as originally enacted, still reading:

For the purpose of affording reasonable facilities for the solemnisation of civil marriages throughout Scotland, the Registrar General—

- (a) shall appoint such number of district registrars as he thinks necessary; and
- (b) may, in respect of any district for which he has appointed a district registrar under paragraph (a) above, appoint one or more assistant registrars, as persons who may solemnise marriages.

Thus, although s. 8 (1)(b) reads “Subject to section 23A of this Act, a marriage between persons of different sexes may be solemnised by and only by a person who is a district registrar or assistant registrar appointed under section 17 of this Act”, and while s. 8(1B)(b) reads “Subject to section 23A of this Act, a marriage between persons of the same sex may be solemnised by and only by a person who is a district registrar or assistant registrar appointed under section 17 of this Act”, it is clear that this repetition has been occasioned by the complexity surrounding religious or belief ceremonies, and since both subsections refer to section 17, it is clear that the Act as amended makes no distinction as to sex where a marriage is solemnized in a civil ceremony.

This observation would appear to be confirmed by section 26(2) of the 1977 Act, as amended, concerning interpretation, which states that: “‘marriage’ means marriage between persons of different sexes and marriage between persons of the same sex.” This suggests that Parliament intended the Scots law concept of an objective, single, definition of marriage to hold good, and that the terms ‘civil’ and ‘religious or belief’ marriage, and the terms ‘marriage between persons of different sexes’ and ‘marriage between persons of the same sex’ are to be understood in respect of the regulations surrounding the solemnisation of regular marriage in Scotland only. Two possible objections to this interpretation arise from the fact that impotence remains a ground

for nullity only in respect of marriages between persons of different sexes,<sup>47</sup> and the fact that adultery remains defined in relation to heterosexual intercourse only. This might suggest that the distinction between opposite sex marriages and same sex marriages transcends the context of regulations concerning the solemnisation of marriage: while it cannot be said that ‘religious or belief’ or ‘civil’ marriages gives rise to any differences in the substantive law of marriage in respect of voidable marriages, ‘opposite sex’ and ‘same sex’ marriages appear so to do.

#### **3.4.4 Legal protections**

One further line of inquiry in respect of the Marriage and Civil Partnership (Scotland) Act 2014 concerns the so called “protections” whereby religious or belief bodies or their celebrants may not be compelled by law to solemnise marriages between persons of the same sex. These protections are intended to allay any apprehensions on the part of religious or belief bodies that they or their celebrants may be compelled by law against their own beliefs to solemnise a marriage between persons of the same sex. In general it is difficult to see how this could occur in any event, since Scots law holds religious or belief ceremonies to be nothing more than a type of ceremony within which couples may validly contract a regular marriage. In this, participation in a religious or belief ceremony is simply permitted in Scots law, but participation is voluntary and optional, certainly on the part of couples wishing to marry, and it is difficult to see how it is not also optional on the part of religious and belief celebrants, as what we are dealing with are voluntary associations, with the exception of the Church of Scotland. But even in the case of the Church of Scotland, it appears from the report on the place of the Church of Scotland in Scots law that the present-day Church of Scotland continues to be recognised within the British constitution and within Scots law as enjoying its own exclusive spiritual jurisdiction, which jurisdiction is acknowledged as not being derived from any civil source of sovereignty or authority. In this, it is difficult to see how either the Church of Scotland or a voluntary association could be compelled by Scottish civil courts to perform any form of ceremony against its own wishes.

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<sup>47</sup> Marriage and Civil Partnership (Scotland) Act 2014, s. 5(1).

The other obvious line of thought in this respect is that a Scottish civil court has never been known to compel a religious or belief body to solemnise the marriage of persons of different sexes. This may seem obvious, but it must be the case that, for example, Catholic priests or ministers of the Free Church of Scotland sometimes decline to solemnise the marriage of a person who had already been married and divorced. The decision of whether to agree to perform a ceremony to solemnise a marriage must be analogous to decisions made by voluntary associations in respect of admitting and removing members and appointing and removing office holders.

Nevertheless, the 2014 Act does contain certain so called safeguards in this respect. The somewhat torturous parallel procedures for obtaining approval from Scottish Ministers to solemnise valid regular marriages in Scotland has already been noted: a religious or belief body must explicitly apply and subsequently be authorised to solemnise marriage between persons of the same sex as distinct to persons of different sexes. This in itself provides some degree of protection against compulsion, because a same-sex couple could not procure a Marriage Schedule from a registrar in respect of a body or celebrant not previously authorised to solemnise marriage between persons of the same sex. In this, should a religious or belief celebrant not so authorised decide to conduct a ceremony for a same sex couple anyway, the resulting marriage would be irregular, and therefore null *ab initio*. In addition to this procedural arrangement intended to preclude compulsion, the Marriage (Scotland) Act 1977, s. 8 (1D)(a)-(c) states in effect, and for the avoidance of doubt, that no duty is imposed by virtue of the Act upon any religious or belief body to in any way apply for authorisation to solemnize marriages between persons of the same sex. And for good measure s. 8 (1D)(d) states that the Act in no way “imposes a duty on any person who is an approved celebrant in relation to marriages between persons of the same sex to solemnise such marriages”. It is not clear that this section really says anything new, although it is admittedly only for the avoidance of doubt.

### **3.5 Ceremony and consent: a doubt?**

There has been extensive statutory reform of marriage law over the past hundred years or so but to a considerable extent this reform has concentrated on the

solemnisation of marriage: the formal procedures by which parties may constitute a valid legal marriage. Much less focus has been placed upon the notion of the consent which parties exchange. Here there is less certainty and less transparency as to the role, if any, which religion continues to play. When a couple exchange consent to be husband and wife or to be married, what does that mean? Do they consent to adopt spousal roles and enter into a relationship entirely of their own creation and construction or do they consent to enter into some objectively defined concept? And does the type of ceremony, in the context of which they exchange consent, have any relevance?

These are questions which have been very rarely considered in recent legal review of marriage but they were at the centre of the judgment of the Inner House of the Court of Session in *SH v KH*.<sup>48</sup> This was a case concerning an allegedly sham marriage, entered into by the man to obtain immigration benefits, in which the court was being asked to declare the marriage null on the basis of tacit mental reservation; that is that the parties, despite exchanging outward consent, did not in fact consent to be married. In looking at this case, there are a number of points to bear in mind. The law has since changed and it is no longer possible to argue that a marriage is void on the basis of unilateral mental reservation.<sup>49</sup> Further, the decision is situated within the wider policy context of immigration and concerns about sham marriage and it may not be appropriate to draw wider conclusions from its specific circumstances. Nonetheless it offers a rare and interesting insight into judicial understanding of marriage and the legal significance of compliance with procedural and ceremonial requirements. Set against extensive statutory reform, which is almost all about procedure and ceremony, and against social expectations about the individual highly personal nature of the marriage relationship, it is a decision which at least gives rise to a doubt.

### **3.5.1 Form and substance**

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<sup>48</sup> *SH v KH* (2005), 2006 S.C. 129, 2005 S.L.T. 1025, 2005 Fam. L.R. 80. See also Jane Mair, 'Marriage: legal status or personal relationship?' in *Edinburgh Law Review* (2007), 11(1), 117-120.

<sup>49</sup> As per the Marriage (Scotland) Act 1977, s. 20A(4), which section was inserted into the 1977 Act by the Family Law (Scotland) Act 2006, s.2. It may be noted that a marriage is still void if a party to a marriage is found incapable of "understanding the nature of marriage" (Marriage (Scotland) Act 1977, s.20A(3)(b)), which is distinct from any problems concerning defining the "nature of marriage" in law.

In *SH v KH*, Lord Penrose considered, from paragraph 29 of his judgment, “whether in Scots law marriage has become a matter of form, effected where prescribed procedures are followed, including the use of appropriate language, with all the consequences the law provides, or involves matters of substance that go to the root of the marriage relationship that may be absent notwithstanding formal compliance with the prescribed procedural requirements.”

He began by noting that a notice of intention to marry contains the solemn declaration that “I and the person named in Part F intend to be married on the date and place entered.” (para 30). Next, Penrose observed that “neither the Act<sup>50</sup> nor the regulations<sup>51</sup> defined marriage”, but that rather “the 1977 Act and the regulations made under it are, with the exception of the declaration of intent in the marriage notice, concerned wholly with procedural regularity.” Penrose continued: “The Act followed on the recommendations of the Kilbrandon Committee on *The Marriage Law of Scotland* (Cmnd 4011), which was set up to inquire into requirements, both fundamental and formal, for the constitution of marriage in Scotland. The omission of a prescriptive definition of the essentials of marriage was no doubt deliberate.” (para 31).

Lord Penrose (at para 34) then turned to a consideration of the most recent authority on the law of husband and wife in Scotland, namely the fourth edition of Eric Clive’s *Husband and Wife in the Law of Scotland* (1997), in an attempt to obtain a clear definition of what Scots law actually holds marriage to be. Having considered the most relevant passages of that work, Lord Penrose concluded that “one can, therefore, infer that, in Professor Clive’s view, in Scots law marriage remains the voluntary union of one man and one woman, for an indefinite period, ending with death or earlier dissolution, to the exclusion of all others, that involves legal rights and obligations and confers the legal status of husband and wife. That is what is

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<sup>50</sup> i.e. The Marriage (Scotland) Act 1977.

<sup>51</sup> i.e. the regulations concerning the forms to be used in the civil procedures surrounding the solemnisation of regular marriage as contained in the Marriage (Prescription of Forms) (Scotland) Amendment Regulations 1995 (SI 1995/3156), and in the Registration of Births, Still Births, Deaths and Marriages (Prescription of Forms) (Scotland) Amendment Regulations 1995 (SI 1995/3157).

necessarily implied in the expression “accept each other as husband and wife” in s 9(3) of the [1977 Marriage (Scotland)] Act.

Counsels’ arguments were summarised, and provide helpful outlines of the main parameters of the problem under consideration. In paragraph 41, Lord Penrose summarised counsel for the pursuer:

For the pursuer, counsel argued that the Lord Ordinary had failed to make a finding that on 22 June 1998 the parties had exchanged positive matrimonial consent for the purpose of being husband and wife. Without such a finding, there was no justification in law for the conclusion he arrived at. In Scots law, present consent to enter into the conjugal state must be mutually exchanged. That was how marriage was created. The Lord Ordinary appeared to entertain the notion that there were two institutions: civil marriage and religious marriage. There was only one marriage. It might be performed in various ways. But the essence of all forms was consent to enter the conjugal state. That was not a mere matter of words. The words were at best evidence of what was in the parties’ minds. The essence of the conjugal state was consent to live together, to offer mutual support, in most cases to share exclusive sexual relations, and generally to be husband and wife: Stair’s *Institutions*, I iv 1, on “Conjugal Obligations”. Consent to be united as a couple in conjugal society for the foreseeable future was of the essence of marriage.

Counsel for the defender argued against this, albeit in the event unsuccessfully, that: the only irreducible minimum in Scots law was consent to enter into the legal relationship of marriage and an intention to be regarded as husband and wife from that point. Given the infinite range of human relationships, and the scope for change in perceptions over time it was both undesirable and impossible to prescribe any form or forms of behaviour or ways of living in characterising marriage. Marriage could mean different relationships to different people and at different times. It was a relationship of indefinite legal and practical content. It could only be understood as the creation of a legal relationship between two people and between them and society as a whole. The irreducible minimum was consent to what the law required of married people from time to

time. Marriage could be contracted without the prospect of cohabitation at all. In the modern world contemplation of sexual relationships is not essential. The parties can contract out of financial obligation. For each couple, the content of marriage is a matter of particular agreement, not only initially but from time to time during the subsistence of the relationship. The future cannot be predicted, and the nature of the relationship may undergo radical change over time. In this case, on the Lord Ordinary's findings, cohabitation was to be deferred. But that was irrelevant. The parties agreed to enter into a legal relationship, and that was marriage. (para 42)

In effect, Lord Penrose rejected the argument that marriage was merely a matter of form, and maintained that a couple who consented to marriage were consenting to something which was not defined by the procedural regulations surrounding the solemnisation of regular marriage in Scots law. The problem of defining what marriage therefore was, required recourse to older Scottish authorities in the matter, Lord Penrose quoted with approval (at para 46) from Patrick Fraser's *Law of Husband and Wife According to the Law of Scotland* (1876-78).

One source of error as to the legal character of marriage has arisen from the misapplication of the maxim, that consent and not *coitus* makes marriage. This has been interpreted to mean, that consent, *in whatever mode given*, makes marriage ... The doctrine merely amounts to this, that consent being given to marriage as the law directs, *that* is sufficient. The matrimonial consent passing between parties makes a marriage in Scotland and England, and everywhere else, whatever the forms and ceremonies necessary to constitute a marriage may be, because it must be understood that the matrimonial consent is consent to marriage, expressed in the form and manner that the law requires. The contract is constituted by consent alone; but it must be consent to *marriage*; and the law determines what shall import such consent, and what shall be sufficient expression of consent to bind parties.<sup>52</sup>

Lord Penrose maintained that for a marriage to be valid under Scots law, the “essential requirement” is “that the parties exchange consent to become husband and

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<sup>52</sup> Fraser, *Husband and Wife*, i, pp. 170-1.

wife, that is to marry in the sense described by Fraser and adopted into the cases referred to [in paragraphs 48 to 51]” (para 52).<sup>53</sup> It is not enough that a couple participate in a registry office ceremony which they understand to be a formal marriage, rather the “critical question” is whether or not such a couple “intend to become husband and wife” (para 53). In considering what it meant to be husband and wife, Lord Penrose referred to the English case of *Sheffield County Council v. E* (para 54) and accepted that certain of the judge’s (i.e. Munby J’s) considerations of marriage in that case were helpful. This included Lord Penzance’s definition of marriage in *Hyde v. Hyde* as “the voluntary union for life of one man and one woman, to the exclusion of all others” a definition cited by both Patrick Fraser and Eric Clive. Munby J’s own definition is then added, in which marriage “confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other’s society, comfort and assistance.” (para 55). This statement was deemed by Lord Penrose to be “a helpful statement of the position for the purposes of Scots law”, while noting that not all marriages would contain all these characteristics. The Inner House did not need to attempt to delineate the point at which a relationship dis-conformed to these definitions to such an extent as to no longer be regarded as marriage, because for the purposes of the case the couple in question had never acted in any sense as husband and wife following their civil ceremony.

Lords Macfadyen and Marnoch concurred with Lord Penrose, and as such the marriage of the litigants was in effect declared to be null *ab initio*.<sup>54</sup>

Since the Marriage (Scotland) Act 1977 as amended explicitly defines “civil marriage” and “religious or belief marriage” to be nothing more than shorthand ways to refer to “a marriage solemnised” in either a civil or a religious or belief ceremony,

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<sup>53</sup> It could be argued that this involves an implicit rejection of the Lord Ordinary’s distinction between religious and civil marriage as being two different types of marriage.

<sup>54</sup> All citations for *SH v. KH* are from 2005, S.L.T., 1025.

and since Scottish common law as defined by case law holds Scots law to regard valid consent to be married as consent to an objective, and single or unitary, concept of marriage, regardless of which type of ceremony provides the context within which consent to marriage is exchanged, the central question is what does Scots law hold marriage to be as an objective concept. While the definitions offered by Lord Penrose were sufficient for the purposes of determining *SH v. KH* in 2005, it must be asked to what extent these definitions are still serviceable in light of the Marriage and Civil Partnership (Scotland) Act 2014. Yet howsoever marriage ought now to be defined, it is clear that the definition falls to be made by Scots law, primarily by either the courts or the legislature, and not to any form of religious conception of marriage; in this respect there is no such thing in Scots law as substantive “religious marriage”. Yet, that said, until such time as a clear and robust legal definition of what marriage is in law is settled upon, religious and belief conceptions of individual marriages may continue to have a bearing upon cases heard by the courts, particularly sham marriage cases.

### **3.5.2 “Husband and wife” or “marriage”?**

The Inner House’s qualified reliance on Fraser in *SH v KH* has already been noted: “I conceive that marriage ... may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.” This definition must now be considered in light of the amendments made to section 9 of the Marriage (Scotland) Act 1977, in respect of the appropriate form to be used in marriage ceremonies, by the Marriage and Civil Partnership (Scotland) Act 2014.

Section 9(3) refers to marriage between persons of different sexes, 9(3A) refers to marriages between persons of the same sex:

For the purposes of subsection (2)(b) above, a marriage ceremony for marriage between persons of different sexes is of an appropriate form if it includes, and is in no way inconsistent with—

(a) a declaration by the parties, in the presence of each other, the celebrant and two witnesses—

(i) that they accept each other as husband and wife;

- (ii) that they accept each other in marriage; or
- (iii) either or both of sub-paragraphs (i) and (ii);

and

- (b) a declaration by the celebrant, after the declaration mentioned in paragraph (a) of this subsection—
  - (i) that the parties are then husband and wife;
  - (ii) that the parties are then married; or
  - (iii) either or both of sub-paragraphs (i) and (ii).”

Section 9(3A) provides that:

For the purposes of subsection (2)(b) above, a marriage ceremony for marriage between persons of the same sex is of an appropriate form if it includes, and is in no way inconsistent with—

- (a) a declaration by the parties, in the presence of each other, the celebrant and two witnesses, that they accept each other in marriage;
- (b) a declaration by the celebrant, after the declaration mentioned in paragraph (a), that the parties are then married.

How should these subsections be construed, or how might they come to be construed? The sense of 9(3) would appear to be that “husband and wife” and “marriage” are synonymous, reference to “either or both” being sufficient to contract marriage in Scotland. The sense of 9(3A) is that it is sufficient to refer to “marriage” only, a direct reference to “husband and wife” being excluded. In this, reference to “husband and wife” is clearly not essential to contracting a valid regular marriage in Scotland.

How then does this sit with Lord Penrose’s observations in *SH v KH* concerning the definition of marriage? It may be speculated that the 2014 Act tends to suggest that the courts may no longer adopt Lord Penrose’s general approach of turning to historical Scots law definitions of husband and wife in attempting to define the objective Scots law definition of marriage to which couples may be presumed to some extent to consent during a valid marriage ceremony. This in turn would suggest that although the Scots law doctrine of consent to marriage being an internal consent to an

objective principle not necessarily present in any valid marriage ceremony still holds good, it may no longer be possible to determine what that objective principle is. From this, it may follow that for all practical purposes a marriage contracted through participation in a valid marriage ceremony in Scotland cannot now be annulled on the ground of lack of consent to the Scots law conception of objective marriage. And if so, it follows that conformity with the regulations surrounding the valid contracting of a regular marriage in Scots law may have become *de facto* sufficient for the contracting of regular marriage in Scots law. This line of thought is of course speculative, but if the forgoing were correct, then it would follow that marriage in Scots law is effectively not for any practical purposes an objective principle, but rather, as counsel for the defence in *SH v KH* put it, marriage in Scots law can now “only be understood as the creation of a legal relationship between two people and between them and society as a whole. The irreducible minimum [is] consent to what the law required of married people from time to time.” If marriage in Scots law is therefore for all practical purposes now purely a legal relationship, it cannot be said that religion has any continuing bearing on the matter. Presumably a general danger of defining marriage as a legal relationship only, for the valid contracting of which participation in an approved ceremony is sufficient, is that it becomes difficult to detect sham marriages: the very point of a sham marriage is to obtain some legal right accorded to married couples, but if marriage is only a collection of such legal rights, without any corresponding and definable pattern of behaviour between a married couple, it is difficult to see how sham marriages may be detected, if indeed such a concept can remain legally meaningful within such a context.

Against this speculative line of thought, however, it may be the case that Parliament intended the Scots law objective definition of marriage still to be pegged to a historical definition of husband and wife.<sup>55</sup> For example, the Marriage and Civil Partnership (Scotland) Act 2014, section 4, which concerns “the meaning of marriage and related expressions in enactments and documents”, appears to peg the definition of marriages between persons of the same sex to the concept of husband and wife.

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<sup>55</sup> This does appear to have been the intention of Parliament as per the Scottish Government’s notes on the Marriage and Civil Partnership (Scotland) Bill: “3.27 The draft Bill also makes provision, at section 4 so that the concept of marriage in the common law is taken as meaning both opposite sex and same sex marriage and spouses.” (<http://www.gov.scot/Publications/2012/12/9433/272395>).

Thus section 4(2)(b) reads “Subsection (3) applies to references (however expressed) in any enactment to two people who are (or were) living together as if they were husband and wife” while 4(3) reads “The references include two people of the same sex who are (or were) not married to, nor in civil partnership with, each other but who are (or were) living together as if they were married to each other”. This appears to say that those references to persons of the same sex who were neither married nor in civil partnership, but who nevertheless lived together as married may be defined “as if they were husband and wife”. In this respect the concepts considered in *SH v. KH* may still be relevant for married same-sex couples, since it may be possible for the courts to treat such marriages in law as if marriages between husband and wife.

### **3.6 Conclusions**

Religion no longer enjoys any place in the Scots law of marriage in respect of legislative competence or jurisdiction, and there is little evidence of ongoing direct religious influence in terms of statutory provisions. Nevertheless, it could conceivably be argued that the Scots law doctrine of the objectivity of marriage in common law is itself a vestige of medieval Canon law, and that although the actual definition of objective marriage in Scots law is vague, attempts to formulate a definition have tended to look backwards to a time when Scotland was more obviously a Protestant country. That is to say, it would appear that both Scots common law and Scots statute law continue to place reliance upon the concept of husband and wife in defining objective marriage, whether that be in respect of opposite sex couples consenting to be married as husband and wife, or same-sex couples consenting to be married as if husband and wife. But even in this, it is difficult to see that the concept of husband and wife in Scots law still retains any of the historical features of Scots marriage law which may be argued to have enjoyed a religious provenance.

Be that as it may, the only prominent place still occupied by religion is in respect of a number of authorised ceremonial options within which a couple may validly contract a regular marriage in Scots law. The type of ceremony used, be it religious or otherwise, has no effect on the Scots law understanding of regular marriage – all competent ceremonies produce regular marriage. A religious marriage ceremony does

not produced a distinctly ‘religious marriage’ in Scots law, but rather valid regular marriage is always valid regular marriage, regardless of the approved ceremony used; however difficult it may be for Scots law to define exactly what ‘valid regular marriage’ means. Just as Scots law makes procedural distinctions between ‘religious or belief’ and ‘civil’ in respect of ceremonies, without extending such distinctions beyond the regulations surrounding the contracting of regular marriage, so too are Scots law distinctions about ‘opposite-sex’ marriage and ‘same-sex’ marriage confined almost exclusively to procedural regulations. Put another way, Scots law now acknowledges three distinct types of ceremonies within which valid regular marriages may be contracted: religious and belief opposite sex ceremonies; religious and belief same-sex ceremonies; and civil ceremonies: but all three types of ceremonies are intended to give rise to Scots law valid regular marriages. To this might be added a fourth kind of ceremony, namely ‘Church of Scotland’, as it not yet entirely clear if ceremonies conducted by ministers and deacons of the Church of Scotland are ‘religious’ ceremonies, or ‘religious or belief’ ceremonies in law, but in any event the Church of Scotland’s ceremonies also give rise to Scots law valid regular marriages.

On a more speculative note, it might be wondered whether or not religious or belief ceremonies should continue to play a part in the solemnisation of regular marriages for the purposes of Scots law. Certainly the statutory regulations surrounding marriage ceremonies would be much simplified if only civil ceremonies were on offer. Such a reform would not preclude those couples who adhere to a particular religion or system of belief from participating in a religious or belief ceremony subsequent to a civil ceremony. In terms of bars to such a reform, the most obvious must be the position of the Church of Scotland within the context of the British constitution and Scots law. As has been discussed above, the current shape of the Scots law regulations governing marriage ceremonies is predicated upon the historical position of the Church of Scotland in respect of regular marriage and the subsequent development of a model of ceremonial pluralism surrounding regular marriage since 1834. The 1977 Marriage Act, as amended, still reflects historical developments within Scots law as to authorisation to solemnise marriage. While civil marriage ceremonies have the potential to replace all other forms of marriage ceremony in

Scotland, the place and status of the Church of Scotland is still thought to be guaranteed by the constituting documents of the British state, or, even should it be argued that the Church of Scotland has voluntarily surrendered its Established Church status, by its “national Church” status as per the Church of Scotland Act 1921.<sup>56</sup>

It may also be speculated that the Scottish legislature ought to offer a definition of objective marriage, so that it is clear to all couples marrying in Scotland what it is that they are consenting to. This would be of particular value to the courts in determining which marriages are well intentioned, and which are sham. As things presently stand, it would fall to the Court of Session to formulate what the common law definition of marriage in Scots law now is in the light of the Marriage and Civil Partnership (Scotland) Act 2014, so as to be able to distinguish marriages entered into in good faith from sham marriages. Although the law has been reformed to the extent that a marriage is no longer void simply on the basis of a tacit mental reservation, it is clear that as a matter of policy and particularly in the context of immigration, governments wish to be able to distinguish between ‘proper’ and ‘sham’ marriage.

Finally, a more general observation may be offered about the relation between religion and law in respect of the Scots law position concerning the objectivity of marriage and of the general reticence of Scots law to define the same. In this, prior to the Reformation there was in effect no Scots law of marriage, but rather the Canon law of marriage: within the context of the Catholic ascendancy, marriage was defined as a supra-legal reality defined by Catholic doctrine as one of the seven sacraments of the Church, and within this context the doctrine of irregular marriage, as long maintained in Scots law, was developed. At the Reformation both the idea of marriage as sacrament was rejected, and Scots marriage law first came into being. From the Reformation on, Scots law has undoubtedly enjoyed the inherent right to define its own objective conception of marriage but, within the context of the Scottish

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<sup>56</sup> In this respect it ought to be noted that the place of the Church of Scotland in respect of the regulations governing marriage ceremonies in Scotland has been attributed by the Scottish Government to the Kirk’s “national church” status as recently as 2014 (“the Church of Scotland, reflecting its national church status, is authorised to solemnise opposite sex marriages through the Marriage (Scotland) Act 1977” (Marriage and Civil Partnership (Scotland) Act 2014, The Qualifying Requirements: An Initial Paper, para 9, <http://www.gov.scot/Topics/Justice/law/17867/samesex/qualifying-requirements-discussion-paper>)).

Protestant ascendancy, Scottish Protestant customs and beliefs surrounding marriage almost certainly provided a seemingly self-evident definition of marriage for Scots law. In this, religion defined marriage through custom and Scots law passively accepted that definition. Within the context of same-sex marriage, Scots law has for the first time since the Reformation defined marriage in a way which is directly at variance with the old Protestant marriage customs. Historical religious marriage customs can no longer be seen as an automatic point of reference for Scots law, from which it follows that the Marriage and Civil Partnership (Scotland) Act 2014 may well have made explicit for the first time the Scots law rejection of at least the historical role of religion in Scotland in defining objective marriage.

# Chapter 4

## Education

### Chapter 4 Education

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## 4.1 Introduction

### 4.1.1 The legal foundations

The present-day place of religion in schools in Scotland is principally governed by the [Education \(Scotland\) Act 1980 \(c 44\)](#).<sup>1</sup> The contents of this Act in respect of religion reflect the two main phases of nationalisation of church schools in Scotland. Nevertheless, in respect of non-denominational schools, arrangements concerning religious observance are not prescribed in detail in law, but are often a matter of general government guidance, local authority policy, head teachers' discretion, and local custom.

The first phase of nationalisation occurred in respect of the schools of the old "Established" Church of Scotland and the Free Church of Scotland by virtue of the **Education (Scotland) Act 1872 (c 62)**. The 1872 Act formally abolished the jurisdiction of the presbyteries of the old "Established" Church of Scotland over Scottish schools, and transferred the oversight of the schools nationalised in 1872 to parochial school boards. These schools were known as non-denominational schools. Although formal legal ties between the Protestant churches and the nationalised non-denominational schools were severed, those churches continued to exercise a strong degree of control over the transferred schools by virtue of their *de facto* presence on school boards, and by virtue of the statutory recognition of the ongoing custom of religious observance and instruction in such schools. Within the context of a strongly Presbyterian country, it was presumably felt that more formal statutory rights were not required on the part of the Protestant churches in order to guarantee the ongoing Protestant character of such schools. There was no statutory obligation in respect of religious observance imposed upon non-denominational schools until the passage of the [Education \(Scotland\) Act 1946 \(c 72\)](#). It would also appear that the Church of

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<sup>1</sup> Where legislation is available online, links are included. Otherwise, where there is no open access version readily available, key sections have been quoted in the text.

Scotland and other denominations enjoyed no statutory right to representation on school boards, nor on the 36 local education authorities by which such boards were replaced by the **Education (Scotland) Act 1918 (c 48)**. Only when local government was re-organised by the [Local Government \(Scotland\) Act 1973 \(c 65\)](#) were advisory local education committees created on which the Church of Scotland and other denominations enjoyed a statutory right of representation.

The second phase of nationalisation of church schools in Scotland occurred with the passage of the Education (Scotland) Act 1918, by virtue of which the schools of the Roman Catholic Church in Scotland were transferred to the then newly created 36 *ad hoc* local education authorities. The statutory language used in the 1918 Act did not refer explicitly to the schools of the Roman Catholic Church, but rather to schools run by denominations which had not previously been nationalised. In this, while the vast majority of schools nationalised by the 1918 Act were Catholic, these schools were designated “denominational” schools, and it was possible for any school run by any denomination to be transferred to the state under the terms of the 1918 Act.

Denominational schools were subject to a markedly different arrangement in respect of religious observance and instruction when compared to the non-denominational schools. In the latter, the Presbyterian churches relied upon the maintenance of the customs of what had been their old church schools, whereas in the former, the denomination in whose interests a denominational school was run by a local authority enjoyed substantial statutory controls over religious aspects of such schools. In practice this usually meant that the Hierarchy of the Catholic Church in Scotland enjoyed the right to examine appointees to teaching posts within Catholic denominational schools as to their religious beliefs and character, to appoint unremunerated chaplains to such schools, and to determine the religious education curriculum. Denominational schools run by local authorities in the interests of other denominations, such as the Scottish Episcopal Church, were subject to similar controls by virtue of the neutral statutory language employed in the 1918 Act. Various denominations continue to enjoy statutory rights over denominational schools which are not afforded to the Church of Scotland in respect of the non-denominational schools, following the abolition of the “educational” jurisdiction of Church of Scotland presbyteries in 1872.

### **4.1.2 Structure of the chapter**

The main focus of this chapter is on the legal framework which underpins the distinct categories of denominational (4.3) and non-denominational schools (4.4) and the development of the concepts of religious education and religious observance. In addition, the chapter also highlights specific aspects of the legal regulation of education where religion features: the rights of parents and children in respect of education (4.5); the place of representatives of religious organisations in the structure of governance (4.6); the training and employment of teachers (4.7) and the role of chaplains (4.8).

## **4.2 Non-denominational public schools**

### **4.2.1 The Education (Scotland) Acts 1872 and 1980**

The Education (Scotland) Act 1872 created a temporary Board of Education for Scotland,<sup>2</sup> charged with overseeing the creation of elected School Boards in every parish and burgh throughout Scotland.<sup>3</sup> These school boards were bodies corporate,<sup>4</sup> in which were to be vested “the parish and other schools which have been established and now exist in any parish under the recited Acts [see Preamble to 1872 Act], or any of them, together with teachers’ houses and land attached thereto”.<sup>5</sup> At the same time “all jurisdiction, power, and authority possessed or exercised by presbyteries or other church courts with respect to any public schools in Scotland” was abolished.<sup>6</sup> All schools vested in the newly created elected School Boards were declared to be public schools,<sup>7</sup> and were to be funded by means of a local rate.<sup>8</sup>

Section 68 of the 1872 Act prescribed that:

Every public school, and every school subject to inspection and in receipt of any public money as herein-before provided, shall be open to children of all

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<sup>2</sup> Education (Scotland) Act, 1872 (c 62), s3.

<sup>3</sup> Education (Scotland) Act, 1872 (c 62), s8ff.

<sup>4</sup> Education (Scotland) Act, 1872 (c 62), s22.

<sup>5</sup> Education (Scotland) Act, 1872 (c 62), s23.

<sup>6</sup> Education (Scotland) Act, 1872 (c 62), s23.

<sup>7</sup> Education (Scotland) Act, 1872 (c 62), s25.

<sup>8</sup> Education (Scotland) Act, 1872 (c 62), s44.

denominations, and any child may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school: and no child shall in any such school be placed at any disadvantage with respect of the secular instruction given therein by reason of the denomination to which such child or his parents belong, or by reason of his being withdrawn from any instruction in religious subjects.

The requirement for public schools to make provision for religious instruction and religious observance was contained in the Preamble to the 1872 Act:

Whereas it has been the custom in the public schools of Scotland to give instruction in religion to children<sup>9</sup> whose parents did not object to the instruction so given, but with liberty to parents, without forfeiting any of the other advantages of the schools, to elect that their children should not receive such instruction, and it is expedient that the managers of public schools shall be at liberty to continue the said custom.<sup>10</sup>

Detailed regulations concerning the frequency of religious observance and instruction were not laid out in the 1872 Act, but rather were remitted to the Scotch Education Department,<sup>11</sup> defined by the Act as “the Lords of any Committee of the Privy Council appointed by Her Majesty on Education in Scotland”.<sup>12</sup>

The key features of the 1872 Act in relation to non-denominational public schools are substantially retained in the current Education (Scotland) Act 1980, as amended. They have passed through various statutes, notably the [Education \(Scotland\) Act 1946, with minor reforms of language and scope, but broadly, the principles of the 1872 Act](#) remain the basis of the contemporary law concerning religious observance and instruction in non-denominational public schools: the custom of religious instruction

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<sup>9</sup> This clause in the Preamble to the 1872 Act was subsequently replaced in section 8 of the Education (Scotland) Act 1946 by the clause “for religious observance to be practiced and for instruction in religion to be given to pupils”, which remains the wording used in section 8(1) of the Education (Scotland) Act 1980. To what extent the clause “to give instruction in religion to children” in the 1872 Act was interpreted in the light of section 68 of the 1872 Act, which makes explicit reference to “instruction in religious subjects” and to “religious observance” has not here been determined.

<sup>10</sup> It may be noted that this clause was repeated word for word in the Education (Scotland) Act 1918, s7, with the additional words “subject to the provisions of section 68 (Conscience Clause) of the Education (Scotland) Act 1872”.

<sup>11</sup> Education (Scotland) Act, 1872 (c 62), s68.

<sup>12</sup> Education (Scotland) Act, 1872 (c 62), s1.

has continued, albeit expanded to include explicit reference to religious observance and religious instruction; the conscience clause concerning withdrawal of children from the same has been retained; the frequency and content of religious observance and instruction remains a matter of policy, not legislation. Specifically, the following should be noted:

The Education (Scotland) Act 1980, section 8(1) retained a lightly revised version of the Preamble to the 1872 Act, which revised version had been first used in the Education (Scotland) Act 1946, section 8, in respect of the custom of public schools to give instruction in religion to children:

Whereas it has been the custom in the public schools of *Scotland for religious observance to be practised and for instruction in religion to be given to pupils*<sup>13</sup> whose parents did not object to *such observance or instruction*<sup>14</sup>, but with liberty to parents, without forfeiting any of the other advantages of the schools, to elect that their children should not *take part in such observance or receive such instruction*<sup>15</sup>, *be it enacted that education authorities*<sup>16</sup> shall be at liberty to continue the said custom, *subject to the provisions of section 9 of this Act*<sup>17</sup>[emphasis added]

But whereas the 1872 Act had simply granted liberty for the custom of Scottish public schools in relation to religious instruction to be continued, the [1980 Act, section 8\(2\)](#), imposes a statutory obligation – first introduced 1929<sup>18</sup> and subsequently repeated in the Education (Scotland) Act 1946, section 8 (2) – on education authorities to continue with the provision of religious observance and instruction. At the same time the 1980 Act retains the mechanism, first introduced in 1929 and subsequently repeated in the 1946 Education Act, by which education authorities might discontinue

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<sup>13</sup> “to give instruction in religion to children” in 1872 Act.

<sup>14</sup> “the instruction so given” in the 1872 Act.

<sup>15</sup> “receive such instruction” in the 1872 Act.

<sup>16</sup> “and it is expedient that the managers of public schools” in the 1872 Act.

<sup>17</sup> There was no similar cross-reference to s68 of the 1872 Act in the 1946 Act, although this too was a “conscience clause”.

<sup>18</sup> John Stevenson, “Securing religious education in non-denominational schools 1872-1972: church and school. A policy of co-operation”, *Records of the Scottish Church History Society* vol. 44 (2015), pp. 74-102.

the same via a local election. Thus the Education (Scotland) Act 1980, section 8 provides:

(2) It shall not be lawful for an education authority to discontinue religious observance or the provision of instruction in religion in terms of subsection (1) above, unless and until a resolution in favour of such discontinuance duly passed by the authority has been submitted to a poll of the local government electors for the education area taken for the purpose, and has been approved by a majority of electors voting thereat.

(3) A poll under subsection (2) above shall be by ballot and shall be taken in accordance with rules to be made by the Secretary of State, which rules may apply with any necessary modifications any enactments relating to parliamentary or local government elections.

The wording of both these subsections was taken directly from the Education (Scotland) Act 1946, section 8 (2) and (3), as also retained by the [Education \(Scotland\) Act 1962, section 8 \(2\) and \(3\)](#).

The conscience clause contained in the 1872 Act (section 68) is repeated almost word for word in section 9 of the 1980 Act, and in this the 1980 Act follows section 9 of the Education Acts of 1946 and 1962:

Every public school [*and every grant-aided school*]<sup>19</sup> shall be open to *pupils*<sup>20</sup> of all denominations, and any *pupil*<sup>21</sup> may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school; and no *pupil*<sup>22</sup> shall in any such school be placed at any disadvantage with respect to the secular instruction given therein by reason of the denomination to which such *pupil*<sup>23</sup> or his parents belong, or by reason of his being withdrawn from any instruction in religious subjects. [emphasis added]

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<sup>19</sup> Words substituted by Standards in Scotland's Schools etc. Act 2000 asp 6 (Scottish Act) Sch.2 para. 3(3). These words read "and every school subject to inspection and in receipt of any public money as herein-before provided" in section 68 of the 1872 Act.

<sup>20</sup> "children" in the 1872 Act.

<sup>21</sup> "child" in the 1872 Act.

<sup>22</sup> "child" in the 1872 Act.

<sup>23</sup> "child" in the 1872 Act.

Just as the 1872 Act had left the formulation of detailed regulations concerning the frequency of religious observance and instruction to the Scotch Education Department,<sup>24</sup> detailed provisions as to the meaning of the statutory obligation in respect of religious observance and instruction, imposed by the 1980 Act, continues to be a matter of policy, rather than statutory regulation. As the Stair Memorial Encyclopaedia, Education (Re-issue), para 310 concerning “requirement for religious instruction and observance”, notes, “religious observance and instruction in schools is the subject of guidance by the Scottish Ministers”.

#### **4.2.2 Religious Observance in Non-denominational Schools**

In 1991 the then Scottish Office Education Department issued [SOED Circular 6/91](#) stating that “all primary pupils ‘should take part in religious observance not less than once a week’ and that all secondary pupils ‘should take part in religious observance at least once a month and preferably with greater frequency’”, and stating that “in ‘non-denominational schools’ religious observance should be of a ‘broadly Christian character’”.<sup>25</sup>

Following Scottish devolution, Her Majesty’s Inspectorate of Education issued a report stating that many non-denominational schools were failing to provide time for religious observance as set out in SOED Circular 6/1991.<sup>26</sup> In the wake of this report, the then Minister for Education, Europe and External Affairs, Jack McConnell, established a Religious Observance Review Group, which Group issued its findings in 2004.<sup>27</sup> The findings contained in [The Report of the Religious Observance Review Group \(Edinburgh: The Scottish Executive, 2004\)](#) were accepted by the then Scottish Executive (a Labour-Liberal Democrat coalition) and informed that administration’s [Scottish Executive Education Department Circular 1/2005 concerning the Provision of Religious Observance in Scottish Schools](#). The findings of the 2004 Report were

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<sup>24</sup> Education (Scotland) Act, 1872 (c 62), s68.

<sup>25</sup> *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 4.

<sup>26</sup> *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 1.

<sup>27</sup> *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 1.

also subsequently accepted by the Scottish Government in 2011 (an SNP minority government) and informed that administration's [Learning Directorate's 2011 Circular 'Curriculum for Excellence – Provision of Religious Observation in Schools'](#). The 2005 and 2011 Circulars are close as to tenor and content.

Turning to the 2004 *Report of the Religious Observance Review Group* the following ought to be noted. Perhaps most importantly, the Report adopted a definition of the phrase “religious observance” as found in the Education (Scotland) Act 1980, which definition was explicitly accepted in the 2005 and 2011 Scottish Executive/Government Circulars concerning Religious Observance. The definition of “religious observance” as far as the Scottish Government is concerned is therefore “community acts which aim to promote the spiritual development of all members of the school community and express and celebrate the shared values of the school community”.<sup>28</sup> The 2004 Report also offered definitions of the aims of religious observance, and of the term “spiritual development”;<sup>29</sup> although these aspects of the Report have not been explicitly accepted by Scottish ministers in either 2005 or 2011.

The consultation paper upon which the 2004 Report was founded made a distinction between “religious observance” and “organised acts of worship”, stating that “an organised act of worship is based upon the assumption that those present share [various elements concerning ‘focus of worship’, ‘desire to worship said focus of worship’, ‘commitment to life stances related to focus of worship’]. Religious observance does not assume these elements”. Nevertheless, the Report at the same time also allowed that “whilst religious observance as defined in the consultation paper is not an act of organised worship, it does not preclude the possibility of worship as the free response of individuals to the stimulus offered”.<sup>30</sup> This is explained by reference to the fact that some school communities are continuous with a faith community, in which cases “that community’s faith in ‘the focus of worship’ may be assumed and worship may be considered to be appropriate as part of the

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<sup>28</sup> *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), 12; cf SOED Circular 1/2005, para. 6; cf 2011 Circular “Curriculum for Excellence – Provision of Religious Observation in Schools”, para. 7.

<sup>29</sup> *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), p. 12.

<sup>30</sup> *Ibid.*, pp. 15-16.

formal activity of the school.” The Report then added that “where, as in most non-denominational schools, there is a diversity of beliefs and practices, the Review Group believes that the appropriate context for an organised act of worship is within the informal curriculum as part of the range of activities offered for example by religions, groups, chaplains, and other religious leaders”.<sup>31</sup>

In this, the 2004 Report maintained that the statutory obligation imposed by the 1980 Education Act anent “religious observance” did not mean that “organised acts of worship” were part of the statutory obligation. Rather, the Report allowed for a diversity of approaches depending upon the relation between the school and local community. On the one hand, it might be presumed that in some schools on, for example, the Isle of Lewis, children, parents, and teachers might for the most part happen to be Presbyterians, in which case “religious observance” would probably involve acts of Presbyterian worship. On the other hand, a school in, for example, suburban Edinburgh might choose to remove acts of worship from religious observance, preferring rather to permit pupils and parents belonging to the same faith group to participate in their own organised acts of worship as part of “the informal curriculum” of a school.

In addition to these various distinctions, the 2004 Report also distinguished religious observance from religious and moral education (RME). The report went on to define RME within the context of both non-denominational and denominational schools, but for the present position on this head it is best to consult the Scottish Government Circulars issued in 2011 along with the [‘Curriculum for Excellence – Provision of Religious Observation in Schools’](#), namely Education Scotland’s [‘Curriculum for Excellence – Provision of religious and moral education in non-denominational schools and religious education in Roman Catholic schools’](#). The contents of this Circular are discussed further, below.

As to the frequency of religious observance in non-denominational schools, the 2004 Report recommended that, while the Scottish Office Education Department Circular

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<sup>31</sup> *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), p. 16.

6/91 stated that religious observance should occur weekly in primary and monthly in secondary schools, “every school should provide opportunities for religious observance at least six times in a school year in addition to traditional celebrations central to the life of the school community”.<sup>32</sup> This recommendation was accepted by the Scottish Executive in 2005, and by the Scottish Government in 2011.<sup>33</sup>

Determining the content of religious observance is a matter firmly devolved to individual schools, with general support from education authorities. In the 2011 Circular *Curriculum for Excellence – Provision of Religious Observation in Schools*, para. 11, it was stated that “The precise form of religious observance will be determined by each school’s policy within the local authority’s framework, but these might include opportunities for class, year, stage or whole school observance as well as involvement by pupils and other, including school chaplains and other faith leaders, in planning and presentation”.<sup>34</sup>

In respect of the involvement of chaplains in the life of schools, this is also a matter devolved to schools, specifically to head teachers. Both Circular 1/2005, para. 16, and the 2011 Circular *Curriculum for Excellence – Provision of Religious Observation in Schools*, para. 18, contain the same provision: “Scottish Government Ministers value the important and varied contributions that chaplains and other faith group leaders make to the life of the school, for example in their involvement in religious observance, acts of worship, religious and moral education and a broader pastoral role. Head teachers are encouraged to engage in full discussion with chaplains and other faith group leaders in the planning and implementation of religious observance.” The appointment and place of chaplains in non-denominational and denominational schools is discussed at 4.7, below.

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<sup>32</sup> *The Report of the Religious Observance Review Group* (Edinburgh: The Scottish Executive, 2004), p. 18.

<sup>33</sup> SOED Circular 1/2005, para. 12; 2011 Circular “Curriculum for Excellence – Provision of Religious Observation in Schools”, para. 13. Both used the following sentences: “Every school should provide opportunities for religious observance at least six times in a school year, in addition to traditional celebrations central to the life of the school community, a preferably with greater frequency. We recognise that many primary schools value weekly religious observance as part of their regular assembly programme and will wish to continue with this. The school community should be involved in making decisions about frequency.”

<sup>34</sup> This clause was taken word for word from Circular 1/2005, para. 9.

In respect of organised acts of worship in schools, this too is a matter devolved to schools, principally to head teachers. Both the 2005 and 2011 Circulars accept the recommendations of the 2004 Report of the Religious Observance Review Group anent distinguishing religious observance and organised acts of worship, without precluding the latter being part of the former, and state that “Members of the school community, including pupils, parents and representatives of faith groups and communities, may wish to have opportunities for organised acts of worship within the informal curriculum of the school. [Scottish Government] Ministers would encourage head teachers to consider these requests positively and make suitable arrangements if appropriate support arrangements can be provided”.<sup>35</sup>

Generally then, the statutory duty imposed upon local authorities to provide religious observance in Scottish non-denominational public schools by the Education (Scotland) Act 1980 is still in force today, but the definition of that duty, and the ways in which it may be discharged by local authorities and schools, has been given a broad interpretation by Scottish Government policy in conformity with the 2004 Report of the Religious Observance Review Group. Central to this policy is a continuation of the fact that both the 1872 and 1980 Education Acts state that “religious observance” is based upon “custom”, without defining what that custom, or customs, were or are. In this, broad scope has been given to local authorities and schools to continue with and evolve their own customs in respect of religious observance, and thereby to fulfil their statutory duty. As the Stair Memorial Encyclopaedia, Education (Re-issue), paragraph 310, notes, “the ‘custom’ of modern education may no longer reflect the ‘custom’ referred to in the legislation”.

#### **4.2.3 Religious and Moral Education in Non-denominational Schools**

The [Education \(Scotland\) Act 1980, section 8](#), continues to impose a statutory obligation on local authorities in respect of religious instruction, as well as religious observance, as first introduced by [section 8 of the Education \(Scotland\) Act 1946](#). In non-denominational schools, religious instruction presently takes the form of “religious and moral education”. The curriculum content for RME is not a matter

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<sup>35</sup> 2011 Circular “Curriculum for Excellence – Provision of Religious Observation in Schools”, para. 21: cf SOED Circular 1/2005, para. 18.

dealt with by the 1980 Act, but is, like the content of religious observance, a matter of government policy, which policy tends to be devolved to education authorities and schools. The most recent Scottish Government Circular on the subject of RME in both non-denominational and denominational schools, was issued in 2011, at the same time as the 2011 circular anent religious observance. The 2011 “religious instruction” Circular, [‘Curriculum for Excellence – Provision of religious and moral education in non-denominational schools and religious education in Roman Catholic schools’](#), makes a distinction between “religious and moral education” in non-denominational schools (RME), and “religious education” in Roman Catholic schools (RERC). The distinction is a little misleading, since although the majority of denominational schools in Scotland are Roman Catholic, there are three Episcopal and one Jewish denominational schools in Scotland.

Nevertheless, the 2011 Circular treats of RME and RERC separately. Thus, in respect of religious instruction in non-denominational schools (RME) the following may be noted, at paragraph 11:

In order to meet statutory requirements and the principles and practices of Curriculum for Excellence, schools should plan and deliver religious and moral education as both a specific subject discipline and one which contributes to high quality interdisciplinary learning, as they do with each of the eight curriculum areas. *Every child and young person can expect their education to provide them with a broad general education, and within religious and moral education this includes well planned experiences and outcomes across Christianity, world religions and developing beliefs and values...* Religious and moral education should also contribute to learning and development through the other contexts for learning, that is the ethos and life of the school community and the opportunities provided for personal achievement. Schools and local authorities will have policies detailing their rationale and practices for the delivery of religious and moral education which are available and shared with parents, learners and the wider community.

[Emphasis added]

### 4.3 Denominational public schools

#### 4.3.1 The Education (Scotland) Acts 1918 and 1980

The Catholic Church in Scotland, which historically ran its own system of voluntary schools,<sup>36</sup> declined to transfer its schools to the state in 1872, possibly because the Catholic Church in Scotland was still not at ease with the British State; and perhaps also because of the pronounced anti-Catholic traditions within Scottish Presbyterianism,<sup>37</sup> with attendant unease at entrusting the education of Catholic children to a public school system still strongly influenced by Presbyterianism, notwithstanding the Conscience Clause contained in the Education (Scotland) Act 1872. Historically, following the Scottish Reformation, Roman Catholics had been subject to various civil and penal disabilities and sanctions; in respect of education, seventeenth-century Scottish legislation had forbidden Roman Catholics from sending their children abroad for a Catholic education, and had prohibited Catholics from educating their own children.<sup>38</sup> While Catholic emancipation had been a marked feature of nineteenth-century Catholic-British State relations, the Catholic Church in Scotland appears to have been still sufficiently wary of the British State in Scotland in 1872 to persist in the maintenance of its own system of voluntary schools in Scotland.

Despite the Catholic Church in Scotland's persistence in maintaining its own system of schools outwith the public school system created by the 1872 Act, it became clear that educational outcomes for Scottish children were better in the state schools than in the underfunded voluntary Catholic schools<sup>39</sup> and, as such, the Education (Scotland)

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<sup>36</sup> There were more than 200 voluntary Catholic schools in Scotland by 1918 (Alex Salmond, Cardinal Winning Lecture, 2008, <http://www.scotland.gov.uk/News/Speeches/Speeches/First-Minister/cardwinlecture>).

<sup>37</sup> I.e. only in 1986 did the General Assembly of the Church of Scotland issue a declaratory act by which it ceased to affirm the anti-Catholic clauses of the Westminster Confession of Faith (General Assembly 1986 Act 5, Declaratory Act Anent the Westminster Confession of Faith, [http://www.churchofscotland.org.uk/about\\_us/church\\_law/acts](http://www.churchofscotland.org.uk/about_us/church_law/acts)).

<sup>38</sup> Stair Memorial Encyclopaedia, volume 3, para. 1660, citing the Perverts to Papacy Act 1609 (*RPS*, 1609/4/16) and the Mass Act 1661 (“Likewise his majesty, considering how dangerous it is that children are educated by persons popishly affected, do therefore, conforming to former acts of parliament, appoint that children under popish parents, tutors or curators shall be taken from them and committed to the education of some well-affected and religious friend, at the sight and by order of his majesty’s privy council”, *RPS*, 1661/1/56).

<sup>39</sup> Some examples of the discrepancies between private Catholic schools and Scottish public schools were highlighted in 2008 by the then First Minister, Alex Salmond: “What did such inequalities of funding mean in practice? A graphic picture was painted during a Commons “Supply Day Debate” on Scottish finances in August 1917. We are indebted to figures provided by Mr Boland - the MP for

Act 1918 made extensive provision for the transferral of these voluntary Catholic schools to the public school system.<sup>40</sup> This scheme was not compulsory, but any such school not availing itself of the provisions of the Act within two years would lose any state funding in which it had been in receipt via the provision of education grants from the state.<sup>41</sup> In order to satisfy both the Catholic Church and the trustees of the various voluntary Catholic schools in Scotland, the 1918 Act contained various guarantees for state-funded Catholic schools as to ethos, the vetting of teachers, and religious observance and instruction. This arrangement has been described by the former First Minister of Scotland, Alex Salmond, as “an unprecedented concordat between church and state in the provision of education”.<sup>42</sup>

This, then, was the main historical context in which denominational state schools (hereafter denominational schools) were first created in Scotland. Nevertheless, one of the striking features of the 1918 Act, and the subsequent legislative provisions to which it has given rise concerning denominational schools, is that it contains neutral statutory language, and was not passed explicitly in favour of the Catholic Church. Rather the statutory language used refers to “denominational schools” and the churches or denominations in whose favour such schools are run. Thus, while the majority of schools nationalised by the 1918 Act were Roman Catholic, the provisions of the 1918 Act and its successor legislation may be applied to any “church or

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South Kerry. Which in itself is a reminder of the certainty of political change. I know there are some local Headteachers here so let me give you the Glasgow figures. The salary for a “board school” Headteacher was £366 (that’s per annum, not per week). Meanwhile for a Headteacher in a voluntary Catholic school, the figure was £181. A child at a Glasgow board school had £3 and 16 shillings per annum spent on their education. A child at a Catholic school, less than half of that. At the end of that Commons debate Robert Munro, the Secretary for Scotland (the post wasn’t elevated to Secretary of State until some years later) asked whether Scotland’s Catholic community was: “willing to bring schools under public control, subject to suitable safeguards both in the matter of the choice of teachers and religious instruction, and so enjoy the benefit of rate aid?’ If so, Munro went on to say, ‘the position of the schools would in every particular, immediately improve.’ He wasn’t wrong!” (Alex Salmond, Cardinal Winning Lecture, 2008, <http://www.scotland.gov.uk/News/Speeches/Speeches/First-Minister/cardwinlecture>).

<sup>40</sup> The 1918 Act in fact replaced the elected school boards created by the 1872 Act with education authorities, to which new education authorities voluntary denominational schools were to be transferred.

<sup>41</sup> Education (Scotland) Act 1918, section 18(5): “After the expiry of two years from the passing of this act no grant from the Education (Scotland) Fund shall be made in respect of any school to which this section applies unless the school shall have been transferred to the education authority, and as from the expiry of that period the Education (Scotland) Act, 1897, shall cease to have effect: Provided, That the department may extend the said period in any case where, in the opinion of the department, further time is required for the completion of a transfer.”

<sup>42</sup> Cardinal Winning Lecture, 2008, <http://www.scotland.gov.uk/News/Speeches/Speeches/First-Minister/cardwinlecture>

denominational body” in Scotland. This term “church or denominational body” has been given a sufficiently broad definition to allow creation of a Jewish denominational primary school in Scotland. How far this definition may be construed or reformed is considered further, below.

In respect of voluntary schools transferred to the education authorities created by the Education (Scotland) Act 1918, c 48, section 18(3) made provision for teachers in denominational schools to be approved by representatives of the churches or denominational bodies in whose interest a denominational school was being conducted by an education authority:

the education authority... shall have in respect thereto the sole power of regulating the curriculum and of appointing teachers : Provided, That –

(ii) All teachers appointed to the staff of any such school by the education authority shall in every case be teachers who satisfy the department as to qualification, and are approved as regards their religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted.

Section 18(3)(iii) made provision for religious observance and instruction in public denominational schools in the following terms:

Subject to the provisions of section 68 (conscience clause) of the Education (Scotland) Act, 1872, the time set apart for religious instruction or observance in any such school shall not be less than that so set apart according to the use and wont of the former management of the school, and the education authority shall appoint as supervisor without remuneration of religious instruction for each such school, a person approved as regards religious belief and character as aforesaid, and it shall be the duty of the supervisor so appointed to report to the education authority as to the efficiency of the religious instruction given in such schools. The supervisor shall have the right of entry to the school at all times set apart for religious instruction or observance. The education authority shall give facilities for the holding of religious examinations in every such school.

In respect of the creation of new denominational schools by education authorities, section 18(8) of the 1918 Act stated that:

In any case where the department are satisfied, upon representations made to them by the education authority of any education area, or by any church or denominational body acting on behalf of the parents of children belonging to such church or body, and after such inquiry as the department deem necessary, that a new school is required for the accommodation of children whose parents are resident within that education area, regard being had to the religious belief of such parents, it shall be lawful for the education authority of that area to provide a new school, to be held, maintained, and managed by them subject to the conditions prescribed in subsection (8) of this section, so far as those conditions are applicable ; the time set apart for religious instruction in the new school being not less than that so set apart in schools in the same education area which have been transferred under this section.

In respect of the discontinuation of denominational schools by education authorities, section 18(9) of the 1918 Act stated that:

If at any time after the expiry of 10 years from the transfer of a school under this section or from the provision of a new school as aforesaid, the education authority by whom the school is maintained are of opinion that the school is no longer required, or that, having regard to the religious belief of the parents of the children attending the school, the conditions prescribed in subsection (3) of this section ought no longer to apply thereto, the authority may so represent to the department, and if the department, after such inquiry as they deem necessary, are of the same opinion and so signify, it shall be lawful for the education authority thereafter to discontinue the school, or, as the case may be, to hold, maintain, and manage the same in all respects as a public school, not subject to those conditions: Provided, That in the case of any school which has been transferred to an education authority under this section, that authority shall in either of those events make to the trustees by whom the school was transferred, or to their successors in office or representatives, such compensation (if any) in respect of the school or other property so transferred

as may be agreed, or as may be determined, failing agreement, by an arbiter appointed by the department upon the application of either party.

These principal features of the Education (Scotland) Act 1918, section 18 – concerning the transfer, creation, and discontinuation of denominational schools to and by Scottish education authorities, with rights to denominations to approve both teachers and unremunerated supervisors of religious education in such schools as to religious belief and character, and with guarantees that the time set apart for religious observance and instruction in such schools would conform to the customs of such schools prior to their transfer to education authorities – are still in effect retained today by virtue of various sections of the Education (Scotland) Act 1980, as amended by the Education (Scotland) Act 1981. The provisions of the 1918 Act were not interpolated directly into the 1980 Act, but rather were transmitted through various sections of the Education (Scotland) Acts of 1946 and 1962, with various additions.<sup>43</sup>

The most relevant sections of the Education (Scotland) Act 1980, as amended, in relation to denominational schools are as follows:

**Section 16 –The transference of denominational schools to education authorities**

16 (1) It shall be lawful for the person or persons vested with the title of any school established after 21st November 1918, to which section 18 of the Act of 1918 would have applied had the school been in existence at that date, with the consent of the trustees of any trust upon which the school is held and of the Secretary of State, to transfer the school together with the site thereof and any land or buildings and furniture held and used in connection therewith, by sale, lease or otherwise, to the education authority, who shall be bound to accept such transfer, upon such terms as to price, rent, or other consideration as may be agreed, or as may be determined, failing agreement, by an arbiter appointed by the Secretary of State upon the application of either party.

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<sup>43</sup> The history of the development of statutory provisions concerning denominational schools from the 1918 Act, through the 1946 and 1962 Acts, to the 1980 Act has not been researched in any detail for this report.

## **Section 17 – Provision, maintenance and equipment of schools and other buildings**

(2) In any case where an education authority are satisfied, whether upon representations made to them by any church or denominational body acting on behalf of the parents of children belonging to such church or body or otherwise, that a new school is required for the accommodation of children whose parents are resident within the area of the authority, regard being had to the religious belief of such parents, it shall be lawful for the education authority to provide a new school.<sup>44</sup>

In respect of this provision, it should be noted that new denominational schools are subject to section 21(1) – (4) of the 1980 Act, which subsections govern denominational schools already in existence (as per section 21(5)), with the proviso that the time set aside for religious observance and instruction is not less than that in other denominational schools within the education authority, rather than being governed by the “use and wont” clause governing these matters in voluntary schools transferred to education authorities.

In respect of the process for approving the religious belief and character of teachers to be appointed to denominational schools, section 21 provides:

21(2) Subject to subsections (2A) and (2C) below, in any such school the education authority shall have the sole power of regulating the curriculum and of appointing teachers:

(2A) A teacher appointed to any post on the staff of any such school by the education authority shall satisfy the Secretary of State as to qualification, and shall be required to be approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted;

(2B) Where the said representatives of a church or denominational body refuse to give the approval mentioned in subsection (2A) above they shall state their reasons for such refusal in writing.

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<sup>44</sup> S. 17(2) substituted by the Education (Scotland) Act 1981 (c. 58), s. 7(1), Sch. 8

(2C) subject to the provisions of section 9 of this Act,<sup>45</sup> the time set apart for religious instruction or observance in any such school shall not be less than that so set apart according to the use and wont of the former management of the school.<sup>46</sup>

In respect of section 21(2A), the procedure whereby a teacher may satisfy the Catholic Church as to religious belief and character is set out on the website of the Scottish Catholic Education Service. Roman Catholics must obtain a reference from their parish priest, while non-Catholics must provide the details of a ‘suitable professional person’ willing to provide a reference as to religious belief and character.<sup>47</sup>

In respect of the appointment of supervisors of religious instruction, section 21(3) provides:

For each such school the education authority shall appoint as supervisor of religious instruction, without remuneration, a person approved as regards religious belief and character as aforesaid, and the supervisor so appointed shall report to the education authority as to the efficiency of the religious instruction given in such school, and shall be entitled to enter the school at all times set apart for religious instruction or observance.

## **Section 22 – Discontinuance and moves of educational establishments**

22(4) If at any time after the expiry of ten years from the transfer of a school under section 16 of this Act, or from the provision of a new school under section 17(2) of this Act, the education authority by whom the school is maintained are of opinion that the school is no longer required, or that, having regard to the religious belief of the parents of the children attending the

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<sup>45</sup> Section 9 being the Conscience Clause in respect of withdrawal of pupils from religious observance and instruction. In this respect the Scottish Government Circular issued in 2011 “Curriculum for Excellence – Provision of Religious Observation in Schools”, para. 17 noted that “Where a parent chooses a denominational school for their child’s education, they choose to opt in to the school’s ethos and practice which is imbued with religious faith and religious observance. In denominational schools, it is therefore more difficult to extricate a pupil from all experiences which are influenced by the school’s faith character.”

<sup>46</sup> It should be noted that this section of the Act as it appears here has been variously amended and expanded by the Self-Governing Schools etc. (Scotland) Act 1989 (c.39).

<sup>47</sup> <http://www.sces.uk.com/approval.html>

school, the conditions prescribed in subsections (1) to (4) of section 21 of this Act or in the said subsections so far as applicable and having effect by virtue of subsection (5) of that section, as the case may be, ought no longer to apply thereto, it shall, subject to sections 22C and 22D of this Act and the Schools (Consultation) (Scotland) Act 2010 (asp 2),<sup>48</sup> be lawful for the education authority thereafter to discontinue the school, or, as the case may be, to hold, maintain and manage the same in all respects as a public school not subject to those conditions:

Provided that—

- (i) in the case of any school which has been transferred as aforesaid to an education authority, that authority shall in either of those events make to the trustees by whom the school was transferred, or to their successors in office or representatives, such compensation (if any) in respect of the school or other property so transferred as may be agreed, or as may be determined, failing agreement, by an arbiter appointed by the Secretary of State upon the application of either party; and
- (ii) if before the expiry of ten years from the transfer of any such school, the education authority are of opinion as aforesaid and so represent, and the trustees by whom the school was transferred, or their successors in office or representatives, formally intimate to the authority that they concur with the authority in their opinion as represented, then in such case, it shall, subject to sections 22C and 22D of this Act and the Schools (Consultation) (Scotland) Act 2010 (asp 2), be lawful for the education authority forthwith to discontinue or to hold, maintain or manage the school as aforesaid, subject to the like provision with respect to compensation.

Note that in respect of the payment of compensation in section 22(4)(i), the Stair Memorial Encyclopaedia comments that when denominational schools transferred to education authorities are discontinued “compensation must be paid to the trustees, or

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<sup>48</sup> Which concerns the requirement of local authorities to consult in respect of a range of proposals, including changing a denominational school into a non-denominational school etc.

their successors or representatives, by whom the school was transferred.”<sup>49</sup>

In respect of any proposal put forward by an educational authority by which a denominational school may be changed so as to remove the possibility of religious observance and instruction for the children of parents of religious faith at the school in question, it is provided that:

**Section 22C - Consent for certain changes affecting denominational schools.**

- (1) An education authority shall submit to the Secretary of State for his consent any proposal of theirs to which this section applies and shall not implement such a proposal without his consent.
- (2) A proposal to which this section applies is one which—
  - (a) relates to a school transferred to an education authority under section 16(1) or provided by them under section 17(2) of this Act; and
  - (b) will, if implemented, have the effect that all or some of the pupils who attend the school will no longer receive school education in a school of the kind referred to in paragraph (a) above or that all or some of the children who would, but for the implementation of the proposal, have been likely to attend it will not be likely to receive such education in a school of that kind.
- (3) The Secretary of State shall not grant consent under this section unless he is satisfied that adequate arrangements have been made for the religious instruction of pupils and children who would, as a result of implementation of the proposal, no longer receive or be likely to receive school education in a school of the kind referred to in paragraph (a) of subsection (2) above.
- (4) In granting consent under this section the Secretary of State may impose such conditions as he thinks fit with regard to the religious instruction of the pupils and children referred to in paragraph (b) of subsection (2) above and to related matters and conditions imposed by the Secretary of State under this section may be revoked or amended by him at any time.
- (5) Any question which may arise—
  - (a) whether a proposal is one to which this section applies;

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<sup>49</sup> Stair Memorial Encyclopaedia, volume 3, para. 1665.

(b) as to the implementation of a proposal to which the Secretary of State has consented under this section;

(c) as to the fulfilment or observation of any conditions upon his consent imposed under subsection (4) above shall be determined by the Secretary of State and the education authority shall perform their duties under this Act in accordance with any such determination.

(6) In this section, the reference to section 16(1) or 17(2) of this Act shall include a reference to the corresponding provision of the Act of 1918, the Act of 1946 and the Act of 1962.

In respect of the consent of Secretary of State for Scotland required for any proposal put forward by an educational authority by which a denominational school may be discontinued, amalgamated with another school, moved to another site, have its admissions arrangements altered, or be changed into a non-denominational school, in those cases where agreement has not been reached by the education authority and the representatives of the church or denomination in whose interest the school is conducted, it is provided:

**Section 22D - Further provisions relating to denominational schools**

(1) An education authority shall submit to the Secretary of State for his consent any proposal of theirs to which this section applies and shall not implement such a proposal without his consent.

(2) A proposal to which this section applies is one—

(a) which relates to a school transferred to an education authority under section 16(1) or provided by them under section 17(2) of this Act;

(b) to—

(i) discontinue the school or a part of it;

(ii) amalgamate the school or a part of it with another school;

(iii) change the site of the school;

(iv) change the arrangements for admission to the school; or

(v) disapply to the school the conditions prescribed in subsections (1) to (4) of section 21 of this Act or in the said subsections so far as applicable and having effect by virtue of subsection (5) of that section; and

(c) in relation to which the Secretary of State, having consulted any education authority affected by it, is satisfied, upon written representations made, in the case of any church or denominational body in whose interest the school is conducted other than the Roman Catholic Church, by a person authorised for that purpose by that church or denominational body and, in the case of the Roman Catholic Church, by the Scottish Hierarchy of that Church, that –

(i) if implemented, it will have any of the results specified in subsection (3) below; and

(ii) the education authority submitting the proposal under subsection (1) above and the church, denominational body or Hierarchy, as the case may be, have, after discussion, failed to reach agreement that it should be implemented.

(3) The results referred to in subsection (2)(c)(i) above are—

(a) a significant deterioration for pupils belonging to the area of the education authority submitting the proposal under subsection (1) above; or

(b) a significant deterioration for pupils belonging to the area of any other education authority; or

(c) where neither paragraph (a) nor paragraph (b) above applies, such a deterioration for pupils as mentioned in the said paragraph (a) and pupils belonging to the area of another education authority as, taken together, amounts to a significant deterioration, in the provision, distribution or availability of school education in schools of the kind referred to in subsection (2)(a) above compared with such provision, distribution or availability in other public schools.

(5) The Secretary of State shall not grant consent under this section in relation to a school unless he is satisfied that adequate arrangements have been made for the religious instruction of the children who will no longer receive or be likely to receive school education in a school of the kind referred to in subsection (2)(a) above.

(6) In granting consent under this section in relation to a school the Secretary of State may impose such conditions as he thinks fit with regard to the

religious instruction of the children who will no longer receive or be likely to receive school education in a school of the kind referred to in subsection (2)(a) above and to related matters and, in doing so, he shall have regard to the duties imposed by section 21 of this Act on education authorities in relation to schools of that kind, and conditions imposed by the Secretary of State under this section may be revoked or amended by him at any time.

(7) Any question which may arise—

- (a) whether a proposal is one to which this section applies;
- (b) as to the implementation of a proposal to which the Secretary of State has consented under this section;
- (c) as to the fulfilment or observation of any conditions upon his consent imposed under subsection (6) above shall be determined by the Secretary of State and the education authority shall perform their duties under this Act in accordance with any such determination.

(8) In this section the reference to section 16(1) or 17(2) of this Act shall include a reference to the corresponding provision of the Act of 1918, the Act of 1946 and the Act of 1962.

The provisions made by section 22 of the Education (Scotland) Act 1980 in respect of the discontinuation of denominational schools by a local authority were considered by the House of Lords in an appeal from the Inner House of the Court of Session in 1987, namely *Scottish Hierarchy of the Roman Catholic Church v Highland Regional Council*. Highland Regional Council proposed to discontinue two Roman Catholic primarily schools within the region, and obtained the consent of the Secretary of State for Scotland to that effect. The Hierarchy of the Roman Catholic Church petitioned the Court of Session for judicial review of the Secretary of State for Scotland's decision in the matter, on the ground that the Secretary had acted *ultra vires*. This argument was rejected by both the Inner and Outer House, and eventually by the House of Lords. Nevertheless, Lord Mackay of Clashfern's judgment in the House of Lords provides a helpful summary of section 22 of the 1980 Act thus:

My Lords, the judges in the Court of Session and counsel before your Lordships were agreed that in these provisions Parliament had not described its intentions with conspicuous clarity. However, in my opinion, it is clear that

the legislature intended, by the amendments introduced in 1981 to s. 22, to authorise education authorities generally to use the powers affected by the amendments without reference to the Secretary of State. On the other hand, Parliament appreciated that certain proposals to exercise these powers might have particular consequences which make it expedient that the Secretary of State's consent to such proposals should be required before they could be implemented. I take the example of the power to close a school which is in issue in the present case. Ordinarily the authority, after the necessary consultation prescribed under s. 22A, could give effect to the proposal without recourse to the Secretary of State. If, however, the school proposed for closure had a primary department and the nearest primary school was more than five miles away the authority could not give effect to that proposal without the consent of the Secretary of State. If the school was a denominational school and its closure meant that some or all of its pupils would no longer be educated at such a school its closure required the consent of the Secretary of State. If the school was a denominational school and its closure involved a significant deterioration in the provision by the education authority of denominational schools as compared with non-denominational schools its closure would require the consent of the Secretary of State. The criteria established under s. 22B and s. 22C are relatively clear cut. Whether or not a significant deterioration would result under s. 22D is very much a matter of opinion and therefore called for a preliminary ruling whether the proposal did involve such a significant deterioration. If it does, the consent of the Secretary of State is required.<sup>50</sup>

In addition, the case reveals various interesting details in respect of the conditions the Secretary of State for Scotland can attach to the giving of his consent for a denominational school to be discontinued. In the instance of one of the two denominational schools, which the Secretary gave his consent to the local authority's proposal to discontinue, the following conditions were applied. Since the pupils who had formally attended the denominational school were to be transferred to a non-denominational school, a teaching position was guaranteed in that school for a teacher

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<sup>50</sup> *Scottish Hierarchy of the Roman Catholic Church v Highland Regional Council*, 1987 S.L.T. 708.

approved by the Hierarchy of the Catholic Church, provision was made for the transferred pupils to receive religious instruction four times a week from a representative (i.e. chaplain) appointed by the Hierarchy, and one hour a week of religious observance. From this, it may be the case that various non-denominational schools in Scotland have specific provisions made by virtue of decisions made by former Secretaries of State for Scotland by which they are rendered in effect quasi-denominational schools.

While the specific arrangements reached in Scotland in respect of faith schools have been driven, historically and principally, by the situation of the Catholic Church, statutory provisions are couched in terms of “churches and denominational bodies” and, as such, faith schools may be provided by the state for any religious group. At present “Scotland has 370 state-funded faith schools - 366 Catholic, one Jewish and three Episcopalian”.<sup>51</sup>

At present, the regulations governing the creation of new denominational schools make no explicit provision for belief bodies. This may be because no belief body has petitioned a local authority to the effect that a “denominational” school be established and carried on in its interests. Nevertheless, it is unlikely that a local authority would reject a petition from a belief body in such a case on the ground that the petitioning body was not a denomination or religious body. It is already well established in the jurisprudence of the European Court of Human Rights that the term “religion” should be interpreted broadly, so as to include non-religious belief and there are specific examples in Scots law of this approach being applied: Scots marriage law<sup>52</sup> and Scots charity law<sup>53</sup> hold belief bodies and non-religious forms of belief to be directly analogous with and equal to religious bodies and religious belief.

#### **4.3.2 Admissions Policies for Denominational Schools**

Admissions policies for denominational schools are a matter for individual local authorities, and as such are not determined by the Scottish Government or by individual schools. Local authorities may alter their admission policies in respect of

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<sup>51</sup> <http://www.scotland.gov.uk/Topics/Education/Schools/FAQs>

<sup>52</sup> i.e. Marriage (Scotland) Act 1977, s. 8(1)(a)(ii).

<sup>53</sup> Charities and Trustee Investment (Scotland) Act 2005, s. 7(3)(f).

denominational schools, but must only do so following a public consultation,<sup>54</sup> and with the consent of the Secretary of State for Scotland.<sup>55</sup> In effect, local authorities may tighten or relax admission procedures depending upon the capacity and occupancy levels of denominational schools within its jurisdiction. So, if Catholic schools are oversubscribed, admission policies may be tightened so as to permit the admission to denominational schools only of those children in possession of a valid baptismal certificate.<sup>56</sup> Conversely, admission policies presumably may be relaxed where there are declining numbers of Catholic families within a school catchment area.

The admissions policies of local authorities in respect of denominational schools may not directly discriminate against potential pupils not of the religion in whose interests the schools in question are carried on, but they may prioritise potential pupils who are of the religion in question. The selection of pupils for admission to denominational schools by having regard to their or their parents' religion is not considered to be unlawfully discriminatory under the terms of the Equality Act 2010. So, the [Equality Act 2010, s. 85](#) (1) and (2) (a) to (d) states that:

- (1) The responsible body of a school to which this section applies must not discriminate against a person—
  - (a) in the arrangements it makes for deciding who is offered admission as a pupil;
  - (b) as to the terms on which it offers to admit the person as a pupil;
  - (c) by not admitting the person as a pupil.
- (2) The responsible body of such a school must not discriminate against a pupil—
  - (a) in the way it provides education for the pupil;
  - (b) in the way it affords the pupil access to a benefit, facility or service;
  - (c) by not providing education for the pupil;

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<sup>54</sup> Conform to the Schools (Consultation) (Scotland) Act 2010.

<sup>55</sup> Education (Scotland) Act 1980, s. 22D(2)(iv). The Secretary of State for Scotland must consult the representatives of the denominations in whose interests denominational schools are being carried on within the local authority in question prior to giving his consent, as per s. 22D(2)(c). In granting such consent, the Secretary of State for Scotland may impose certain conditions, as per s. 22D(6).

<sup>56</sup> For example see the recent consultation undertaken by Falkirk Council in this respect at <http://www.falkirk.gov.uk/services/council-democracy/consultations-surveys/previous-consultations/schools-admissions-policy.aspx>

(d) by not affording the pupil access to a benefit, facility or service;

Notwithstanding that, Scottish denominational schools are exempt from these provisions by virtue of [schedule 11, paragraph 5](#) to the same Act, concerning religion or belief-related discrimination, which states that the section just cited:

so far as relating to religion or belief, does not apply in relation to—

(c) a school transferred to an education authority under section 16 of the Education (Scotland) Act 1980 (transfer of certain schools to education authorities) which is conducted in the interest of a church or denominational body;

(d) a school provided by an education authority under section 17(2) of that Act (denominational schools).

The UK Government's Department of Education 2014 [The Equality Act 2010 and Schools](#) advice document, pages 12 to 13, offers a discussion of a faith school's admissions policies and the Equality Act 2010. Although this document concerns English, rather than Scottish, schools, the discussion of the provisions and exemptions contained in the 2010 Act is nevertheless helpful:

#### **Schools with a religious character**

2.3 Schools with a religious character (commonly known as faith schools) have certain exceptions to the religion or belief provisions which allow them to discriminate because of religion or belief in relation to admissions and in access to any benefit, facility or service.

#### **Admissions**

2.4 Schools with a religious character may give priority in admissions to members of their own religion. The Admissions Code provides that this may only be done when a school is oversubscribed – schools subject to the Code are not permitted to refuse admission to pupils not of their faith if they have unfilled places.

For example, a Muslim school may lawfully give priority to Muslim pupils when choosing between applicants for admission. However, the Admissions

Code will not allow it to refuse to accept pupils of another or no religion unless it is oversubscribed.

The exception is not in fact confined to preferring children of the school's own faith. It would, for example, allow a Church of England school to allocate some places to children from Hindu or Muslim families if it wanted to ensure a mixed intake reflecting the diversity of the local population. It would not, however, allow the school to base this selection on ethnic background rather than faith.

### **Benefits facilities and services**

2.5 In addition to the admissions exception, schools with a religious character also have exceptions for how they provide education to pupils and in the way they allow access to other aspects of school life which are not necessarily part of the curriculum. For example:

A Jewish school which provides spiritual instruction or pastoral care from a rabbi is not discriminating unlawfully by not making equivalent provision for pupils from other religious faiths.

A Church of England school which organises visits for pupils to sites of particular interest to its own faith, such as a cathedral, is not discriminating unlawfully by not arranging trips to sites of significance to the faiths of other pupils.

A child of a different faith could not claim, for example, that they were being treated less favourably because objects symbolic of a school's faith, such as the Bible, were given a special status in the school.

### **What is not permissible**

2.6 These exceptions allow such schools to conduct themselves in a way which is compatible with their religious ethos. But the Equality Act does not permit less favourable treatment of a pupil because they do not (or no longer) belong to the school's religion. For example, it would be unlawful for a Catholic school to treat a pupil less favourably because he rejected the Catholic faith and declared himself to be a Jehovah's Witness or an atheist.

2.7 Nor does it allow them to discriminate on religious grounds in other respects, such as excluding a pupil or subjecting a pupil to any other detriment. It also does not permit them to discriminate in relation to other protected characteristics, for example a school with a religious character would be acting unlawfully if it refused to admit a child because he or she was gay – or their parents were.'

### **4.3.3 Religious Education in Denominational Schools**

As noted above, the Scottish Government makes a distinction between religious instruction in non-denominational schools (RME) and religious instruction in denominational, or as the 2011 Circular somewhat misleadingly designates them, Roman Catholic schools (RERC). In respect of Roman Catholic schools, the [Scottish Government's 2011 Circular on religious instruction](#) differentiates between “Religious and Moral Education and Religious Education in Roman Catholic Schools within Curriculum for Excellence” (paras. 4. to 8.) and “Religious Education in Roman Catholic Schools” (paras. 12. to 14.).

In respect of the former the following extracts in particular may be noted:

Paragraph 4 mentions views which are independent of religious belief, but also uses explicitly theological language: [RERC] increases children and young people’s awareness of the spiritual dimension of human life through exploring the world’s major religions and views, including those which are independent of religious belief, and considering the challenges posed by those beliefs and values... Specifically, the process of learning in religious education in Roman Catholic schools assists children and young people to make an informed mature response to God’s call to relationship. This encourages children and young people to act in accordance with an informed conscience in relation to matters of morality through developing their knowledge and understanding of significant aspects of Catholic Christian faith.

Paragraph 6: In Roman Catholic schools the experiences and outcomes should be delivered in line with the guidance provided by the Scottish Catholic

Education Service.

Paragraph 7: Under section 9 of the Education (Scotland) Act 1980, the conscience clause advises that parents have a statutory right to withdraw children from participation in religious and moral education and religious education in Roman Catholic schools.

Paragraph 8: An additional factor which parents should consider is that in choosing a denominational school for their child's education, they choose to opt in to the school's ethos and practice which is imbued with religious faith and it is therefore more difficult to extricate a pupil from all experiences which are influenced by the school's faith character.

In respect of the latter the following may be noted:

Paragraph 12: All Catholic schools are expected by the Bishops' Conference of Scotland to follow guidelines established by the Catholic Education Commission on the provision of adequate time for religious education within the school curriculum. These guidelines indicate a requirement for a minimum of 2.5 hours per week in primary school and 2 hours per week in all stages of secondary school. In all secondary stages this minimum time allocation is expected by the Commission to be provided through 2 periods of religious education classes per week and enriched by additional activities throughout the school year.'

Paragraph 13 concerning the relevant legislation on the management of denominational schools in Scotland states that:

A teacher appointed to any post on the staff of any such school by the education authority shall be required to be approved as regards religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted. For those teaching posts which impact on the teaching of religious education, teachers will, in addition, be expected to have obtained an appropriate teaching qualification in Catholic Religious Education.'

Paragraph 14: The role of the wider parish community plays an important part in the delivery of religious education. Active learning approaches to learning and teaching, including collaborative learning, will encourage children and young people to discuss and share ideas, experiences and moral challenges in a variety of ways. Such opportunities are not only provided by the teacher but by parents and families and in local parish and community settings. Schools are encouraged to use the rich resources available from the local, national and global community when planning their programmes of study.

#### **4.4 Rights to education**

Both parents and their children have various rights in respect of education: international and European human rights and legal rights set out in domestic legislation. To some extent these rights take account of religion, although generally subject to restrictions which recognise the overriding requirements of providing efficient instruction and training and avoiding unreasonable public expenditure.<sup>57</sup> Equality rights also operate to protect against discrimination between different religions and beliefs and these are relevant in moves towards greater diversity of beliefs in the context of education. A detailed exploration of these various areas of law is beyond the scope of this review<sup>58</sup> and what this section aims to do is simply to outline the key provisions and protections which exist and to highlight some of the issues to which they may give rise.

##### **4.4.1 The European Convention on Human Rights (ECHR)**

The *European Convention on Human Rights*, First Protocol, Article 2 states that:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching is in

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<sup>57</sup> Human Rights Act 1998, Sched 3.

<sup>58</sup> See for further detail R Reed and J Murdoch, *A Guide to Human Rights Law in Scotland* (3rd ed) Bloomsbury, 2008, 6.153 – 6.157 and for discussion of children’s rights and education law in Scotland, L-A Barnes, “The Child’s Right to Education” in A Cleland and EE Sutherland, *Children’s Rights in Scotland* (3<sup>rd</sup> ed), W Green, 2009, 209-231.

conformity with their own religious and philosophical convictions.

The European Court of Human Rights has stated that the second sentence of Article 2 aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the “democratic society as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.”<sup>59</sup>

It is clear that the right to respect for religious and philosophical convictions belongs to the parents of a child and not to the child or to any religious organisation or association.<sup>60</sup> This approach is followed in Scots domestic law, as set out below. It fits well with the general tenor of respect for private and family life.<sup>61</sup>

At the time of ratification of the treaty, the United Kingdom made a reservation to the effect that the obligation under Article 2 only applies in so far as “it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure”.<sup>62</sup> In *X and Y v United Kingdom*,<sup>63</sup> it was made clear that the Article did not place an obligation on a state to establish or support any establishment supporting any particular set of religious or other beliefs. The right operates in respect of access to the education which is being provided rather than requiring a state to make special educational provision in respect of particular religious or other beliefs.

#### **4.4.2 The UN Convention on the Rights of the Child (UNCRC)**

While the ECHR sets out general human rights, the UN Convention on the Rights of the Child is a specialised set of rights designed specifically for children. Articles 28–30 of the UN CRC all deal with aspects of education, which can overlap in various ways with religion. Education as a fundamental developmental right is set out in Article 28 and further elaboration of the aims of education is set out as follows in Article 29:

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<sup>59</sup> *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976), (1979-80) 1 E.H.R.R. 711.

<sup>60</sup> *Jordebo Foundation of Christian Schools and Jordebo v Sweden* (1987) DR 51.

<sup>61</sup> Art 8

<sup>62</sup> Human Rights Act 1998, Sched 3.

<sup>63</sup> (1982) DR 31, 210.

1. States Parties agree that the education of the child shall be directed to
  - (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;
  - (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
  - (c) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
  - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; ...

The religious rights of children in minority communities have specific protection in terms of Article 30. In contrast to the individual focus of many of the other Articles, Article 30 highlights in particular the right of the child "in community with other members of his or her group ... to profess and practise his or her own religion."

Although the CRC sets out individual rights for children, it proceeds on the basis that children are best situated within families and again there is clear respect for parents within the context of education. Article 5 provides that:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

#### **4.4.3 Domestic law**

The provisions of Scots law in respect of the right to education and rights in respect of

religious education are largely consistent with these various human rights.

Section 28(1) of the Education (Scotland) Act 1980 provides that:

In the exercise and performance of their powers and duties under this Act, the Secretary of State and education authorities shall have regard to the general principle that, so far as is compatible with the provision of suitable instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.

In keeping with the idea that the state provision of religious education is a benefit for religious parents rather than an independent right for children,<sup>64</sup> it is the parents who have the right to remove their child from religious education in school. The view of the Scottish Government is that “there is an intrinsic value in learning about religion as well as learning from religion” and that religious and moral education should not be simply about the delivery of information but should also allow for “the idea of ‘personal search’” and the “development of a child or young person’s own beliefs and values”.<sup>65</sup> Section 9 of the Education (Scotland) Act 1980 provides, in what is termed the “conscience clause”, that:

Every public school [and every grant-aided school] shall be open to pupils of all denominations, and any pupil may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school; and no pupil shall in any such school be placed at any disadvantage with respect to the secular instruction given therein by reason of the denomination to which such pupil or his parents belong, or by reason of his being withdrawn from any instruction in religious subjects.

The first part of this provision fits very closely with the human rights protections for individual belief and conscience set out above and the second part reflects the contemporary legal framework of equality which aims to protect against

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<sup>64</sup> For further discussion, see e.g. S. Grover, “Children’s right to be educated for tolerance: minority rights and inclusion” (2007) 19(1) *Education and the Law* 59.

<sup>65</sup> Scottish Government, *Curriculum for excellence: religious and moral education principles and practice*, 2012, available at [www.curriculumforexcellencescotland.gov.uk](http://www.curriculumforexcellencescotland.gov.uk). In Scotland there is provision for both religious education and religious observance, with the latter involving practising religion or participating in some other form of “reflection”.

disadvantage. Section 85(2)(a)-(d) of the Equality Act 2010 imposes a duty on the “responsible body” of a school not to discriminate:

- (a) in the way it provides education for the pupil;
- (b) in the way it affords the pupil access to a benefit, facility or service;
- (c) by not providing education for the pupil;
- (d) by not affording the pupil access to a benefit, facility or service

but such a duty

so far as relating to religion or belief, does not apply in relation to anything done in connection with acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum)<sup>66</sup>

There is relatively little case law relating to these provisions in the context of religious discrimination and in particular there is little that is specific to Scotland. Therefore although we have a relatively detailed statutory framework it has rarely been tested.

#### **4.5 Governance and representation on education bodies**

Provision is made for representation of churches and religious bodies in various ways in the structure for governance of education in Scotland. The following provisions show how this is legally regulated and the extent to which there is special provision for certain denominations, in particular the Church of Scotland.

##### **4.5.1 Representatives of churches and denominational bodies on education committees appointed by education authorities**

When local government was re-organised in Scotland by the Local Government (Scotland) Act 1973, [section 124](#) made provision for each of the new 32 local authorities to appoint advisory education committees. Although the wording of section 124 was subsequently re-phrased by the Local Government etc (Scotland) Act 1994 (c 39), section 31, its tenor remained effectively the same. Section 124(4) is concerned with the appointment of representatives of churches and denominational bodies on education committees, whereby one place on each such committee is

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<sup>66</sup> Equality Act 2010, s89(12).

expressly reserved for a representative of the Church of Scotland as nominated by the General Assembly. Other denominations also enjoy places on these education committees, most notably the Catholic Church, although only the Church of Scotland enjoys a prescribed place on all such committees. This provision remains in force at the present time.

**Section 124 - Membership of committees appointed by education authorities.**

(1) Where an education authority appoint a committee whose purposes include—

- (a) advising the authority on any matter relating to the discharge of their functions as education authority; or
- (b) discharging any of those functions of the authority on their behalf, the members of such committee shall, notwithstanding the provisions of section 57(3) and (4)(a)<sup>67</sup> of this Act, be appointed in accordance with this section.

(2) Subject to the provisions of section 59<sup>68</sup> of this Act, an education authority who appoint a committee such as is mentioned in subsection (1) above shall secure that—

- (a) at least half of the persons appointed by them to be members of such committee are members of the authority; and
- (b) the persons appointed by them to be members of such committee shall include the three persons mentioned in subsection (4) below.

(3) Subject to the provisions of subsection (2) above, an education authority may appoint persons who are not members of the authority to be members of a committee such as is mentioned in subsection (1) above.

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<sup>67</sup> Section 57(3) runs: 'A committee appointed under subsection (1) above, other than a committee for regulating and controlling the finance of the local authority or of their area may, subject to section 59 below, include persons who are not members of the appointing authority or authorities or, in the case of a sub-committee, the authority or authorities of whom they are a sub-committee, but at least two-thirds of the members appointed to any such committee (other than a sub-committee) shall be members of that authority or those authorities, as the case may be.' Section 57 (4)(a) runs: '(4) A local authority may appoint a committee, and two or more local authorities may join in appointing a committee, to advise the appointing authority or authorities on any matter relating to the discharge of their functions, and any such committee— (a) may consist of such persons (whether members of the appointing authority or authorities or not) appointed for such term as may be determined by the appointing authority or authorities'.

<sup>68</sup> Which section concerns disqualification from membership of committees.

(4) The three persons mentioned in subsection (2)(b) above (who shall not be members of the education authority appointing such committee) are—

(a) one representative of the Church of Scotland, nominated in such manner as may be determined by the General Assembly of the Church;

(b) in the case of the education authority for each area other than Orkney Islands, Shetland Islands and Western Isles, one representative of the Roman Catholic Church, nominated in such manner as may be determined by the Scottish Hierarchy of the Church;<sup>69</sup> and

(c) one person or in the case of the education authorities for Orkney Islands, Shetland Islands and Western Isles, two persons, in the selection of whom the authority shall have regard (taking account of the representation of churches under paragraphs (a) and (b) above) to the comparative strength within their area of all the churches and denominational bodies having duly constituted charges or other regularly appointed places of worship there.

(5) Where two or more authorities appoint a joint committee whose purposes include discharging any of the functions of those authorities as education authorities on their behalf, section 57(3) of this Act shall apply to such a joint committee as if for the words 'two-thirds' there were substituted the words 'one-half'.

#### **4.5.2 The General Teaching Council for Scotland**

The General Teaching Council contains religious representatives under the Public Services Reform (General Teaching Council for Scotland) Order 2011/215 (Scottish SI), schedule 2 [membership of the General Teaching Council for Scotland], para.3, the 11 members of the GTC are to include one “nominated by the Church and Society Council of the General Assembly of the Church of Scotland” and one “nominated by the Scottish Hierarchy of the Roman Catholic Church”.

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<sup>69</sup> This did not represent an alteration of the 1973 provision as originally enacted, since the Catholic Church enjoyed prescribed places only in the case of those education authorities constituted 'for the area of a region', s.1(2) of the 1973 Act stating that 'Scotland (other than Orkney, Shetland and the Western Isles) shall be divided into local government areas to be known as regions'.

### **4.5.3 Parent Councils and Combined Parent Councils**

Parent councils in denominational schools include religious representatives. Under the Scottish Schools (Parental Involvement) Act 2006 asp 8, section 7, denominational schools “must provide for at least one of the council’s members to be so co-opted and to be a person nominated by the church or denominational body in whose interest the school is conducted”. Under section 16(13 &14) of the same Act, where a:

Combined Parent Council is being established and one or more of the represented schools is a denominational school, the constitution of the Combined Parent Council must provide for (a) the church or denominational body in whose interest a represented school is conducted, or (b) where there is more than one such church or denominational body, each church or body, to nominate at least one person to be a co-opted member of the council.

## **4.6 Teacher training and Universities**

### **4.6.1 University teachers of Christian theology and divinity**

Under the Universities (Scotland) Act 1932, the appointment of professors of theology in faculties of divinity or theology in Scottish universities was transferred from the Crown and other bodies to the University Courts with special provision for the approval for appointments by the General Assembly of the Church of Scotland (and special provision for professors at former United Free Church Colleges, which Church united with the Church of Scotland in 1929). Section 4 of the Act, a provision entitled “Anent Scottish Universities entering into agreements with Churches and Associations”, stipulated that:

Nothing in this Act contained shall restrict any University Court from entering into agreements with any Christian Church or Association of Christians whereby teachers of theology may be admitted to University status or privileges.

Separate provisions were enacted for named positions in the Universities of Aberdeen and St Andrews. Provision was made also to ensure specific bursaries remained used

for theology students. This Act effectively created, or regularised, the appointment by Universities of theology and divinity professors acceptable to churches or associations of Christians which bodies traditionally recognised, and to this day still recognise, specific university qualifications for appointment of graduates in the work of Christian churches or associations. This could in principle be used to ensure, for example, that teaching of Christian theology may only be undertaken by Christians. However, this provision only applies to faculties of theology or divinity, and not to faculties of education which train school teachers.

#### **4.6.2 Catholic Teacher Training in Scotland**

In order to supply Catholic schools with suitably qualified teachers, Notre Dame College of Education, Bearsden, Glasgow, was set up in 1895 and Craiglockhart College, Edinburgh, opened in 1919. These Catholic teacher training colleges were merged into St Andrew's College of Education in 1981, which was designated as a Catholic Institute of Higher Education, and its qualifications were validated by the Council for National Academic Awards. This Council was discontinued in 1993, from which time, St Andrew's College of Education's qualifications were validated by the University of Glasgow. On 11 April 1999 St Andrew's College of Education merged with Glasgow University and formed the main part of a new University Faculty of Education (renamed School of Education upon the University of Glasgow restructuring in 2010).<sup>70</sup> The teacher training of Catholic teachers for employment in Scotland's denominational Catholic state-funded schools is presently carried on under the auspices of the St Andrew's Foundation for Catholic Teacher Education within the University of Glasgow's School of Education.<sup>71</sup> This arrangement may be considered as analogous to the position of the Church of Scotland in relation to the Schools of Divinity at Scotland's four ancient universities.

#### **4.7 Chaplains**

The role of chaplains in Scotland's state funded schools is relatively straightforward for denominational schools, but rather more complex for non-denominational schools,

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<sup>70</sup> Historical information taken from [http://www.gashe.ac.uk:443/public\\_docs/isaar/C0738.htm](http://www.gashe.ac.uk:443/public_docs/isaar/C0738.htm)

<sup>71</sup> <http://www.gla.ac.uk/schools/education/standrewsfoundation/>

the latter taking up the majority of this section.

#### **4.7.1 Denominational schools**

In denominational schools, the [Education \(Scotland\) Act 1980, s.21\(3\)](#) states that:

For each such [i.e. denominational] school the education authority shall appoint as supervisor of religious instruction, without remuneration, a person approved as regards religious belief and character as aforesaid,<sup>72</sup> and the supervisor so appointed shall report to the education authority as to the efficiency of the religious instruction given in such school, and shall be entitled to enter the school at all times set apart for religious instruction or observance.

In this, chaplains to denominational schools are effectively presented by the denomination in whose interests a school is run (usually, but not always, the Catholic Church), rather than selected by a school's head teacher, which is in marked contrast to practice in non-denominational schools.

#### **4.7.2 Non-denominational schools**

In non-denominational schools, the fulfilment of the statutory obligation concerning religious observance is a matter for head teachers, acting within the general frameworks set out in Scottish and Local Government policy documents, and with a view to local custom. In this, non-denominational schools may have long-standing customary arrangements with local parish ministers in respect of religious observance, and may also appoint ministers as chaplains. But there are no statutory obligations placed upon non-denominational schools to appoint chaplains, nor to favour the ministry of the Church of Scotland in relation to religious observance, and it appears from anecdotal evidence that at least some non-denominational schools do not appoint chaplains at all.

The fact that the appointment of chaplains is a matter for head teachers, whose decisions may reflect local customary arrangements, may explain why Freedom of

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<sup>72</sup> That is 'approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted' (Education (Scotland) Act, s. 21(2A)).

Information requests to local authorities in Scotland as to which chaplains etc have access to non-denominational schools have not previously received satisfactory answers. Such requests may in effect have been seeking information which local authorities did not possess, as local authorities have not historically compiled such information. As is discussed below, South Lanarkshire Council certainly now appear to be compiling such information annually.

That said, local authorities are supposed to produce policy guidance for head teachers within their authority in respect of religious observance. While a systematic search has not been made in respect of the chaplaincy policies of Scotland's 32 local authorities, various insights have been obtained from [Glasgow City Council's 2009 Religious Observance Policy document](#), and also from [Argyll and Bute Council's 2010 Education Management Circular No 1.43](#) concerning the role of chaplains in non-denominational schools. To this evidence may be added the [Guidance for Schools Regarding Chaplains and Chaplaincy Teams in Non denominational Schools](#), recently approved by the Education Resources Committee of South Lanarkshire Council.

Various aspects of these documents are cited below, and these policy documents clearly provide various examples of good practice. The appointment of chaplains to Catholic schools is in the hands of members of the Hierarchy of the Catholic Church, and it may be presumed that parents who send their children to such schools have enjoyed a relatively clear understanding of what the religious aspects of such schools are likely to be. The appointment of chaplains to non-denominational schools remains in the hands of individual head teachers, and it would appear that, as traditional customs have altered, greater clarity and transparency surrounding chaplains and their roles in non-denominational schools has been required. The guidance issued by South Lanarkshire Council provides an example of best practice, and has been welcomed by

the Scottish Secular Society,<sup>73</sup> by the Presbytery of Hamilton (Church of Scotland),<sup>74</sup> and by the Free Church of Scotland.<sup>75</sup>

### **4.7.3 Some examples of policy**

What follows is a sample of key provisions from three recent Policy documents.

#### *Glasgow City Council's 2009 Religious Observance Policy*

This policy document confirms that in non-denominational schools, head teachers are responsible for the content of religious observance in their own schools. Glasgow City Council recommend at page 15 that:

Schools should establish a Religious Observance Planning Group, which would be remitted to consider the following:

School Policy development and review

School Religious Observance Annual Programme of Events

Developing good practice and identifying / delivering appropriate training

Such a group may include within its membership, staff members (including Senior Staff members with Religious Observance remit), chaplains, children and young people and parents / carers. The school's Pupil Council may also be engaged in leading and / or developing good practice in Religious Observance.

Detailed guidance is also provided concerning the "Role of Chaplaincy" (pp. 20-23).

#### *(i) Appointment of Chaplains*

In Roman Catholic schools, chaplains are appointed by the Archbishop of Glasgow, whilst in the non-denominational sector they are invited to participate in school life by the Headteacher. (p. 20).

#### *(ii) Role of Chaplains in non-denominational schools (Religious Observance)*

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<sup>73</sup> <http://www.scottishsecularsociety.com/south-lanarkshire-education-resources-committee-implements-the-ssss-recommendations-in-full/>

<sup>74</sup> <http://www.presbyteryofhamilton.co.uk/news/2015/02>

<sup>75</sup> <https://theweeflea.wordpress.com/2015/01/23/response-to-guidelines-issued-by-south-lanarkshire-council-on-chaplains-and-religious-observance/>

Chaplaincy teams are a core resource for schools...The chaplaincy may of course support a wide range of curricular areas in the school including Religious and Moral Education and Personal and Social Developments. Consequently it is the expectation of the authority that all schools will have a chaplaincy in place. (p. 20).

The Headteacher should discuss with the chaplain(s) how Religious Observance should be planned in light of the above advice to address the needs of the whole school community...Amongst the appropriate functions of the chaplaincy are the following: assisting with curricular delivery within particular units or courses; membership of the school's Religious Observance Planning Group. (p. 20).

Chaplains may or may not be involved in Religious Observance in the non-denominational sector depending on the programme approved by the Head Teacher. In the denominational sector the chaplaincy will of course play a key role. The role of chaplains in both sectors is to add further substance to the agreed national definition of religious observance.

An approach seeking to convert an audience to one faith group or another is not appropriate in the non-denominational sector, however [sic] it is important that Christian clergy are able to participate with integrity in an religious observance experience when invited to do so by the Headteacher. The opportunities for this will be explored as part of the programme of Chaplains' meeting organised by the Authority.

Within the context of organised acts of worship within schools, the chaplain will be addressing members of their own faith communities. In this context a confessional approach is appropriate. (p. 21).

### *(iii) The Pastoral Role of the Chaplaincy*

As an integral part of the chaplaincy's involvement with the shared community values of the school, the chaplaincy exists to benefit and support all staff, children and young people and their families...

Chaplains may be invited to support school excursions, events and celebrations out with the assumed context of chaplaincy involvement (pp. 21-22).

*(iv) Curricular Support*

Chaplains can be useful contacts to enable schools to form relationships with local religious communities. Visits to churches and religious buildings can complement the study of religious belief in school and the involvement of the chaplaincy and local churches or religious buildings in developing anti-sectarianism or an understanding of ecumenism can similarly add to greater understanding of key concepts for children and young people. (p. 22).

*(v) Chaplaincy Teams*

To deliver a quality input into the educational sector a team chaplaincy approach would be the favoured option in terms of constructing a school chaplaincy...

Many schools have chaplaincy teams which include representatives from a range of traditions who cooperate with other members of staff and young people in the planning, preparation and presentation of acts of Religious Observance.

*Argyll and Bute Council's 2010 Education Management Circular No 1.43 concerning the role of chaplains in non-denominational schools*

*(i) Appointment of Chaplains*

Chaplains to non-denominational schools are appointed at the invitation of the head teacher / campus principle and endorsed by the education authority. Not all chaplains need be Christian or of one Christian denomination. A school can decide to appoint a chaplaincy team if this is considered appropriate...When a chaplaincy changes the head teacher / campus principle must inform the

Executive Director of Community Services. Standard disclosure procedures must be followed; see education management circular 1.56. (p.1).

*(ii) Chaplains and Religious Observance*

There are many different ways in which schools make arrangements for religious observance. Normally this will be at a school assembly, but not all assemblies need be occasions for religious observance. Religious observance and the assembly are the responsibility of the head teacher/campus principal and the school staff. Where this is appropriate provision may be made for religious observance of faiths other than Christianity. Chaplains are not always necessarily involved. Where chaplains are involved the extent of their involvement varies greatly...

Through religious observance (and possibly through the religious and moral education programme) schools should offer chaplains the opportunity to speak about their faith and the search it initiates; to speak about their own experience; to tell of other faith explorers; and to counter religious stereotypes, whether they be of Christian, Jewish or any other faith community.

Chaplains should acknowledge that religious observance should be inclusive and should safeguard at all times the freedom of conscience of pupils, parents and staff... (p. 2).

*(iii) Chaplains as a resource*

Visits to churches

The chaplain is very likely to be the minister of a local church and so visits to that church can be arranged. Where there is a team of chaplains of different denominations, visits to their different places of worship might be encouraged. It would be useful if Christian chaplains could not only explain the difference among the various branches of the Church in, for example, catholic, presbyterian and orthodox traditions, but also ensure that they emphasise what is held in common. In particular they might demonstrate how Christians of

different denominations can work and worship together. (p.3)

### Chaplains and RME

Whereas in the primary sector all teachers have to teach religious and moral education and may also assist with religious observance and school assemblies, in secondary schools the religious education department has its own specialist teachers who may have little or no responsibility for religious observance. Unless the chaplain is a trained teacher and currently registered with the GTC, they should not be asked to teach a class without the presence of the class teacher. However, the chaplain does have an unique range of other experiences in the field of religious education which can make a positive contribution to the quality of classroom learning, so there is merit in exploring the possibility of the chaplain sharing in the work of the class on a team teaching basis for certain units of work. (pp. 3-4).

#### *(iv) Chaplains as representative of denominational bodies*

The chaplain enters the school as the representative of religious organisations in the area.

In certain areas where the church is strongly identified with the local community, the chaplain may also represent the community and its interest in the school.

This interest may be expressed by the school chaplain participating in events which affect both the school and the community, e.g. prize giving, displays and ceremonies. In a different way the chaplain may also help the school with its role in the wider community. (p.5).

### *South Lanarkshire Council's 2015 Guidance for Schools Regarding Chaplains and Chaplaincy Teams in Non-denominational Schools*

#### *1.5 Chaplains in South Lanarkshire Council schools*

The head teacher is responsible for the composition and size of the chaplaincy team. Chaplains are in school by invitation of the head teacher. As with all visitors to establishments, the head teacher must know who is in their establishment and what their role and function is. Chaplains for each school will be drawn from local places of worship and faith groups.

Head teachers must inform the parent council, as representatives of the parent forum, in decisions about the composition and size of the chaplaincy team. Information about who is in the chaplaincy team and of what they do in school must be provided annually to parents.

For formal approval, schools are required to notify South Lanarkshire Council annually as to the composition of their Chaplaincy Team, using the South Lanarkshire Council pro forma.

#### *1.6 Child Protection/ PVG*

All members of the Chaplaincy Team must have full PVG.<sup>76</sup>

Chaplains' roles will vary from school to school: present at assemblies, leading religious observance, visiting classes, engaging with small groups or any other activity agreed with the head teacher.

During visits to classes and small groups at least one member of the teaching staff must be present.

If a chaplain is delivering an extra curricular activity under the auspices of the school, such as Scripture Union, with no members of school staff present then parental permission is required.

#### *1.7 The role of the chaplain*

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<sup>76</sup> PVG refers to 'Protecting Vulnerable Groups' via Disclosure Scotland background checks, for which see [here](#).

The chaplain's key function is to assist the establishment in the delivery of religious observance / time for reflection. The role of the chaplain can be a diverse one and may include:

- assisting the school to help support and develop the religious observance calendar of events;
- providing pastoral care and support for staff, pupils and their families, where appropriate;
- having a key role during times of extreme difficulty or crisis;
- supporting school community events;
- visiting classes at the invitation of teachers and / or head teacher to complement the curriculum;
- contributing to extracurricular clubs in consultation with the head teacher;
- leading or helping pupil groups with a particular religious, moral or citizenship interest;
- participating in school trips;
- providing a link between the school and local community;
- any other activity agreed between the head teacher and the chaplain.

The role of the chaplain may differ from school to school depending on the school community, the chaplain's particular interests and the time available.

### *1.8 Engagement with parents*

Annually schools must inform their parent council about the composition of the chaplaincy team. This information must be updated in the school handbook each year.

Parents must be informed about the times and subject of planned activities which will be delivered by the chaplaincy team.

Under the terms of the Education (Scotland) Act 1980, parents / carers have the right to ask for their children to be withdrawn from religious observance and / or religious and moral education. A statement to this effect must be included in the school handbook. In addition, parents must be reminded on an annual basis of their right to withdraw. This should be done through the school's first newsletter.

#### *1.9 Religious and moral education and chaplaincy*

The chaplaincy team has no function to ensure that religious and moral education is carried out. The programme of religious and moral education and its delivery remains the responsibility of the head teacher and the teaching staff of the school. However, schools may involve the chaplaincy team, as a resource, in religious and moral education planning and delivery.

## **4.7 Conclusions**

Education stands out rather distinctively in our review of religion in Scots law. For the most part, in other areas, the general trend has for some time been towards the secularisation of the law. By this we mean that in general, there has been a strong drift towards the diminution of statutory support for religion and religious influence. The major exception to this is Education. Education is an area in which the influence of religion has changed its form, but has in many ways been increasing. There is no question that education in the school classroom and the university lecture theatre has been secularising for some considerable time, and is continuing to do so. But this is in contrast to changes in curricular and governance structures which have not diminished, but rather strengthened, the place of religion. As education has been secularising in some ways, the Church of Scotland, the Roman Catholic Church and other religious bodies have increased the legal safeguards for their former rights and privileges and greater explicit protection for what they have perceived as their place in the overall system of education.

The general effect of this has been to increase the statutory protection for religion and church interests in education. A recent article by John Stevenson has demonstrated

how this applies in the area of religious education in non-denominational schools.<sup>77</sup> The author shows how the legislative framework for religious education was actually extremely thin when state schooling was created in 1872; the legislation was permissive on religious instruction, and the first attempt by the Church of Scotland to make religious instruction compulsory failed in 1918. But from 1929, it required a plebiscite to remove it from the curriculum of schools.<sup>78</sup> After 1945, there was a move to the universal adoption of a unified RE curriculum in non-denominational schools designed by the churches and overseen by new regulations. In addition, church influence in the management of education by local authorities, which was abandoned in 1929, was given a new statutory framework only in 1973, and persists to this day.

We must add an important caveat here. The firming up of these statutory protections does not imply that the content of teaching in schools or universities has in some sense become more religious, or more militant, or more fundamentalist. Indeed, there has been considerable evidence for some decades that the teaching of religion in non-denominational schools and in university theology departments has become strongly influenced by secularising trends; including teaching on multiple faiths, the liberalisation of theology, and more recently the discussion of non-religious belief positions. There have been instances where conservative Christians have reputedly influenced religious observance and teaching in Scottish schools; but instances of liberalisation and even the decay of religious observance abound, and have done so since the 1960s.

While to some extent the place of religion in education has become more explicitly protected through statutory reform, the twin notions of "custom" and of "use and wont" continue to determine much about the place of religion in the school lives of young people, principally in non-denominational schools. Though "custom" and "use and wont" may have been subtly different, in practice they both tended to devolve control of religious instruction or education in schools to local administration: initially to school boards and education authorities, later to local authorities and, increasingly

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<sup>77</sup> John Stevenson, "Securing religious education in non-denominational schools 1872-1972: church and school. A policy of co-operation", *Records of the Scottish Church History Society* vol. 44 (2015), pp. 74-102.

<sup>78</sup> *Ibid.*, p. 74.

through the twentieth century, to the head teacher. This, it might be argued was facilitated, and is still facilitated, by reliance on the undefined concept of custom and the absence of clear legislative control of religious education in schools.

Other issues have been highlighted concerning religion in the education system. Firstly, while parents have the right, currently in terms of the 1980 Act, to withdraw their children from religious observance and religious instruction, there is no comparable right for the child to undertake this for her/himself. While this Scottish approach is consistent with human rights documents, and it must be considered within the broader context of family law, which provides both for the exercise of parental responsibilities for the benefit of the child and for children to be consulted on major decisions and more generally to “be heard”, the position of the rights of the child versus the responsibilities of the parent is nonetheless an area of education law which might attract further attention in the future.

Secondly, since 1872 it has been a principle in non-denominational schools that religious observance and religious education should be separated in the timetable from other subjects. Thus, it is not permissible for these to intrude, for example, into science classes. Of course, there are shades of grey in this area, and things may not be clear cut in practice, especially in early years of primary schooling, but the quality of enforcement of this separation of religious from secular subjects might be an area worth scrutiny for those concerned with the preservation of this longstanding principle.

Thirdly, provision has been made since 1929, reinforced in 1946, for the setting aside of the statutory obligation to teach religious education, if a majority of electors within a local authority vote in favour of discontinuation of this obligation. As far as is known, such a plebiscite has never been called, nor even considered, by a Scottish local authority but it may be an opportunity to be considered.

Fourthly, the appointment, or not, of school chaplains and the nature and frequency of religious observance, are areas where there is relatively little or no statutory regulation, but, instead, considerable discretion rests with head teachers.

Nevertheless, as local customs have altered with time, some local authorities have begun to issue more detailed guidance and this may be an area where there is potential for further reform.

Fifthly, it is interesting to note how few explicit guarantees, for the Church of Scotland in particular, were included in the early legislation. The fact that three places on each local authority education committee are reserved to the Church of Scotland, the Roman Catholic Church and a third representing the largest church group in the area, is, for example, a curiously late addition to legal governance of education in Scotland. This lack of explicit guarantees, together with the effect of contemporary equality provisions, may be seen as creating opportunities for belief organisations and others to seek recognition and a stronger place within education law and governance.

Sixthly, the terms of the 1918 nationalisation of Catholic schools and its successor legislation was framed in neutral statutory language, with the result that any denomination or religious body in Scotland may potentially have a denominational school or schools carried on in its interests by a local authority. Any denomination or religious body may petition a local authority to establish and carry on a denominational school. While, to our knowledge, no belief body has petitioned a local authority for a school, this may be a possibility.

So, education has in many ways bucked the trend towards the general secularisation of legislation in Scotland since the nineteenth century. The story of the last 140 years has been one of a move from permissive, devolved attitudes to religious observance, religious education and church schools, towards increasing control and regulation, with RME and RO becoming in effect compulsory inclusions in the school timetable, and with church participation in the governance of local authority schools and education re-instituted in 1973 exactly 100 years after it was, in the main, abandoned. At the same time, there is religious adaptation going on. One is the recently developed argument that children require religious literacy<sup>79</sup> - not merely of other religions, but of different faith conditions such as spirituality. This has become a reason to sustain the compulsory status of RME, but is not necessarily one in which non-belief

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<sup>79</sup> See for example the website <http://www.religiousliteracy.org.uk/>

positions have attained parity in the curriculum. There are, however, potential new roles for non-religious belief bodies - in conducting their own state-funded schools, or drawing attention to ways to transfer schools from denominational status. Still, education remains a sector in which the churches continue to inject considerable effort to retain a foothold in a society which is otherwise secularising rapidly.

# **Part III**

## **A General Audit**

**In Part 2 of the Report, we traced in detail the changing place of religion within three areas of Scots law. There, our aim was to explore in depth the current law in force and to trace back its historical origins, highlighting areas of uncertainty or controversy. In Part 3, our coverage is much broader but at the same time much less detailed. We have looked at a wide range of areas of Scots law with a view to charting the extent to which religion, and associated concepts, are acknowledged, protected, privileged or otherwise recognised in current legislation.**

**In each of these areas, we set out key statutory provisions and we have tried to highlight any emergent issues or themes. This is a very “general” audit of the law; it does not claim to be exhaustive, and it looks primarily at legislation as contained in Acts of the UK and Scottish Parliaments. The starting point was searching on Westlaw using a number of search terms including religion, religious, belief, church, conscience, conscientious, Protestant, Catholic, Jew and Jewish. We have made some reference to case law but this is limited, both by the fact that there is little Scottish case law in these areas and by the practical limitations of time. In a relatively short research project, we cannot explore all areas in the same depth as we sought to achieve in the case studies in Part 2. Instead, our aim in Part 3 is to provide an overview of the legal landscape and to highlight issues which may merit further future exploration.**

# **Chapter 5**

## **Armed services law**

### Chapter 5 Armed services law

5.1 Introduction

5.2 Equality

5.3 Religiously aggravated offences

5.4 Accommodating religion

5.5 Oaths

#### **5.1 Introduction**

This chapter brings together a number of provisions which deal with religion or belief within the specific context of the law regulating the armed services. Members of the armed services are generally excluded from, for example, employment law and whereas other workplaces are regulated by the Equality Act 2010 separate but similar protection is provided for those in the services. Much of the legislation, therefore, which governs the armed services is simply a specialized version of existing provisions.

#### **5.2 Equality**

Those subject to service law may not be discriminated against on the grounds of religion or belief, along with other characteristics such as race or sexual orientation. Thus the general protection of the Equality Act is replicated within the context of the armed services and provision is made for a specific complaint system. This can be seen in the following provisions:

##### **Armed Forces (Service Complaints Commissioner) Regulations**

##### **2007/3352, reg. 2**

(1) For the purposes of section 338(1) of the Act, a person has been wronged in a prescribed way if he has been the subject of:

- (a) discrimination;

...

- (2) In this regulation “*discrimination*” means—
- (a) discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender re-assignment, status as a married person or civil partner, religion, belief or sexual orientation; and ...

**Armed Forces Act 2006, s. 338(1)**

- (1) This section applies where the Service Complaints Commissioner (“the Commissioner”) considers that any communication made to him contains an allegation that a person named in such a communication—
- (a) is subject to service law and has been wronged in a prescribed way; or
  - (b) was wronged in such a way while he was so subject.”

**Armed Forces (Service Complaints Commissioner) Regulations 2007/3352, reg. 2**

- (1) For the purposes of section 338(1) of the [Armed Forces] Act [2006], a person has been wronged in a prescribed way if he has been the subject of:
- (a) discrimination;
  - (b) harassment;
  - (c) bullying;
  - (d) dishonest, improper or biased behaviour.

- (2) In this regulation “*discrimination*” means—
- (a) discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender re-assignment, status as a married person or civil partner, religion, belief or sexual orientation; ...

**Armed Forces (Redress of Individual Grievances) Regulations 2007/3353, reg. 9**

- (1) A service complaint panel shall include one independent member in any case in which the service complaint:
- (a) alleges discrimination;

...

(3) In this regulation, “*discrimination*” means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender re-assignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of part-time employees.”

### **5.3 Religiously aggravated offences**

As, in 5.2 above, the general protection against discrimination is applied in the specific context of the armed services, so too the general criminal law approach to religious aggravation is reflected in specific provision for offences committed by service personnel. This can be seen in the Armed Forces Act 2006, section 240 which provides that:

- (1) This section applies where a court or officer dealing with an offender for a service offence (other than an offence mentioned in subsection (3)) is considering the seriousness of the offence.
- (2) If the offence was racially or religiously aggravated the court or officer—
  - (a) must treat that fact as an aggravating factor; and
  - (b) must state in open court that the offence was so aggravated.

### **5.4 Accommodating religion**

In service custody premises, detainees must be afforded such provisions as to permit them to practise their religion in much the same manner as provision is made in civil prisons and young offenders’ institutions. Non-working on Sundays is protected in such premises in a way that no longer happens for work generally. The various provisions designed to accommodate religious obligation and to allow detainees to continue to practise their religion are set out below:

**Service Custody and Service of Relevant Sentences Rules 2009/1096, part 3, rules 12, 28, 29, 30 & 31**

12. (1) On Sundays and public holidays a detainee within rule 11(2)(a) or (b) shall not carry out work or training except work which is necessary for the service of the service custody premises in which he is detained.

(2) Such a detainee whose recognised day of religious observance falls on a day other than a Sunday—

(a) shall not be required to carry out any more work or training on that day than other detainees are required to do on a Sunday; and

(b) may be required to do work or training on Sundays.

28. So far as practicable, the commandant shall make available for the use of every detainee in service custody premises such books of religious observation or instruction as are recognised as such by his denomination or religion and are approved by the Secretary of State for use in service custody premises.

29. The commandant of service custody premises shall afford facilities to the chaplain and other ministers of religion to have access to detainees at times approved by the commandant, but not less than weekly, for the purpose of visiting them or giving them religious instruction.

30. (1) Where the chaplain is of the same denomination as a detainee, he shall visit him as soon as practicable after his admission, at regular intervals during his sentence, and shortly before his release.

(2) Where there is a minister of religion who regularly attends service custody premises and who is of the same faith as a detainee in those premises, he shall visit him as soon as reasonably practicable after his admission, at regular intervals during his sentence, and shortly before his release.

(3) Where there is no such chaplain or minister of religion, the commandant shall ask the detainee on admission if he would like one to visit him; and if the detainee wishes to be so visited, the commandant shall, if it is reasonably practicable, arrange for such a visit to take place.

(4) The commandant shall make available to chaplains and other ministers of religion on the occasion of their visits to service custody premises a list of

detainees who are sick or undergoing punishment under these Rules, if the chaplain or minister so requests.

(5) A detainee may request a visit from a chaplain or minister of religion at any time, and the commandant shall, if it is reasonably practicable, arrange for such a visit to take place.

31. (1) Whenever reasonably practicable, the chaplain shall conduct religious services in service custody premises on Sundays, other customary days and on such other convenient occasions approved by the commandant as the chaplain may decide.

(2) The commandant shall make such provision for religious services to be conducted by other ministers of religion as he thinks appropriate from time to time.

(3) A detainee who is in cellular confinement may only attend religious services with the commandant's permission.

There is also specific provision in relation to headgear worn for religious reasons in the Armed Forces Act 2006, section 72:

(2) Nothing in section 70 or 71 authorises anyone to require an arrested person to remove any of his clothing in public other than an outer coat, jacket, headgear or gloves.

(3) The reference in subsection (2) to headgear does not include headgear worn for religious reasons.

## **5.5 Oaths**

Service law contains many detailed provisions concerning the administration of oaths in service courts across the Armed Forces. Religious oaths may be tailored to the religious beliefs of those taking such oaths as seen in the Armed Forces (Service Inquiries) Regulations 2008/1651, schedule 1, para. 3:

If none of the forms of oath provided in this Schedule is appropriate to the religious beliefs of the person taking the oath, an oath may be administered in such form and manner as the person taking the oath declares to be binding on his conscience in accordance with his religious beliefs.

This same clause is also used in:

Courts-Martial (Royal Navy) Rules 2007/3443, schedule 4, part 1, para. 3;  
Naval Custody Rules 2000/2367, schedule 4, part 1, para. 3;  
Summary Appeal Court (Navy) Rules 2000/2370, schedule 5, part 1, para. 3;  
Summary Appeal Court (Air Force) Rules 2000/2372, schedule 5, part 1, para. 3;  
Administration of Oaths (Summary Appeal Court) (Navy) Order 2000/2376, schedule 1, para. 3;  
Administration of Oaths (Summary Appeal Court) (Air Force) Order 2000/2378, schedule 1, para. 3;  
Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009/2056, schedule 2, para.3;  
Courts-Martial (Royal Air Force) Rules 2007/3444, schedule 4, part 1, para. 3.

Service policemen are directed to take oaths while holding a New Testament, or an Old Testament should they be of the Jewish religion (Item 49b). As provided in the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009/2056, schedule 2, paras. 1 & 5:

1. The service policeman taking the oath shall hold the New Testament, or if a Jew the Old Testament, in his uplifted hand and shall say, or repeat after the person administering it, the oath provided in paragraph 5 of this Schedule.

5. The oath shall be sworn in the following form:

“I swear by Almighty God that I shall truthfully answer any questions I am asked.”

This same clause as found in para. 1 above is also used in:

Armed Forces (Service Inquiries) Regulations 2008/1651, schedule 1, para. 1;  
Courts-Martial (Royal Navy) Rules 2007/3443, schedule 4, part 1, para. 1;  
Courts-Martial (Royal Air Force) Rules 2007/3444, schedule 4, part 1, para. 1;  
Naval Custody Rules 2000/2367, schedule 4, part 1, para. 1;  
Summary Appeal Court (Navy) Rules 2000/2370, schedule 5, part 1, para. 1;  
Summary Appeal Court (Air Force) Rules 2000/2372, schedule 5, part 1, para.  
1;  
Administration of Oaths (Summary Appeal Court) (Navy) Order 2000/2376,  
schedule 1, para.1;  
Administration of Oaths (Summary Appeal Court) (Air Force) Order  
2000/2378, schedule 1, para.1.

Solemn affirmations may be substituted for religious oaths as can be seen in the following examples:

**Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009/2056, part 2, art. 11:**

(1) Before a judge advocate asks any question which a service policeman would be required under article 8(6) to answer on oath, an oath shall be administered to the service policeman.

(2) If—

(a) a service policeman required under article 8(6) to answer on oath objects to being sworn, or

(b) it is not reasonably practicable without inconvenience or delay to administer an oath to a service policeman in the manner appropriate to his religious belief,

he shall be required to make a solemn affirmation instead of taking an oath.

(3) An oath or affirmation required to be administered under this Order shall be administered in the form and manner set out in Schedule 2 by the judge advocate or by another person acting on his behalf.

**Armed Forces (Service Inquiries) Regulations 2008/1651, reg. 11(8)**

(8) Where the president would, apart from this paragraph, require a witness to give oral evidence on oath and—

(a) the witness objects to taking an oath; or

(b) it is not reasonably practicable without inconvenience to, or without delaying the proceedings of, the panel to administer an oath to a witness in the manner appropriate to his religious belief,

he must be required to make a solemn affirmation instead of taking an oath.”

**Courts-Martial (Royal Navy) Rules 2007/3443, part 9, rule 56**

(3) If—

(a) a person required to take an oath for the purposes of proceedings before the court objects to being sworn, or

(b) it is not reasonably practicable to administer an oath to such a person as aforesaid in the manner appropriate to his religious belief,

he shall be permitted to make a solemn affirmation instead of taking an oath.

A similar provision is to be found in:

Courts-Martial (Royal Air Force) Rules 2007/3444, part 9, rule 59

Summary Appeal Court (Navy) Rules 2000/2370, part v, rule 31(4)

Naval Custody Rules 2000/2367, part v, rule 27(2)

Summary Appeal Court (Air Force) Rules 2000/2372, part v, rule 31(4)

# Chapter 6

## Blasphemy

### Chapter 6 Blasphemy

6.1 Overview of blasphemy

6.2 Historical development

6.3 The most recent cases

6.4 Conclusions

### 6.1 Overview of blasphemy

The crime of blasphemy is not unlike the crime of heresy in historical Scots law, in that both presupposed an established church whose doctrines are formally acknowledged in law. That is to say, blasphemy, like heresy, is a crime relative to a fixed set of beliefs to which people are obliged to adhere under pain of criminal sanctions. In this, what could be classed as blasphemous or heretical during the pre-Reformation period can often be distinguished from what was classed as blasphemous or heretical during the Scottish Protestant ascendancy. From this perspective, even if it may be argued that the crime of blasphemy lingers on in Scots law, it is difficult to see how it could be coherently enforced within a plural religious context.

### 6.2 Historical development

The crime of blasphemy in post-Reformation Scotland did enjoy a statutory basis by virtue of statutes enacted during the reigns of Charles II<sup>1</sup> and William II,<sup>2</sup> but both these Acts “were repealed by the Act of 1813 (53 Geo. III, c. 160)” following which time the crime of blasphemy has existed “...only at common law...”.<sup>3</sup> That the Scots

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<sup>1</sup> Act against the crime of blasphemy, *RPS*, [1661/1/264](#) .

<sup>2</sup> Act against blasphemy, *RPS*, [1695/5/117](#) .

<sup>3</sup> G. Maher, ‘Blasphemy in Scots Law’ 1977 *S.L.T. (News)*, 257-260, at 259.

law of blasphemy no longer enjoys a statutory basis, but is rather a lingering feature of common law, is also maintained by the *Stair Memorial Encyclopaedia*.

The criminal common law offence of blasphemy is categorised by the *Stair Memorial Encyclopaedia* as a crime against public order and decency, along with mobbing, breach of the peace, violation of sepulchres, public indecency, and bigamy.<sup>4</sup> Under the specific entry for blasphemy it is argued that the law of blasphemy remains part of Scots law at common law, although no case has been reported on this head since 1843. Consequently, it can be stated that blasphemy is no longer prosecuted in Scotland. Although not in desuetude, any such prosecution would probably contravene the European Convention on Human Rights, and as such would probably fail. To this it may be added from another source that the common law penalties for blasphemy appear to have been mitigated in 1825.<sup>5</sup>

### 6.3 The most recent cases

The last reported cases of blasphemy to be heard before the High Court of Justiciary occurred on 9 November 1843, namely *Thomas Paterson* (1843, 1 Broun 629) and *Henry Robinson* (1843, 1 Broun 643). The judges were the Lord Justice-Clerk (Lord Hope), together with the Lords Mackenzie, Medwyn, Moncrieff, and Cockburn.

In both cases the pannels were accused of selling printed works in Edinburgh of a blasphemous tenor, although in *Robinson* the pannel had also been engaged in selling sexually obscene works which on occasion included engravings. Both cases have been briefly discussed in G. Maher “Blasphemy in Scots Law” 1977 SLT (News) 257-260, from page 259b. Maher points out that the Lord Justice-Clerk held that “as the Scriptures and the Christian (Protestant) religion are part of the statute law of the land, then whatever vilified them was an infringement of the law”. Maher goes on:

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<sup>4</sup> *Stair Memorial Encyclopaedia*, Criminal Law (Reissue), section 17, Crimes Against Public Order and Decency, paragraph 419.

<sup>5</sup> “...the statutory law of blasphemy was repealed in 1813, and the common law penalties mitigated in 1825...” (G. Campbell H. Paton, ‘The Eighteenth Century and Later’ in *An Introduction to Scottish Legal History* (Edinburgh: The Stair Society, 1958), 50-63, at 60).

“But we should note that Lord Hope was referring not to any statutes about denial of God or Christianity nor to the common law, but instead to such statutes as the Act of 1690 (*APS*, ix, 133, c. 4) which established the presbyterian church in Scotland and ratified the [Westminster] Confession of Faith as the doctrinal basis of that church. And, as Lord Hope himself pointed out, the effect of so establishing certain doctrines was not to preclude taking or expressing other beliefs or views directly contrary to these doctrines – it rather protects the established doctrines from being brought into contempt”.

Of the two reported cases of blasphemy before the High Court in 1843, *Thomas Paterson* is by far the more interesting, containing as it does a detailed discussion of the law of blasphemy in Scotland by the Lord Justice-Clerk, Lord Hope. As to what constituted blasphemy in *Paterson*, the Lord Justice-Clerk, in his charge to the jury, was at pains to point out that printed works which “deny the truth and authority of the Holy Scriptures and Christianity” were not in and of themselves blasphemous, but rather blasphemous works were those which were not “of fair and serious speculation or argument upon these sacred topics, but such as indicated an obvious intention to bring them into ridicule and contempt”. As to the basis of the law of blasphemy in Scotland in 1843, the Lord Justice-Clerk stated that “the Holy Scriptures and Christian religion are part of the statute law of the land, and whatever vilifies them is, therefore, an infringement of the law”.

In order to demonstrate this principle, which had already been accepted by the court in an interlocutor of relevancy, the Lord Justice-Clerk variously cited the Confession of Faith Ratification Act 1690, which Act confirmed and ratified the Westminster Confession of Faith. Specifically, the Lord Justice-Clerk quoted from part 1, ss. 1, 4, and 10, part 20, s. 4, and part 23, s. 3 of the Westminster Confession of Faith as found in the 1690 Act.

It does not appear that the 1690 Act was quoted in order to establish the detailed parameters of the law of blasphemy, in terms of what constituted the offence, and how it was to be punished, which appear to be based, as Maher and the *Stair*

*Memorial Encyclopaedia* concur, on common law, but rather the Act was cited in order to establish that Scots law acknowledged a defined confession of faith.

The crime of blasphemy tends to be the preserve of jurisdictions in which there is a prevailing religious ascendancy with clearly stated doctrinal beliefs – in Scotland’s case either the dogmas of the Catholic Church during the medieval period, or the Scots Confession of Faith and later the Westminster Confession of Faith during the early modern and modern periods. Presumably with this in mind, the Lord Justice-Clerk quoted various parts of the Westminster Confession of Faith in order to determine what the standard of faith was against which blasphemy could occur, and in order also to determine to what extent the Confession permitted deviation in matters of religion. On the basis of his analysis of the Confession, the Lord Justice-Clerk concluded that “the law of Scotland, apart from all questions of Church Establishment or Church Government, has declared that the Holy Scriptures are of supreme authority. It gives every man the right of regulating his faith or not by the standard of the Holy Scriptures, and gives full scope to private judgment, regarding the doctrines contained therein; but it expressly provides, that all “blasphemies shall be suppressed,” [Confession, part 23, s. 3] and that they who publish opinions “contrary to the known principles of Christianity,” [Confession, part 20, s. 4] may be lawfully called to account, and proceeded against by the civil magistrate. This law does not impose upon individuals any obligation as to their belief. It leaves free and independent the right of private belief, but it carefully protects that which was established as part of the law from being brought into contempt. Such being the law, the duty which you have to discharge is plain and easy. The questions to be determined are, whether the works which the pannel is charged with publishing, are of the character imputed to them - if they are, whether they were published by him wickedly and feloniously, that is, with the intention of promoting the purpose for which they were composed, namely, of vilifying the Holy Scriptures and Christian religion.”

The jury found the charges against the pannel proven, and Thomas Paterson was sentenced to 15 months in prison.

## 6.4 Conclusions

From the preceding discussion, it would appear that: (i) the crime of blasphemy is still a crime in Scotland at common law, and that (ii) the prerequisite for blasphemy, namely a standard of faith acknowledged by law as applying within Scotland is also still on the statute book, by virtue of the Confession of Faith Ratification Act 1690. This 1690 Act has never been repealed, nor may it be argued clearly that it has fallen in desuetude, notwithstanding that such argument may ordinarily be employed in respect of Acts of the pre-Union Scottish Parliament. The problems surrounding the 1690 Act in terms of repeal or desuetude have already been noted in Chapter 1 on the Church of Scotland, where it is noted that this 1690 Act was ratified by the Act for securing of the Protestant Religion and Presbyterian church government (1707), which was in turn incorporated into the Scottish Parliament's 1707 Act whereby the Treaty of Union was ratified, and as such is bound up with the constituting documents of the British State.

Yet, despite the survival of the 1690 Act and the problems which attend it as to repeal or desuetude, it provides little more than the fixed point of doctrinal belief which is a fundamental prerequisite of the concept of blasphemy. It is the case that the statutory basis of the law of the crime of blasphemy has been repealed two centuries ago, and that what remains is a vestige of the common law, which has not been enforced for more than 170 years. It may be that the common law crime of blasphemy in Scots law could simply be abolished by statute, the common law offences of blasphemy and blasphemous libel having been abolished in England and Wales by the Criminal Justice and Immigration Act 2008 c. 4, s.79.

# **Chapter 7**

## **Broadcasting and Communications**

### Chapter 7 Broadcasting and Communications

- 7.1 Introduction
- 7.2 Broadcasting licences
- 7.3 Religious programmes
- 7.4 Protection against harm etc
- 7.5 Stirring up religious hatred
- 7.6 Conclusions

#### **7.1 Introduction**

The presence of religion in broadcasting and the prioritisation of religious views over other non-religious beliefs or of a particular religious view are issues which emerge from time to time in discussion of television and radio schedules and individual programme content. In this section of the Report, we set out various statutory provisions which regulate aspects of broadcasting and communications. These provisions are not specifically Scottish but apply on a UK basis.

#### **7.2 Broadcasting licences**

Religious organisations are variously not permitted to hold broadcasting licences in the United Kingdom. These restrictions are set out in the Broadcasting Act 1990 and were introduced as part of the regulation of independent broadcasting. Despite criticism and some parliamentary attempt to remove the restrictions, they continue to apply. The restrictions on licence holding are set out in part 2 of schedule 2 to the Broadcasting Act 1990 which provides in paragraph 2 that:

- (1) The following persons are disqualified persons in relation only to licences falling within sub-paragraph (1A)—
  - (a) a body whose objects are wholly or mainly of a religious nature;

- (b) a body which is controlled by a body falling within paragraph (a) or by two or more such bodies taken together;
- (c) a body which controls a body falling within paragraph (a);
- (d) a body corporate which is an associate of a body corporate falling within paragraph (a), (b) or (c);
- (e) a body corporate in which a body falling within any of paragraphs (a) to (d) is a participant with more than a 5 per cent. interest;
- (f) an individual who is an officer of a body falling within paragraph (a); and
- (g) a body which is controlled by an individual falling within paragraph (f) or by two or more such individuals taken together.

(1A) A licence falls within this sub-paragraph if it is—

- (a) a Channel 3 licence;
- (b) a Channel 5 licence;
- (c) a national sound broadcasting licence;
- (d) a public teletext licence;
- (e) an additional television service licence;
- (f) a television multiplex licence; or
- (g) a radio multiplex licence.

These restrictions on licence holding by religious bodies, among others, were however lessened to some extent by the Communications Act 2003, section 348. It provided that the disqualification would apply only to the listed types of licence and that religious bodies might apply for other forms of licence, not covered by the foregoing paragraph. Detailed Guidance is provided by Ofcom in respect of such applications.<sup>1</sup> The Communications Act 2003, schedule 14, part 4, paragraph 15 provides that:

(1) A person mentioned in paragraph 2(1) of Part 2 of Schedule 2 to the 1990 Act (religious bodies etc.) is not to hold a Broadcasting Act licence not mentioned in paragraph 2(1A) of that Part unless—

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<sup>1</sup> See <http://licensing.ofcom.org.uk/tv-broadcast-licences/other-issues/religious-guidance>.

- (a) OFCOM have made a determination in his case as respects a description of licences applicable to that licence; and
- (b) that determination remains in force.

### **7.3 Religious programmes**

Ofcom is under a general statutory obligation to oversee and review the nature and content of programming and to pay particular attention to various issues including the nature of religious programmes. This obligation is set out in section 319 of the Communications Act 2003, in the following terms:

(1) It shall be the duty of OFCOM to set, and from time to time to review and revise, such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure the standards objectives.

(2) The standards objectives are—

...

(e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes

...

(6) Standards set to secure the standards objective specified in subsection (2)(e) shall, in particular, contain provision designed to secure that religious programmes do not involve—

(a) any improper exploitation of any susceptibilities of the audience for such a programme; or

(b) any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.

Religious and other beliefs are to be dealt with in a suitable range of programmes by public service broadcasters. Such programmes may deal with the history of different religions and other beliefs, and may show acts of worship as set out in the Communications Act 2003, section 264:

(6) A manner of fulfilling the purposes of public service television broadcasting in the United Kingdom is compatible with this subsection if it ensures—

...

(f) that those services (taken together) include what appears to OFCOM to be a suitable quantity and range of programmes dealing with each of the following, science, religion and other beliefs, social issues, matters of international significance or interest and matters of specialist interest;

(g) that the programmes included in those services that deal with religion and other beliefs include—

(i) programmes providing news and other information about different religions and other beliefs;

(ii) programmes about the history of different religions and other beliefs; and

(iii) programmes showing acts of worship and other ceremonies and practices (including some showing acts of worship and other ceremonies in their entirety) ...

The contents of such programmes are subject to the general duty of Ofcom as set out in section 319 of the Communications Act 2003 (quoted above). In particular, religious programmes may not exploit any susceptibilities of audiences for which such programmes are intended,<sup>2</sup> nor may they involve abusive treatment of the religious views and beliefs of adherents.<sup>3</sup>

#### **7.4 Protection against harm etc**

There are various provisions in the Communications Act 2003 which seek to prevent the promotion discrimination, incitement to religious hatred and general harm. These apply broadly to programmes, advertisements and various forms of broadcasting.

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<sup>2</sup> Communications Act 2003, s319(6)(a).

<sup>3</sup> Ibid, s319(6)(b).

Programmes and their contents, including product placements, may not promote discrimination on the grounds of religion or belief, nor incite religious hatred.

**Communications Act 2003, s. 368E**

(1) An on-demand programme service must not contain any material likely to incite hatred based on race, sex, religion or nationality.

**Communications Act 2003, s. 368F**

(4) Advertising included in an on-demand programme service must not—

- (a) prejudice respect for human dignity;
- (b) include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation ...

**Communications Act 2003, s. 368G**

(11) A sponsorship announcement must not—

- (a) prejudice respect for human dignity;
- (b) include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation ...

**Communications Act 2003 c. 21, s. 368H**

(12) Condition F is that the way in which the product, service or trade mark, or the reference to it, is included in the programme by way of product placement does not—

- (a) prejudice respect for human dignity;
- (b) promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation ...

There is also provision in respect of video recordings where the objective is similarly protective, although here the language is slightly different and there is specific reference to protecting against “offence”. This is potentially a very broad protection, covering works which are either “intended” or “likely (to any extent)” to cause

offence. This legislation governs the distribution of video recordings and there is provision in section 2 for certain video games to be exempt from the statutory regulatory framework. The exemptions include a work concerned with religion. Video Recordings Act 1984:

- s. 2(1A) Subject to subsection (2) or (3) below, a video game is for the purposes of this Act an exempted work if—
- (a) it is, taken as a whole, designed to inform, educate or instruct;
  - (b) it is, taken as a whole, concerned with sport, religion or music; or
  - (c) it satisfies one or more of the conditions in section 2A.

There are however limitations to these exemptions as follows:

(1ZA) A video work other than a video game is not an exempted work for those purposes if it does one or more of the following—

...

- (o) it includes words or images that are intended or likely (to any extent) to cause offence, whether on the grounds of race, gender, disability, religion or belief or sexual orientation, or otherwise.

## **7.5 Stirring up religious hatred**

The provisions above are all related to regulated broadcasting but there is also more general protection against stirring up religious hatred which applies to communication, defined broadly.

There is specific provision in respect of incitement to religious hatred in the Public Order Act 1986, section 29F:

- (1) If a programme involving threatening visual images or sounds is included in a programme service, each of the persons mentioned in subsection (2) is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

- (2) The persons are—
  - (a) the person providing the programme service,
  - (b) any person by whom the programme is produced or directed, and
  - (c) any person by whom offending words or behaviour are used.

Although parts of the 1986 Act extend to Scotland, the part concerning religious hatred applies only to England and Wales, giving rise to a rather anomalous situation.<sup>4</sup>

In 2012, a new Act, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, was introduced in Scotland which, while focusing primarily on behaviour in the context of football matches also includes a much broader provision which sets out a new offence in respect of “threatening communications”. Section 6 provides that:

- (1) A person commits an offence if—
  - (a) the person communicates material to another person, and
  - (b) either Condition A or Condition B is satisfied.
- (2) Condition A is that—
  - (a) the material consists of, contains or implies a threat, or an incitement, to carry out a seriously violent act against a person or against persons of a particular description,
  - (b) the material or the communication of it would be likely to cause a reasonable person to suffer fear or alarm, and
  - (c) the person communicating the material—
    - (i) intends by doing so to cause fear or alarm, or
    - (ii) is reckless as to whether the communication of the material would cause fear or alarm.
- (3) For the purposes of Condition A, where the material consists of or includes an image (whether still or moving), the image is taken to imply a threat or incitement such as is mentioned in paragraph (a) of subsection (2) if—

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<sup>4</sup> For discussion, see [http://www.christian.org.uk/scotland\\_archive/religioushatred/kerrigan&addison\\_opinion.pdf](http://www.christian.org.uk/scotland_archive/religioushatred/kerrigan&addison_opinion.pdf).

- (a) the image depicts or implies the carrying out of a seriously violent act (whether actual or fictitious) against a person or against persons of a particular description (whether the person or persons depicted are living or dead or actual or fictitious), and
  - (b) a reasonable person would be likely to consider that the image implies the carrying out of a seriously violent act against an actual person or against actual persons of a particular description.
- (4) Subsection (3) does not affect the generality of subsection (2)(a).
- (5) Condition B is that—
- (a) the material is threatening, and
  - (b) the person communicating it intends by doing so to stir up hatred on religious grounds.
- (6) It is a defence for a person charged with an offence under subsection (1) to show that the communication of the material was, in the particular circumstances, reasonable.
- (7) A person guilty of an offence under subsection (1) is liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
  - (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

## **7.6 Conclusions**

The regulation of media and broadcasting brings together many of the key issues in contemporary debates about religion in society. At the heart of the regulatory framework is the interplay among freedom of speech, protection against discrimination, provision for diversity and plurality and protection of human dignity. Some of the provisions perhaps reflect earlier traditions where religion and religious organisations had a more settled place in society – for example, the provision of religious programmes as part of public service broadcasting – whereas others reflect more recent trends towards protection of human rights and preservation of human dignity. The language of the different provisions is in itself an indication of some of

the legal difficulties: is the law seeking to protect against intentional stirring up of religious hatred or against any offence, whether intentional or not, which may have been caused.

# Chapter 8

## Charities law

### Chapter 8 Charities law

#### 8.1 Introduction

#### 8.2 Charity test

#### 8.3 A religious charity

#### 8.4 OSCR

### 8.1 Introduction

Charity may be argued to have specific roots within religion, but charity law in Scotland encompasses a much more broadly defined concept. It is important to draw a distinction between ideas of charity and charitable behaviour and the specific purposes required by law in order to satisfy the test for charitable status. “The term “charity” is an imprecise term that is used to refer to actions and programmes of a highly diverse kind. Within the sphere of charity law, ... the expression is not used in its popular sense, but rather ... it refers to a technical concept”<sup>1</sup> and while religion has a place within that technical concept, it is now defined much more broadly in Scots law.

### 8.2 Charity test

Scots law sets out a statutory test for charitable status which requires the body concerned to show that it meets the relevant charitable purposes and that it provides public benefit. The test is set out in section 7 of the Charities and Trustee Investment (Scotland) Act 2005, in the following terms:

(1) A body meets the charity test if–

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<sup>1</sup> MR Blanco, “Religion and the Law of Charities” (2006) 8 *Ecclesiastical Law Journal* 245 at 248.

(a) its purposes consist only of one or more of the charitable purposes,  
and

(b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

(2) The charitable purposes are—

(a) the prevention or relief of poverty,

(b) the advancement of education,

(c) the advancement of religion,

(d) the advancement of health,

(e) the saving of lives,

(f) the advancement of citizenship or community development,

(g) the advancement of the arts, heritage, culture or science,

(h) the advancement of public participation in sport,

(i) the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended,

(j) the advancement of human rights, conflict resolution or reconciliation,

(k) the promotion of religious or racial harmony,

(l) the promotion of equality and diversity,

(m) the advancement of environmental protection or improvement,

(n) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage,

(o) the advancement of animal welfare,

(p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

(3) In subsection (2)–

(a) in paragraph (d), “the advancement of health” includes the prevention or relief of sickness, disease or human suffering,

(b) paragraph (f) includes–

(i) rural or urban regeneration, and

(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities,

(c) in paragraph (h), “sport” means sport which involves physical skill and exertion,

(d) paragraph (i) applies only in relation to recreational facilities or activities which are–

(i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or

(ii) available to members of the public at large or to male or female members of the public at large,

(e) paragraph (n) includes relief given by the provision of accommodation or care, and

(f) for the purposes of paragraph (p), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c).

(4) A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if–

(a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which

is not a charitable purpose,

(b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, or

(c) it is, or one of its purposes is to advance, a political party.

(5) The Scottish Ministers may by order disapply either or both of paragraphs (a) and (b) of subsection (4) in relation to any body or type of body specified in the order.

This provision is set out in full to show the wide range of charitable purposes and the place therein of “advancement of religion”. It is notable that, although there is a separate purpose for the advancement of any philosophical belief, there is an explicit link, in subsection (3)(f) to the advancement of religion.

In order to satisfy the charity test, it must also be shown, that the organisation provides a public benefit. As set out in section 8, there is no presumption of benefit inherent in any of the purposes:

(1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

(a) how any—

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public, in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the

public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

The Charities Act 2011, which sets out a similar charity test principally for application in England and Wales,<sup>2</sup> states in section 1(1)(c) that “advancement of religion” is a charitable purpose, and defines “religion” as used in that subsection as including “(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god.”<sup>3</sup>

### **8.3 A religious charity**

There is specific provision for designation as a “religious charity” in terms of section 65 of the Charities and Trustee Investment (Scotland) Act 2005:

(1) OSCR may designate as a designated religious charity a charity which appears to it to have—

- (a) the advancement of religion as its principal purpose,
- (b) the regular holding of public worship as its principal activity,
- (c) been established in Scotland for at least 10 years,
- (d) a membership of at least 3,000 persons who are—
  - (i) resident in Scotland, and
  - (ii) at least 16 years of age, and
- (e) an internal organisation such that—
  - (i) one or more authorities in Scotland exercise supervisory and

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<sup>2</sup> Although it may also be of relevance to Scottish charities in terms of s7.

<sup>3</sup> Charities Act 2011, s3(2)(a).

disciplinary functions in respect of the component elements of the charity, and

(ii) those elements are subject to requirements as to keeping accounting records and audit of accounts which appear to OSCR to correspond to those required by section 44.

(2) OSCR may determine that subsection (1)(c) need not be satisfied in the case of a charity—

(a) created by the amalgamation of 2 or more charities each of which, immediately before the amalgamation—

(i) was a designated religious charity, or

(ii) was, in OSCR's opinion, eligible for designation as such, or

(b) constituted by persons who have removed themselves from membership of a charity which, immediately before the removal—

(i) was a designated religious charity, or

(ii) was, in OSCR's opinion, eligible for designation as such.

(3) The provisions set out in subsection (4) do not apply to—

(a) a designated religious charity,

(b) any component element of a designated religious charity which is itself a charity (whether or not having as its principal purpose the advancement of religion).

(4) Those provisions are—

subsections (1) and (6) of section 16 (in so far as those subsections relate to any action set out in subsection (2)(b) to (d) of that section),

section 28(3),

section 31(4) and (6),

section 34(5)(c) to (e),

section 69.

(5) OSCR may, by notice served on a designated religious charity, withdraw the designation of the charity as such where–

(a) it appears to OSCR that one or more of paragraphs (a) to (e) of subsection (1) is no longer satisfied in relation to the charity, or

(b) in consequence of an investigation of any component element of the charity under section 28, OSCR has given a direction under section 31(5) in relation to the component element and considers that it is no longer appropriate for the charity to be a designated religious charity.”

#### **8.4 OSCR**

Scottish charities are regulated by the [Office of the Scottish Charity Regulator](#) (OSCR). Decisions by OSCR as to charitable status are subject to appeal to the Scottish Charity Appeals Panel. The Panel reports some of its decisions on its [website](#). A noteworthy recent decision concerned the Scottish Charity Appeals Panel quashing an earlier decision of OSCR in respect of St Margaret’s Children and Family Care Society. The charity in question is a Glasgow based adoption agency run by the Roman Catholic Church in Scotland, and OSCR’s Direction required the adoption agency to “amend its external statements, internal guidance and procedures and practice so as to ensure that the criteria applied to decide whether those enquiring about assessment as adoptive parents will be accepted for full assessment: (i) are clear and transparent; (ii) comply fully with the requirements of The Equality Act 2010. A full “Note of Reasons” for the Panel’s decision is available online on their [Register of Appeals](#), and a summary of the Panel’s decision may be found in that decision from line 1945. In short, the Panel held: that OSCR had discounted at an early stage of its deliberations that the objects of the charity in question was the advancement of religion; that the charity in question did discriminate indirectly “but that indirect discrimination is allowed in terms of The Equality Act because it is a proportionate means of achieving a legitimate aim”; that both the charities exception and the

religious exception contained in The Equality Act applied; that OSCR had erred in its application of the Public Benefit Test; and that the decision made by OSCR which was the subject of the appeal had been “a disproportionate regulatory measure”.

# Chapter 9

## Conscience and Conscientious Objection

### Chapter 9 Conscience and conscientious objection

#### 9.1 Freedom of conscience

#### 9.2 Conscientious objection

##### 9.2.1 Education

##### 9.2.2 Military service

##### 9.2.3 Medical law

##### 9.2.4 Jobseekers

#### 9.3 Conclusions

### 9.1 Freedom of conscience

Several statutory provisions might be brought together under the general heading of conscience and conscientious objection, all being provisions which permit individuals, in certain situations, to act or be excused from acting, in accordance with their religious belief. Some of these provisions are relatively long established whereas others have developed more recently.

Rights to freedom of conscience are commonly associated with the European Convention on Human Rights which provides, in Article 9, that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

## **9.2 Conscientious objection**

### 9.2.1 Education

The use of a conscience clause in legislation in respect of the parental withdrawal of pupils from religious observance and religious instruction in Scotland since 1872 has already been noted in the fuller section of the final report concerning Education.

### 9.2.2 Military service

Other than the use of the concept of conscience in the context of Scottish education, the only other place the concept appears to have been used in historical law is in relation to compulsory military service and conscientious objections. The National Service Act 1948, sections 17-22 was the last UK Act which dealt with compulsory national service in the British Armed Forces: dealing with conscientious objection to being registered in the military service register, or to performing military service, or to performing combatant duties. While neither conscription nor national service at present apply in the UK, the phrase “conscientious objection” is still used in respect of military service, as in the European Convention on Human Rights, Article 4(3)(b).

### 9.2.3 Medical law

While the principle of conscientious objection is not currently relevant in the UK in terms of military service, it is used in a different context; that of medical law. The phrase is found in the Abortion Act 1967 in respect of conscientious objection to involvement in procedures surrounding the procurement of lawful abortions and it is notable here that it is the principle of “conscientious objection” which is used rather than objection on the ground of religion or belief. Section 4 of the Abortion Act 1967 provides that:

(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:

Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

(3) In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in any treatment authorised by this Act shall be sufficient evidence for the purpose of discharging the burden of proof imposed upon him by subsection (1) of this section.

A recent series of cases before the Outer and Inner Houses of the Court of Session, and ultimately before the United Kingdom Supreme Court, concerning two Roman Catholic midwives at the Southern General Hospital, Glasgow, and whether or not they might legitimately avoid being indirectly involved in certain provisions surrounding the procurement of legal abortions, ought to be particularly noted here.

The principal preliminary event to these cases concerned a decision by Greater Glasgow and Clyde Health board to the effect that [section 4\(1\) of the Abortion Act 1967](#) did not confer upon two Roman Catholic midwives (who objected to abortion on the ground of conscientious objection) “any right to refuse to delegate to, supervise or support staff in the provision of nursing care to patients undergoing medical termination of pregnancy”. The midwives in question applied to the Court of Session for judicial review. The Outer House in *Doogan v Greater Glasgow and Clyde Health Board*<sup>1</sup> held that Parliament did not intend “participate” to be broadly construed and, as such, since the midwives in question were not required to participate directly in abortions, dismissed the petition for judicial review. This decision was subsequently reversed by the Inner House of the Court of Session,<sup>2</sup> who adopted a broad interpretation of section 4(1) of the 1967 Act, and held, among various other points,

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<sup>1</sup> 2012 S.L.T. 1041.

<sup>2</sup> *Doogan v Greater Glasgow and Clyde Health Board*, 2013 S.L.T. 517.

that “the right of conscientious objection extended not only to the actual medical or surgical termination but to the whole process of treatment given for that purpose where it was not only the actual termination which was authorised by the Act for the purposes of s.4(1), but any part of the treatment given for that end purpose, and s.4(1) allowed an individual to object to participating in “any” treatment under the Act”.

The decision of the Inner House was further appealed to the United Kingdom Supreme Court,<sup>3</sup> who in the event allowed the appeal, thus setting aside the earlier judgment of the Inner House of the Court of Session. Specifically, the UK Supreme Court held that “(1) ... the question for the court was purely one of statutory construction, namely the meaning of the words “to participate in any treatment authorised by this Act to which he has a conscientious objection”; (2) that the course of treatment to which the respondents might object was the whole course of medical treatment bringing about the termination of the pregnancy; (3) that a narrow meaning of the words “to participate in” was likely to have been in Parliament’s contemplation when passing the 1967 Act: it was unlikely that, in enacting the conscience clause, Parliament had in mind the host of ancillary, administrative and managerial tasks that might be associated with the acts made lawful in s.1 of the 1967 Act, and “participate” meant taking part in a hands on capacity; (4) that a necessary corollary of a healthcare professional’s duty of care towards a patient was an obligation, when failing to provide care due to conscientious objection, to refer that patient’s case to a professional who did not share the objection”

The concept of conscientious objection is also found in other statutes dealing with medical law, such as the Human Fertilisation and Embryology Act 1990. Section 38 of the 1990 Act provides that:

(1) No person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty, however arising, to do so.

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<sup>3</sup> *Doogan v Greater Glasgow and Clyde Health Board*, 2015 S.L.T. 25.

(2) In any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(3) In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in a particular activity governed by this Act shall be sufficient evidence of that fact for the purpose of discharging the burden of proof imposed by subsection (2) above.

National Health Service regulations concerning the provision of contraceptive services and abortion variously make reference to conscientious objection and attempt to define its reasonable accommodation. This can be seen in respect of the provision, by contractors in the National Health Service, of contraceptive services:

**National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004/115, schedule 1, para. 3**

(1) A contractor whose contract includes the provision of contraceptive services shall make available to all its patients who request such services the services described in sub-paragraph (2).

(2) The services referred to in sub-paragraph (1) are—

...

(d) the giving of advice about emergency contraception and where appropriate, the supplying or prescribing of emergency hormonal contraception or, where the contractor has a conscientious objection to emergency contraception, prompt referral to another provider of primary medical services who does not have such conscientious objections;

(e) the provision of advice and referral in cases of unplanned or unwanted pregnancy, including advice about the availability of free pregnancy testing in the practice area and, where appropriate, where the contractor has a conscientious objection to the termination of pregnancy, prompt referral to another provider of primary medical services who does not have such conscientious objections;

**National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004/116, schedule 3, para. 3**

(1) A provider whose agreement includes the provision of contraceptive services shall make available to all its patients who request such services the services described in sub-paragraph (2).

(2) The services referred to in sub-paragraph (1) are—

- (a) the giving of advice about the full range of contraceptive methods;
- (b) where appropriate, the medical examination of patients seeking such advice;
- (c) the treatment of such patients for contraceptive purposes and the prescribing of contraceptive substances and appliances (excluding the fitting and implanting of intrauterine devices and implants);
- (d) the giving of advice about emergency contraception and where appropriate, the supplying or prescribing of emergency hormonal contraception or, where the provider has a conscientious objection to emergency contraception, prompt referral to another provider (by any arrangement) of primary medical services who does not have such conscientious objections;
- (e) the provision of advice and referral in cases of unplanned or unwanted pregnancy, including advice about the availability of free pregnancy testing in the practice area, and, where appropriate, where the provider has a conscientious objection to the termination of pregnancy, prompt referral to another provider (by any arrangement) of primary medical services who does not have such conscientious objections; ...

**National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004/115, schedule 1, para. 7**

(1) A contractor whose contract includes the provision of maternity medical services shall provide—

...

(c) all necessary maternity medical services to female patients whose pregnancy has terminated as a result of miscarriage or abortion or, where the contractor has a conscientious objection to the termination of pregnancy, prompt referral to another provider of primary medical services who does not have such conscientious objections.

**National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004/116, schedule 3, para. 7**

(1) A provider whose agreement includes the provision of maternity medical services shall provide—

- (a) to female patients who have been diagnosed as pregnant all necessary maternity medical services throughout the antenatal period;
- (b) to female patients and their babies all necessary maternity medical services throughout the postnatal period other than neonatal checks;
- (c) all necessary maternity medical services to female patients whose pregnancy has terminated as a result of miscarriage or abortion or, where the provider has a conscientious objection to the termination of pregnancy, prompt referral to another provider (by any arrangement) of primary medical services who does not have such conscientious objections.

**9.2.4 Jobseekers**

Beyond armed service law and medical law, the phrase “conscientious objection” also occurs, somewhat surprisingly perhaps, in 1996 regulations concerning jobseekers’ allowance, in which interestingly “sincerely held conscientious objection” is used alongside the phrase “sincerely held religious belief”. The Jobseekers’ Allowance Regulations 1996/207, part 2, regulation 13 provides that:

(1) In any week a person may restrict his availability for employment in the following ways, if the circumstances set out apply.

(2) Subject to regulations 6, 7 and 9, a person may impose restrictions on the nature of the employment for which he is available by reason of a sincerely held religious belief, or a sincerely held conscientious objection providing he can show that he has reasonable prospects of employment notwithstanding those restrictions...

### **9.3 Conclusions**

Freedom of conscience is a fundamental element of the protection of individual human rights in respect of religion and belief and the concept of conscientious objection has been a key aspect of the development of the jurisprudence of the European Court of Human Rights in this context. The concept is relatively little found in UK statute and it is of most significance in the context of abortion, the provision of contraception and assisted reproduction services. Here it is notable that there is no explicit link with religion although religion may lie behind the reason for the conscientious objection in individual cases.

# Chapter 10

## Criminal law and prisons

### Chapter 10 Criminal law and prisons

- 10.1 Introduction
- 10.2 Religious offences
- 10.3 Regulation of prisons
- 10.4 Religion and punishment
- 10.5 Witness protection
- 10.6 Jury service
- 10.7 Conclusions

### 10.1 Introduction

Criminal law is an area of law where links with religion and morality are perhaps most obvious and there is much to be explored in terms of the values which underpin a system of criminal law. Ideas of guilt, evil and wickedness are fundamental to criminal law and they have clear echoes of religion and religious teaching. In the institutions of criminal law too there are constructs and images which reference organized religion: the bench, the robed judiciary, the penitent prisoner. The influence of values, religious or otherwise, throughout the development of common law crimes, is outwith the scope of this Report but may be an area for further consideration.<sup>1</sup> The focus here is instead on statutory provisions which fall into two principal areas: specific criminal offences designed to tackle religiously aggravated behaviour and regulation of prisons and prison services.

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<sup>1</sup> See, for example, C. Kennedy, “Criminal Law and Religion in Post-Reformation Scotland” (2012) *Edinburgh Law Review* 178 – 197.

## 10.2 Religious offences

One way of tackling religious prejudice in Scots law is by treating it as a form of aggravation of otherwise criminal behaviour; an approach which can be seen in the Criminal Justice (Scotland) Act 2003, section 74 which provides as follows:

(1) This section applies where it is—

- (a) libelled in an indictment; or
- (b) specified in a complaint,

and, in either case, proved that an offence has been aggravated by religious prejudice.

(2) For the purposes of this section, an offence is aggravated by religious prejudice if—

- (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation; or
- (b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.

(2A) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

...

(4A) The court must—

- (a) state on conviction that the offence was aggravated by religious prejudice,
- (b) record the conviction in a way that shows that the offence was so aggravated,
- (c) take the aggravation into account in determining the appropriate sentence and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

(5) For the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by religious prejudice.

(6) In subsection (2)(a)—

“*membership*” in relation to a group includes association with members of that group; and

“*presumed*” means presumed by the offender.

(7) In this section, “*religious group*” means a group of persons defined by reference to their—

(a) religious belief or lack of religious belief;

(b) membership of or adherence to a church or religious organisation;

(c) support for the culture and traditions of a church or religious organisation; or

(d) participation in activities associated with such a culture or such traditions.

Although not explicit in the 2003 Act, the motivating concern in Scotland is often sectarianism and, in particular, sectarian behaviour associated with football. There are now several specific offences which apply in that context. The Police, Public Order and Criminal Justice (Scotland) Act 2006, section 56 makes provision in respect of “football banning orders”. It provides as follows:

... (2) “*Violence*” means violence against persons or intentional damage to property and includes—

(a) threatening violence; and

(b) doing anything which endangers the life of a person.

(3) “*Disorder*” includes—

- (a) stirring up hatred against a group of persons based on their membership (or presumed membership) of a group defined by reference to a thing mentioned in subsection (5), or against an individual as a member of such a group;
- (b) using threatening, abusive or insulting words or behaviour or disorderly behaviour;
- (c) displaying any writing or other thing which is threatening, abusive or insulting.

(4) In subsection (3)(a), “*presumed*” means presumed by the person doing the stirring up.

(5) The things referred to in subsection (3)(a) are—

- (a) colour;
- (b) race;
- (c) nationality (including citizenship);
- (d) ethnic or national origins;
- (e) membership of a religious group or of a social or cultural group with a perceived religious affiliation;
- (f) sexual orientation;
- (g) transgender identity;
- (h) disability ...

The concept of “a religious group or of a social or cultural group with a perceived religious affiliation” is defined in accordance with section 74(7) of the 2003 Act, quoted above.

This continued link between religious affiliation and football was further highlighted in new legislation, introduced by the Scottish Parliament in 2012, expressly to tackle offensive behaviour which is often associated with sectarian behaviour at football matches. The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 introduced a new statutory offence in section, as follows:

(1) A person commits an offence if, in relation to a regulated football match—

(a) the person engages in behaviour of a kind described in subsection (2), and

(b) the behaviour—

(i) is likely to incite public disorder, or

(ii) would be likely to incite public disorder.

(2) The behaviour is—

(a) expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of—

(i) a religious group,

(ii) a social or cultural group with a perceived religious affiliation,

(iii) a group defined by reference to a thing mentioned in subsection (4),

(b) expressing hatred of, or stirring up hatred against, an individual based on the individual's membership (or presumed membership) of a group mentioned in any of sub-paragraphs (i) to (iii) of paragraph (a),

(c) behaviour that is motivated (wholly or partly) by hatred of a group mentioned in any of those sub-paragraphs,

(d) behaviour that is threatening, or

(e) other behaviour that a reasonable person would be likely to consider offensive.

(3) For the purposes of subsection (2)(a) and (b), it is irrelevant whether the hatred is also based (to any extent) on any other factor.

(4) The things referred to in subsection (2)(a)(iii) are—

(a) colour,

(b) race,

(c) nationality (including citizenship),

(d) ethnic or national origins,

(e) sexual orientation,

(f) transgender identity,

(g) disability.

(5) For the purposes of subsection (1)(b)(ii), behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—

- (a) measures are in place to prevent public disorder, or
- (b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers.

(6) A person guilty of an offence under subsection (1) is liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
- (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

“Religious group” is again defined<sup>2</sup> in accordance with section 74(7) of the Criminal Justice (Scotland) Act 2003.

This new statutory offence may have been devised in response to a very particular type of behaviour but the words of the statute are broad and as was commented in a key decision under the Act, “[i]n enacting s.1(1) the Parliament created a criminal offence with an extremely long reach”.<sup>3</sup>

Although the 2012 Act has specifically associated with organised football, it also creates a separate offence in respect of threatening communications which applies independently of the football environment. This new offence is set out in section 6 as follows:

- (1) A person commits an offence if—
  - (a) the person communicates material to another person, and
  - (b) either Condition A or Condition B is satisfied.

...

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<sup>2</sup> Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s4(2)(c).

<sup>3</sup> *MacDonald v Cairns*, 2013 SLT 929 at 933.

- (5) Condition B is that—
  - (a) the material is threatening, and
  - (b) the person communicating it intends by doing so to stir up hatred on religious grounds...

Section 8(4) of the 2012 Act defines hatred on religious grounds thus:

- (4) “*Hatred on religious grounds*” means hatred against—
  - (a) a group of persons based on their membership (or presumed membership) of—
    - (i) a religious group (within the meaning given by section 74(7) of the Criminal Justice (Scotland) Act 2003 (asp 7)),
    - (ii) a social or cultural group with a perceived religious affiliation, or
  - (b) an individual based on the individual's membership (or presumed membership) of a group mentioned in either of sub-paragraphs (i) and (ii) of paragraph (a).

As with the section 1 offence, this new provision is far reaching and while it is intended to tackle problems associated with sectarianism as understood in the Scottish context, it is set out in broad terms. Clearly it gives rise to concerns about freedom of expression; concerns which Parliament sought to address in section 7:

- (1) For the avoidance of doubt, nothing in section 6(5) prohibits or restricts—
  - (a) discussion or criticism of religions or the beliefs or practices of adherents of religions,
  - (b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters,
  - (c) proselytising, or
  - (d) urging of adherents of religions to cease practising their religions.
- (2) In subsection (1), “*religions*” includes—
  - (a) religions generally,
  - (b) particular religions,

(c) other belief systems.

### **10.3 Regulation of prisons**

In respect of Scottish prisons and young offenders' institutions, a loss of liberty as a result of conviction for a criminal act does not entail a loss of freedom to practise religion.

Governors of Scottish prisons and young offenders' institutions must seek to eliminate discrimination, harassment and victimisation against prisoners on the grounds of "religion or belief" as well as a range of other characteristics such as race and sexual orientation. This obligation reflects the general protection against discrimination which is set out in the Equality Act 2010. It is provided in the Prisons and Young Offenders Institutions (Scotland) Rules 2011/331, part 1, rule 6 that:

Subject to the provisions of these Rules or of any direction made for any purpose specified in these Rules, the Governor must seek to eliminate within the prison discrimination, harassment and victimisation against prisoners on the grounds of—

- (a) age;
- (b) disability;
- (c) gender reassignment;
- (d) marriage and civil partnership;
- (e) pregnancy and maternity;
- (f) race;
- (g) religion or belief;
- (h) sex;
- (i) sexual orientation; or
- (j) other status.

Details about prisoners' "religion, belief, or non-belief" must be recorded by Scottish prisons, and such information must be passed to prison chaplaincy teams, but only if a prisoner has so wished to intimate such information about themselves. It is provided

as follows in the Prisons and Young Offenders Institutions (Scotland) Rules 2011/331, part 2, rule 13 that:

- (1) Details about a prisoner's religion, belief or non-belief must be recorded by the Governor in accordance with this rule.
- (2) A prisoner is to be treated as having a particular religion, belief or non-belief for the purposes of these Rules if he or she has declared this upon reception at the prison or at any other time.
- (3) A prisoner is not obliged to give any information about having a particular religion, belief or non-belief at reception or at any other time.
- (4) Any information provided in accordance with paragraph (2) must be recorded and passed to the chaplaincy team.

Where a prisoner has a particular dietary requirement arising from their religion, such requirements must be accommodated. Prisons and Young Offenders Institutions (Scotland) Rules 2011/331, part 4, rule 35 provides that:

- (3) The Governor must ensure that every prisoner is provided with food which takes into account, so far as practicable, the prisoner's age, health and religious, cultural, dietary or other requirements.

In general, prisoners must be free to practise their own religion, including the possession of religious books and items, attendance at religious services, and contact with prison chaplains where so desired. It is provided in the Prisons and Young Offenders Institutions (Scotland) Rules 2011/331, part 6, rule 44 that:

- (1) Subject to the provisions of the Act, these Rules and any direction made under these Rules, every prisoner is entitled to—
  - (a) observe the requirements and engage in the practices of their religion or belief;
  - (b) possess religious books, items and materials for their own personal use which are appropriate to their religion or belief;

(c) attend religious services or meetings arranged by members of the chaplaincy team; and

(d) make a request to the Governor to see, or to speak to, an appropriate member of the chaplaincy team.

(2) The Governor must—

(a) inform every prisoner of the facilities or arrangements which exist or may be made for the purposes of this rule;

(b) provide such literature and other materials as the Governor considers appropriate for the purposes of paragraph (1)(a) and (b); and

(c) as soon as practicable after a request made by a prisoner under paragraph (1)(d), notify the appropriate member of the chaplaincy team of the prisoner's request.

(3) The Governor may prevent a prisoner from attending a religious service or meeting arranged by the chaplaincy team if the Governor considers it is necessary to do so—

(a) for the maintenance of good order and discipline within the prison;

(b) in the interests of the safety of any person within the prison; or

(c) for the protection of the health of any person within the prison.

(4) Any visit to a prisoner by a member of the chaplaincy team must be held outwith the sight and hearing of an officer except where—

(a) the member or prisoner concerned requests otherwise; or

(b) the Governor considers it would be prejudicial to the interests of security or safety for an officer not to be present.

Prisoners are entitled to observe days of rest or of religious observance so far as reasonably practicable, as provided in the Prisons and Young Offenders Institutions (Scotland) Rules 2011/331, part 9, rule 83:

(3) A prisoner who has declared himself or herself to belong to a particular religion or religious denomination is entitled, as far as reasonably practicable—

(a) to take the weekly rest day specified in paragraph (2) on any recognised weekly day of religious observance; and

(b) to be excused from work or from undertaking an educational class or counselling, arranged in terms of rule 84, on such other days in a year as are recognised days of religious observance and are specified in a direction made by the Scottish Ministers.

All Scottish prisons are expected to appoint a minister or licentiate of the Church of Scotland as a chaplain, the nomination of whom is the duty of the Secretary of State for Scotland. This is required in terms of the Prisons (Scotland) Act 1989, section 3(2):

The Secretary of State shall appoint to each prison a chaplain being a minister or a licentiate of the Church of Scotland.

Chaplains from other denominations may be appointed, and may receive remuneration, at the discretion of the Secretary of State for Scotland in terms of the Prisons (Scotland) Act 1989, section 9:

- 1) Where in any prison the number of prisoners who belong to a religious denomination other than the Church of Scotland is such as in the opinion of the Secretary of State to require the appointment of a minister of that denomination, the Secretary of State may appoint such a minister to that prison.
- (2) The Secretary of State may pay a minister appointed under the foregoing subsection such remuneration as he thinks reasonable.
- (3) The Secretary of State may allow a minister of any denomination other than the Church of Scotland to visit prisoners of his denomination in a prison to which no minister of that denomination has been appointed under this section.
- (4) No prisoner shall be visited against his will by such a minister as is mentioned in the last foregoing subsection; but every prisoner not belonging to the Church of Scotland shall be allowed, in accordance with the arrangements in force in the prison in which he is confined, to attend chapel or to be visited by the chaplain.

(5) The governor of a prison shall on the reception of each prisoner record the religious denomination to which the prisoner declares himself to belong, and shall give to any minister who under this section is appointed to the prison or permitted to visit prisoners therein a list of the prisoners who have declared themselves to belong to his denomination; and the minister shall not be permitted to visit any other prisoners.”

The general model of permitting prisoners to continue to practise their religion is replicated in UK detention centres, including any in Scotland. The provisions are set out in the Detention Centre Rules 2001/238, part 2, rules 13, 14, 20-25, as follows:

### 13. Food

(1) Subject to any directions of the Secretary of State, no detained person shall be allowed, except as authorised by the medical practitioner to have any food other than that ordinarily provided.

(2) No detained person shall be given less food than is ordinarily provided, except with his written consent and upon the written recommendation of the medical practitioner.

(3) The food provided shall:

(a) be wholesome, nutritious, well prepared and served, reasonably varied, sufficient in quantity and

(b) meet all religious, dietary, cultural and medical needs.

### 14. Alcohol

No detained person shall be allowed to have any intoxicating liquor except:—

(a) by written order of the medical practitioner, specifying the quantity and the name of the detained person and the medical reason for the order; or

(b) for the observance of religious festivals, and for sacraments, with the prior agreement of the manager.

### 20. Diversity of religion

The practice of religion in detention centres shall take account of the diverse cultural and religious background of detained persons.

### 21. Religious denomination

If a detained person wishes to declare himself to belong to a particular religion, the manager shall upon that person's reception at the detention centre record the religion to which the detained person wishes to belong.

#### 22. Manager of religious affairs and ministers of religion

(1) Every detention centre shall have a manager of religious affairs whose appointment shall be approved by the Secretary of State.

(2) Where in any detention centre the number of detained persons who belong to a particular religion is such as in the opinion of the Secretary of State to require the appointment of a minister of that religion, the Secretary of State may appoint such a minister to that detention centre.

(3) The manager of religious affairs shall make arrangements for a minister of religion to meet with every detained person of his religion individually soon after the detained person's reception into the detention centre if the detained person so wishes.

(4) A minister of religion shall visit daily all detained persons of his religion who are sick, under restraint, in temporary confinement, or undergoing removal from association, as far as he reasonably can and to the extent that the detained person so wishes.

#### 23. Regular visits by ministers of religion

(1) The manager shall make arrangements for a minister of religion to visit detained persons of his religion as often as he reasonably can and to the extent that the detained person so wishes.

(2) Where a detained person belongs to a religion for which no minister of religion has been appointed the manager will do what he reasonably can, if so requested by the detained person, to arrange for him to be visited by a minister of that religion as often as he reasonably can and to the extent that the detained person so wishes.

#### 24. Religious services

The manager shall make arrangements for ministers of religion to conduct religious services for detained persons of their religions at such times as may be arranged.

#### 25. Religious books

There shall, so far as reasonably practicable, be available for the personal use of every detained person such religious books recognised by his religion as are approved by the Secretary of State for use in detention centres.

#### **10.4 Religion and punishment**

A person who is in possession of an offensive weapon or blade in a Scottish prison commits an offence, although such a person may relevantly argue in his defence that he was in possession of such an item for religious purposes. This is provided in the Criminal Law (Consolidation) (Scotland) Act 1995, section 49C:

- (1) Any person who has with him in a prison—
  - (a) an offensive weapon, or
  - (b) any other article which has a blade or is sharply pointed,commits an offence.
- (2) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon or other article with him in the prison.
- (3) A defence under subsection (2) includes, in particular, a defence that the person had the weapon or other article with him in prison—
  - (a) for use at work,
  - (b) for religious reasons, or
  - (c) as part of any national costume.

There is some provision made to take account of religious beliefs and practices in the context of non-custodial sentences. Community payback orders and work orders must not conflict with the religious beliefs of those subject to them. This can be seen in the Criminal Procedure (Scotland) Act 1995, section 227E:

- (1) In imposing a community payback order on an offender, the court must ensure, so far as practicable, that any requirement imposed by the order avoids—
  - (a) a conflict with the offender's religious beliefs, ...

There is further provision in section 303ZA of the Criminal Procedure (Scotland) Act 1995 as follows:

- (9) Where a work order is made, the supervising officer shall—
  - (a) determine the nature of the work which the alleged offender requires to perform;
  - (b) determine the times and places at which the alleged offender is to perform that work;
  - (c) give directions to the alleged offender in relation to that work;
  - (d) provide the procurator fiscal with such information as the procurator fiscal may require in relation to the alleged offender's conduct in connection with the requirements of the order.
- (10) In giving directions under subsection (9)(c) above, a supervising officer shall, so far as practicable, avoid—
  - (a) any conflict with the alleged offender's religious beliefs;

### **10.5 Witness protection**

Religious belief may be taken into account in determining whether a witness requires protection, or if a witness is vulnerable. The Youth Justice and Criminal Evidence Act 1999, section 46 provides that:

- (4) In determining whether a witness is eligible for protection the court must take into account, in particular—
  - (a) the nature and alleged circumstances of the offence to which the proceedings relate;
  - (b) the age of the witness;
  - (c) such of the following matters as appear to the court to be relevant, namely—
    - (i) the social and cultural background and ethnic origins of the witness,

- (ii) the domestic and employment circumstances of the witness,  
and
- (iii) any religious beliefs or political opinions of the witness;
- (d) any behaviour towards the witness on the part of—
  - (i) the accused,
  - (ii) members of the family or associates of the accused, or
  - (iii) any other person who is likely to be an accused or a witness in the proceedings.

In respect of identifying vulnerable witnesses, the Criminal Procedure (Scotland) Act 1995, section 271(2)(f)(iv) provides that:

- (2) In determining whether a person is a vulnerable witness by virtue of subsection (1)(b) above, the court shall take into account—
    - (a) the nature and circumstances of the alleged offence to which the proceedings relate,
    - (b) the nature of the evidence which the person is likely to give,
    - (c) the relationship (if any) between the person and the accused,
    - (d) the person's age and maturity,
    - (e) any behaviour towards the person on the part of—
      - (i) the accused,
      - (ii) members of the family or associates of the accused,
      - (iii) any other person who is likely to be an accused or a witness in the proceedings, and
    - (f) such other matters, including—
      - (i) the social and cultural background and ethnic origins of the person,
      - (ii) the person's sexual orientation,
      - (iii) the domestic and employment circumstances of the person,
      - (iv) any religious beliefs or political opinions of the person, and
      - (v) any physical disability or other physical impairment which the person has,
- as appear to the court to be relevant.

## **10.6 Jury service**

Ministers, priests, and those who have taken religious vows so as to live in religious communities, such as monks or nuns, are excused from rendering jury service in criminal trials, as provided in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, schedule 1, part 3. Such persons are excusable as of right in the following terms:

(401) Members of certain religious bodies

In respect of jury service in any criminal proceedings, practising members of religious societies or orders the tenets or beliefs of which are incompatible with jury service.

(5) Ministers of religion etc.

- (a) persons in holy orders;
- (b) regular ministers of any religious denomination; and
- (c) vowed members of any religious order living in a monastery, convent or other religious community.

## **10.7 Conclusions**

The provisions highlighted in this section demonstrate a broad range of reasons why religion may feature in legislation. The provisions regulating prisons and detention centres are simply a specialised application of the obligations and protections already applied in society in terms of equality and anti-discrimination legislation. In these provisions, religion is one of a list of protected characteristics. Some of the other provisions, for example those relating to exemption from jury duty, can be seen as an attempt to accommodate the particular beliefs and religious obligations of certain individuals in the context of their wider civic obligations. Perhaps of most interest are the new criminal offences being introduced to tackle sectarianism and religious hatred. These provisions are not without controversy: they have been justified on the strength of the need to tackle an apparently deep rooted and very specific Scottish

problem but the offences are broadly defined and open to wide application. While arguments can be made in favour of tackling offensive and threatening behaviour, the new statutory offences potentially threaten freedom of expression. While the trend through much of Scots law is towards the disappearance of religion as a factor, this is one area where its presence is growing.

# Chapter 11

## Equality law

### Chapter 11 Equality law

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### 11.1 Introduction

Much of the focus on religion in recent legal debate and analysis has been within the context of equality law. Here the legal provisions are UK, European or international in scope and there is little evidence of specific issues in a Scottish context. The provisions are generally well known and therefore we have not sought to include detailed examination or discussion of the law in this report.<sup>1</sup> Instead, what follows is simply a collection of the key provisions.

### 11.2 European context

The key provision of the European Convention on Human Rights in respect of religion and belief is Article 9, which provides that:

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<sup>1</sup> A comprehensive review by P Edge and L Vickers was published in October 2015 by the Equality and Human Rights Commission: *Review of equality and human rights law relating to religion or belief*: accessible at [http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/RR97\\_Review%20of%20equality%20and%20human%20rights%20law%20relating%20to%20religion%20or%20belief.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/RR97_Review%20of%20equality%20and%20human%20rights%20law%20relating%20to%20religion%20or%20belief.pdf)

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

It is further provided in Article 14, that all rights under the Convention are to be enjoyed without discrimination, as follows:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Non-discrimination on the ground of religion is also found in European Union law in, for example, the Treaty on the Functioning of the European Union:

**Article 10**

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Power to adopt further legislation within this area is set out in:

**Article 19**

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action

to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This power was used to adopt the Framework Directive for equal treatment in employment,<sup>2</sup> the purpose of which is set out in Article 1 as being:

... to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Building on jurisprudence of the European Court of Human Rights, it is notable that the term “religion”, used in the ECHR, has been replaced in EU and UK provisions by the term “religion or belief” and this is characteristic of equality law in general where the trend has been to extend protection.

### **11.3 Domestic equality law: general framework**

The rights guaranteed by the ECHR are given effect within the UK by means of the Human Rights Act 1998, section 1:

(1) In this Act “*the Convention rights*” means the rights and fundamental freedoms set out in—

- (a) Articles 2 to 12 and 14 of the Convention,
- (b) Articles 1 to 3 of the First Protocol, and
- (c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation...

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<sup>2</sup> EU Directive 2000/78/EC.

The other main source of equality law within the UK is the Equality Act 2010. The EU Framework Directive was initially implemented in the UK by means of the Employment Equality (Religion or Belief) Regulations 2003 but was subsequently consolidated into the 2010 Act. The legislation operates by setting out a list of protected characteristics and defining a range of prohibited conduct in respect of the protected characteristics.

### **11.3.1 Prohibited conduct**

The 2010 Act establishes forms of prohibited conduct in Chapter 2. Direct discrimination is defined in section 13 as follows:

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

While direct discrimination is limited in that it requires overt reliance on a protected characteristic, its great strength lies in the absence of justification. Indirect discrimination has a potentially greater reach but it does permit the possibility of a defence. The concept of indirect discrimination is set out in section 19 as follows:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are—

age;  
disability;  
gender reassignment;  
marriage and civil partnership;  
race;  
religion or belief;  
sex;  
sexual orientation.

A third type of prohibited conduct is provided for in section 26 in the form of harassment:

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;  
disability;  
gender reassignment;  
race;  
religion or belief;  
sex;  
sexual orientation.

Further protection is provided by section 27 in the form of victimisation which is defined as follows:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
  - (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
  - (a) bringing proceedings under this Act;
  - (b) giving evidence or information in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act;
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

### **11.3.2 Protected characteristic**

Conduct, which is prohibited in terms of Chapter 2 of Part 2 of the 2010 Act, must relate to one of protected characteristics set out in Chapter 1 of Part 2.

#### **Equality Act 2010, section 4**

The following characteristics are protected characteristics—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;

pregnancy and maternity;  
race;  
religion or belief;  
sex;  
sexual orientation.

The UK Equality Act 2010 offers further definition of the terms “religion or belief” in section 10:

- (1) *Religion* means any religion and a reference to religion includes a reference to a lack of religion.
- (2) *Belief* means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
- (3) In relation to the protected characteristic of religion or belief—
  - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
  - (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

Important guidance was given by the Employment Appeal Tribunal in *Grainger plc v Nicholson*<sup>3</sup> as to the meaning of “belief” as follows:

- (i) The belief must be genuinely held. (ii) It must be a belief and not ... an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others<sup>4</sup>

### 11.3.3 Scope of protection

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<sup>3</sup> [2010] ICR 360.

<sup>4</sup> *Ibid*, per Burton, J at 370.

The general principles of non-discrimination which are set out in Part 2 of the Equality Act 2010, apply across a range of situations: the provision of goods and services etc (Parts 3, 4 and 7); work (Part 5); education (Part 6) and associations (Part 7).

The Act also establishes a broad public sector equality duty which includes religion or belief. The duty is set out in section 149, as follows:

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) tackle prejudice, and
- (b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation

#### **11.3.4 Exemptions**

The Equality Act 2010 sets out these general principles of non-discrimination which apply across a broad range of contexts but it also provides for exemptions: some general and some specific to each of the protected characteristics, including religion or belief.

Part 5 of the Act applies the principles of non-discrimination to the workplace. There are however a number of exemptions which are set out in Schedule 9. Paragraph 1 sets out a general exemption which applies where there is an occupational requirement in respect of a particular job; in other words, situations where an employer is entitled to specify that the worker must have the particular characteristic in order to be able to perform the work. Paragraph 1 provides as follows:

- (1) A person (A) does not contravene a provision mentioned in sub-paragraph
- (2) by applying in relation to work a requirement to have a particular protected

characteristic, if A shows that, having regard to the nature or context of the work—

- (a) it is an occupational requirement,
- (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
- (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

This exemption applies to all of the protected characteristics and may therefore include situations where an employer wishes to advertise for or employ a person who has a particular religious belief. The exemption is controlled by the fact that there is an occupational “requirement” and that it is “a proportionate means of achieving a legitimate aim”.

Paragraph 3 of Schedule 9 sets out an exemption which is specific to religion or belief and which applies only to those employers who have an “ethos based on religion or belief”. The exemption applies as follows:

A person (A) with an ethos based on religion or belief does not contravene a provision mentioned in paragraph 1(2) by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and to the nature or context of the work—

- (a) it is an occupational requirement,
- (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
- (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

A further exemption in the context of work is set out in Schedule 9, paragraph 2. This provision specifically permits discrimination on the grounds of sex, sexual

orientation, gender reassignment, marriage and civil partnership in the following terms:

(1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to employment a requirement to which sub-paragraph (4) applies if A shows that—

- (a) the employment is for the purposes of an organised religion,
- (b) the application of the requirement engages the compliance or non-conflict principle, and
- (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

(2) The provisions are—

- (a) section 39(1)(a) or (c) or (2)(b) or (c) [discrimination by employers];
- (b) section 49(3)(a) or (c) or (6)(b) or (c) [discrimination when making an appointment to a personal office];
- (c) section 50(3)(a) or (c) or (6)(b) or (c) [discrimination when making an appointment to a public office];
- (d) section 51(1) [discrimination when making a recommendation in respect of a public office].

(3) A person does not contravene section 53(1) or (2)(a) or (b) [discrimination by qualification bodies] by applying in relation to a relevant qualification (within the meaning of that section) a requirement to which sub-paragraph (4) applies if the person shows that—

- (a) the qualification is for the purposes of employment mentioned in sub-paragraph (1)(a), and
- (b) the application of the requirement engages the compliance or non-conflict principle.

(4) This sub-paragraph applies to—

- (a) a requirement to be of a particular sex;
- (b) a requirement not to be a transsexual person;
- (c) a requirement not to be married or a civil partner;

- (ca) a requirement not to be married to a person of the same sex;
- (d) a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner;
- (e) a requirement relating to circumstances in which a marriage or civil partnership came to an end;
- (f) a requirement related to sexual orientation.

Several exemptions apply to the general principles of non-discrimination in respect of the provision of goods and services. Schedule 23, paragraph 2 applies in respect of the provision of services and the use of premises and is relevant in particular to the provision of marriage and civil partnership services. Paragraph 2 provides:

- (1) This paragraph applies to an organisation the purpose of which is—
  - (a) to practise a religion or belief,
  - (b) to advance a religion or belief,
  - (c) to teach the practice or principles of a religion or belief,
  - (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief,or
  - (e) to foster or maintain good relations between persons of different religions or beliefs.
- (2) This paragraph does not apply to an organisation whose sole or main purpose is commercial.
- (3) The organisation does not contravene Part 3, 4 or 7 [Services and Public Function; Premises; and Associations respectively], so far as relating to religion or belief or sexual orientation, only by restricting—
  - (a) membership of the organisation;
  - (b) participation in activities undertaken by the organisation or on its behalf or under its auspices;
  - (c) the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices;

(d) the use or disposal of premises owned or controlled by the organisation.

(4) A person does not contravene Part 3, 4 or 7 [Services and Public Function; Premises; and Associations respectively], so far as relating to religion or belief or sexual orientation, only by doing anything mentioned in sub-paragraph (3) on behalf of or under the auspices of the organisation.

(5) A minister does not contravene Part 3, 4 or 7 [Services and Public Function; Premises; and Associations respectively], so far as relating to religion or belief or sexual orientation, only by restricting—

(a) participation in activities carried on in the performance of the minister's functions in connection with or in respect of the organisation;

(b) the provision of goods, facilities or services in the course of activities carried on in the performance of the minister's functions in connection with or in respect of the organisation.

(6) Sub-paragraphs (3) to (5) permit a restriction relating to religion or belief only if it is imposed—

(a) because of the purpose of the organisation, or

(b) to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.

(7) Sub-paragraphs (3) to (5) permit a restriction relating to sexual orientation only if it is imposed—

(a) because it is necessary to comply with the doctrine of the organisation, or

(b) to avoid conflict with strongly held convictions within sub-paragraph (9).

(8) In sub-paragraph (5), the reference to a minister is a reference to a minister of religion, or other person, who—

(a) performs functions in connection with a religion or belief to which the organisation relates, and

(b) holds an office or appointment in, or is accredited, approved or recognised for the purposes of the organisation.

(9) The strongly held convictions are—

(a) in the case of a religion, the strongly held religious convictions of a significant number of the religion's followers;

(b) in the case of a belief, the strongly held convictions relating to the belief of a significant number of the belief's followers.

(9A) An organisation does not contravene Part 3, 4 or 7 [Services and Public Function; Premises; and Associations respectively], only by refusing to allow premises owned or controlled by the organisation to be used—

(a) to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex;

(b) to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.

(9B) A person (or a group of persons) does not contravene Part 3, 4 or 7 [Services and Public Function; Premises; and Associations respectively], only by refusing to allow premises owned or controlled by the person (or the group) on behalf of an organisation to be used—

(a) to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex;

(b) to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.

(9C) An organisation does not contravene section 29 [Provision of Services] only by allowing an approved celebrant of the organisation to act as set out in sub-paragraph (1) or (2) of paragraph 25B of Schedule 3.<sup>5</sup>

(9D) In sub-paragraphs (9A) to (9C), “approved celebrant”, “relevant Scottish marriage” and “relevant Scottish civil partnership” have the same meaning as in paragraph 25B of Schedule 3.

(10) This paragraph does not permit anything which is prohibited by section 29 [Provision of Services], so far as relating to sexual orientation, if it is done—

(a) on behalf of a public authority, and

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<sup>5</sup> i.e. “25B.— Marriage of same sex couples and civil partnership: Scotland

(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.

(2) An approved celebrant does not contravene section 29 only by refusing to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.”

(b) under the terms of a contract between the organisation and the public authority.

(11) In the application of this paragraph in relation to sexual orientation, sub-paragraph (1)(e) must be ignored.

(12) In the application of this paragraph in relation to sexual orientation, in sub-paragraph (3)(d), “*disposal*” does not include disposal of an interest in premises by way of sale if the interest being disposed of is—

- (a) the entirety of the organisation's interest in the premises, or
- (b) the entirety of the interest in respect of which the organisation has power of disposal.

(13) In this paragraph—

- (a) “*disposal*” is to be construed in accordance with section 38;
- (b) “*public authority*” has the meaning given in section 150(1).”

Schedule 3, paragraph 29 makes an exception to the general rule that there should be no discrimination based on sex in order to permit religious organisations to offer separate services to men and women. It provides that:

(1) A minister does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex or separate services for persons of each sex, if—

- (a) the service is provided for the purposes of an organised religion,
- (b) it is provided at a place which is (permanently or for the time being) occupied or used for those purposes, and
- (c) the limited provision of the service is necessary in order to comply with the doctrines of the religion or is for the purpose of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers.

(2) The reference to a minister is a reference to a minister of religion, or other person, who—

- (a) performs functions in connection with the religion, and

(b) holds an office or appointment in, or is accredited, approved or recognised for purposes of, a relevant organisation in relation to the religion.

(3) An organisation is a relevant organisation in relation to a religion if its purpose is—

- (a) to practise the religion,
- (b) to advance the religion,
- (c) to teach the practice or principles of the religion,
- (d) to enable persons of the religion to receive benefits, or to engage in activities, within the framework of that religion, or
- (e) to foster or maintain good relations between persons of different religions.

(4) But an organisation is not a relevant organisation in relation to a religion if its sole or main purpose is commercial.

There are several significant exemptions from the general requirements of UK equality law in respect of education and “faith schools”. Section 85 of the Equality Act 2010 sets out a general obligation not to discriminate in terms of admission to school and treatment of pupils:

(1) The responsible body of a school to which this section applies must not discriminate against a person—

- (a) in the arrangements it makes for deciding who is offered admission as a pupil;
- (b) as to the terms on which it offers to admit the person as a pupil;
- (c) by not admitting the person as a pupil.

(2) The responsible body of such a school must not discriminate against a pupil—

- (a) in the way it provides education for the pupil;
- (b) in the way it affords the pupil access to a benefit, facility or service;
- (c) by not providing education for the pupil;
- (d) by not affording the pupil access to a benefit, facility or service;
- (e) by excluding the pupil from the school;

- (f) by subjecting the pupil to any other detriment.
- (3) The responsible body of such a school must not harass—
  - (a) a pupil;
  - (b) a person who has applied for admission as a pupil.
- (4) The responsible body of such a school must not victimise a person—
  - (a) in the arrangements it makes for deciding who is offered admission as a pupil;
  - (b) as to the terms on which it offers to admit the person as a pupil;
  - (c) by not admitting the person as a pupil.
- (5) The responsible body of such a school must not victimise a pupil—
  - (a) in the way it provides education for the pupil;
  - (b) in the way it affords the pupil access to a benefit, facility or service;
  - (c) by not providing education for the pupil;
  - (d) by not affording the pupil access to a benefit, facility or service;
  - (e) by excluding the pupil from the school;
  - (f) by subjecting the pupil to any other detriment.
- ...
- (8) In relation to Scotland, this section applies to—
  - (a) a school managed by an education authority;
  - (b) an independent school;
  - (c) a school in respect of which the managers are for the time being receiving grants under section 73(c) or (d) of the Education (Scotland) Act 1980.
- ...

Exemption for Scottish denominational schools from these general equality obligations is provided by virtue of schedule 11. These provisions are explored in greater depth in Chapter 4.

**Schedule 11, paragraph 5 School with religious character etc.**

Section 85(1) and (2)(a) to (d), so far as relating to religion or belief, does not apply in relation to—

...

- (c) a school transferred to an education authority under section 16 of the Education (Scotland) Act 1980 (transfer of certain schools to education authorities) which is conducted in the interest of a church or denominational body;
- (d) a school provided by an education authority under section 17(2) of that Act (denominational schools);
- (e) a grant-aided school (within the meaning of that Act) which is conducted in the interest of a church or denominational body;
- (f) a school registered in the register of independent schools for Scotland if the school admits only pupils who belong, or whose parents belong, to one or more particular denominations;
- (g) a school registered in that register if the school is conducted in the interest of a church or denominational body.

**Schedule 11, paragraph 6 Curriculum, worship, etc.**

Section 85(2)(a) to (d), so far as relating to religion or belief, does not apply in relation to anything done in connection with acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum).

Further or Higher Education Institutions in the UK are exempt from section 91(1) of the Equality Act 2010, if they are designated an institution with a religious ethos as per schedule 12, part 2, paragraph 5:

**Section 91 Students: admission and treatment, etc.**

- (1) The responsible body of an institution to which this section applies must not discriminate against a person—
- (a) in the arrangements it makes for deciding who is offered admission as a student;
  - (b) as to the terms on which it offers to admit the person as a student;
  - (c) by not admitting the person as a student.

**Schedule 12, part 2, paragraph 5**

(1) The responsible body of an institution which is designated for the purposes of this paragraph does not contravene section 91(1), so far as relating to religion or belief, if, in the admission of students to a course at the institution—

- (a) it gives preference to persons of a particular religion or belief,
- (b) it does so to preserve the institution's religious ethos, and
- (c) the course is not a course of vocational training.

(2) A Minister of the Crown may by order designate an institution if satisfied that the institution has a religious ethos.

There is also specific provision in respect of the employment of teachers in denominational schools which provides an exemption from the general obligation not to discriminate on the grounds of religion or belief. This is set out in the Education (Scotland) Act 1980, section 21:

(2A) A teacher appointed to any post on the staff of any such school by the education authority shall satisfy the Secretary of State as to qualification, and shall be required to be approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted;

The continued application of this exemption is confirmed by the Equality Act 2010. Paragraph 1 of Schedule 22 to the Act provides that there is an exemption from the general obligations not to discriminate in terms of religion or belief (under Parts 3-7) of the Act where it is compliance with other statutory provisions (ie section 21 of the 1980 Act). Specific provision is made in respect of work in paragraph 3:

**Schedule 22, paragraph 3**

(1) A person does not contravene Part 5 (work) only by doing a relevant act in connection with the employment of another in a relevant position.

(2) A relevant position is—

- (a) the head teacher or principal of an educational establishment;
- (b) the head, a fellow or other member of the academic staff of a college, or institution in the nature of a college, in a university;

(c) a professorship of a university which is a canon professorship or one to which a canonry is annexed.

(3) A relevant act is anything it is necessary to do to comply with—

(a) a requirement of an instrument relating to the establishment that the head teacher or principal must be a member of a particular religious order;

(b) a requirement of an instrument relating to the college or institution that the holder of the position must be a woman;

(c) an Act or instrument in accordance with which the professorship is a canon professorship or one to which a canonry is annexed.

(4) Sub-paragraph (3)(b) does not apply to an instrument taking effect on or after 16 January 1990 (the day on which section 5(3) of the Employment Act 1989 came into force).

(5) A Minister of the Crown may by order provide that anything in sub-paragraphs (1) to (3) does not have effect in relation to—

(a) a specified educational establishment or university;

(b) a specified description of educational establishments.

(6) An educational establishment is—

(a) a school within the meaning of the Education Act 1996 or the Education (Scotland) Act 1980;

(b) a college, or institution in the nature of a college, in a university;

(c) an institution designated by order made, or having effect as if made, under section 129 of the Education Reform Act 1988;

(d) a college of further education within the meaning of section 36 of the Further and Higher Education (Scotland) Act 1992;

(e) a university in Scotland;

(f) an institution designated by order under section 28 of the Further and Higher Education Act 1992 or section 44 of the Further and Higher Education (Scotland) Act 1992 ...

#### **11.4 Domestic equality law: specific contexts**

In addition to the framework set out in the Equality Act 2010, there are various statutory examples of the application of the general protection against discrimination

within specific contexts. This can be seen, for example, in the following provisions which set out a framework for protection against discrimination and individual complaints, in respect of the armed services:

**Armed Forces (Service Complaints Commissioner) Regulations**

**2007/3352, regulation 2**

(1) For the purposes of section 338(1) of the Act, a person has been wronged in a prescribed way if he has been the subject of:

(a) discrimination;

...

(2) In this regulation “*discrimination*” means—

(a) discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender re-assignment, status as a married person or civil partner, religion, belief or sexual orientation;

**Armed Forces Act 2006, section 338(1)**

(1) This section applies where the Service Complaints Commissioner (“the Commissioner”) considers that any communication made to him contains an allegation that a person named in such a communication—

(a) is subject to service law and has been wronged in a prescribed way;

or

(b) was wronged in such a way while he was so subject.

**Armed Forces (Service Complaints Commissioner) Regulations**

**2007/3352, regulation 2**

(1) For the purposes of section 338(1) of the [Armed Forces] Act [2006], a person has been wronged in a prescribed way if he has been the subject of:

(a) discrimination;

(b) harassment;

(c) bullying;

(d) dishonest, improper or biased behaviour.

(2) In this regulation “*discrimination*” means—

- (a) discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender re-assignment, status as a married person or civil partner, religion, belief or sexual orientation; and
- (b) less favourable treatment as a part-time employee.”

**Armed Forces (Redress of Individual Grievances) Regulations 2007/3353, regulation 9**

(1) A service complaint panel shall include one independent member in any case in which the service complaint:

- (a) alleges discrimination;

...

(3) In this regulation, “*discrimination*” means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender re-assignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of part-time employees.

A similar context-specific framework of regulation is set out for Scottish prisons in the following provision:

**Prisons and Young Offenders Institutions (Scotland) Rules 2011/331, part 1, rule 6**

Subject to the provisions of these Rules or of any direction made for any purpose specified in these Rules, the Governor must seek to eliminate within the prison discrimination, harassment and victimisation against prisoners on the grounds of—

- (a) age;
- (b) disability;
- (c) gender reassignment;
- (d) marriage and civil partnership;
- (e) pregnancy and maternity;
- (f) race;

- (g) religion or belief;
- (h) sex;
- (i) sexual orientation; or
- (j) other status.

The following provisions all indicate the application of general protection against discrimination within a range of specific situations:

**British Nationality Act 1981, section 44**

(1) Any discretion vested by or under this Act in the Secretary of State, a Governor or a Lieutenant-Governor shall be exercised without regard to the race, colour or religion of any person who may be affected by its exercise.

**Consular Relations Act 1968, section 6**

Her Majesty may by Order in Council designate any State for the purposes of this section; and where a State is so designated, a member of the crew of a ship belonging to that State who is detained in custody on board for a disciplinary offence shall not be deemed to be unlawfully detained unless—

- (a) his detention is unlawful under the laws of that State or the conditions of detention are inhumane or unjustifiably severe; or
- (b) there is reasonable cause for believing that his life or liberty will be endangered for reasons of race, nationality, political opinion or religion, in any country to which the ship is likely to go.

**Communications Act 2003, section 368F**

(4) Advertising included in an on-demand programme service must not—

- (a) prejudice respect for human dignity;
- (b) include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation...

**Communications Act 2003, section 368G**

(11) A sponsorship announcement must not—

- (a) prejudice respect for human dignity;
- (b) include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation..

**Communications Act 2003, section 368H** [in respect of product placement]

(12) Condition F is that the way in which the product, service or trade mark, or the reference to it, is included in the programme by way of product placement does not—

- (a) prejudice respect for human dignity;
- (b) promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation...

**Act of Sederunt (Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) (Association of Commercial Attorneys) 2009/163, schedule 1**

10.2.3 Attorneys must not discriminate on grounds of race, ethnic origin, sex, religion or political persuasion.

## **11. 5 Accommodation and exemption**

The general approach of UK equality legislation is to require equal treatment but in some situations it is also recognised that substantive equality may require exemptions or particular accommodation to be made. It was noted above that the Equality Act 2010 permits exemption from the general obligation of non-discrimination in certain situations relating to religion or belief. A range of specific examples of exemption or of accommodation of religion and belief can also be seen in the following provisions.

Conflict with religious beliefs must be avoided in various contexts, such as when parenting orders or community payback orders are made or imposed by courts.

**Antisocial Behaviour etc. (Scotland) Act 2004, section 110**

(1) A court shall ensure that the requirements of a parenting order made by it avoid, so far as practicable—

(a) any conflict with the religious beliefs of the person specified in the order; and

(b) any interference with times at which that person normally works (or carries out voluntary work) or attends an educational establishment.

(2) The supervising officer appointed by a local authority in respect of a parenting order shall ensure that the directions given by the officer avoid, so far as practicable, the matters mentioned in subsection (1)(a) and (b).”

**Criminal Procedure (Scotland) Act 1995, section 227E**

(1) In imposing a community payback order on an offender, the court must ensure, so far as practicable, that any requirement imposed by the order avoids—

(a) a conflict with the offender's religious beliefs,

(b) interference with the times, if any, at which the offender normally works (or carries out voluntary work) or attends school or any other educational establishment.

(2) The responsible officer must ensure, so far as practicable, that any instruction given to the offender avoids such a conflict or interference.

**Criminal Procedure (Scotland) Act 1995, section 303ZA**

(10) In giving directions under subsection (9)(c) above, a supervising officer shall, so far as practicable, avoid—

(a) any conflict with the alleged offender's religious beliefs;

Failure to undertake work-related activity can be justified on the ground of religious customs and practices.

**Income Support (Work-Related Activity) and Miscellaneous  
Amendments Regulations 2014/1097, part 2, regulation 7**

Matters to be taken into account by the Secretary of State in determining whether a person has shown good cause for failing to undertake work-related activity for the purposes of regulation 6(2) include that—

...

(d) the established customs and practices of the religion to which the person belongs prevented the person undertaking work-related activity on that day or at that time;

**Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2008/2928, regulation 8**

(1) A relevant claimant who is required to take part in a work-focused interview but fails to do so must show good cause for that failure within five working days of the date on which the Secretary of State gives notification of that failure.

(2) In determining whether a relevant claimant has shown good cause for a failure to take part in a work-focused interview, the matters to be taken into account include—

...

(j) that the established customs and practices of the religion to which the relevant claimant belongs prevented attendance on the day or at the time fixed for the work-focused interview;

**Social Security (Jobcentre Plus Interviews for Partners) Regulations 2003/1886**

Matters to be taken into account in determining whether the partner or the claimant has shown good cause for the partner's failure to take part in an interview include—

...

(d) that the established customs and practices of the religion to which the partner belongs prevented him attending on that day or at that time

Jobseekers may also impose restrictions on the nature of employment for which they are available on the ground of religious belief or conscientious objection.

**Jobseeker's Allowance Regulations 1996/207, part 2, regulation 13**

(1) In any week a person may restrict his availability for employment in the following ways, if the circumstances set out apply.

(2) Subject to regulations 6, 7 and 9, a person may impose restrictions on the nature of the employment for which he is available by reason of a sincerely held religious belief, or a sincerely held conscientious objection providing he can show that he has reasonable prospects of employment notwithstanding those restrictions...

The wearing of headgear for religious purposes is variously recognised and respected in law.

**Armed Forces Act 2006, section 72**

(2) Nothing in section 70 or 71 authorises anyone to require an arrested person to remove any of his clothing in public other than an outer coat, jacket, headgear or gloves.

(3) The reference in subsection (2) to headgear does not include headgear worn for religious reasons.

**Road Traffic Act 1988, section 16**

(1) The Secretary of State may make regulations requiring, subject to such exceptions as may be specified in the regulations, persons driving or riding (otherwise than in side-cars) on motor cycles of any class specified in the regulations to wear protective headgear of such description as may be so specified.

(2) A requirement imposed by regulations under this section shall not apply to any follower of the Sikh religion while he is wearing a turban.

**Horses (Protective Headgear for Young Riders) Regulations 1992/1201, regulation 3**

(1) Section 1 of the [Horses (Protective Headgear for Young Riders)] Act [1990 c. 25] shall not apply in relation to a child described in paragraph (2) nor to the riding of horses in the circumstances specified in paragraph (3).

(2) A child referred to in paragraph (1) is a child who is a follower of the Sikh religion while he is wearing a turban.

**Disabled Persons (Badges for Motor Vehicles) (Scotland) Amendment  
(No. 2) Regulations 2011/410, schedule 3, paragraph 1(2)(a)(vi)**

The additional specifications applicable to an individual's badge as follows:—

(a) subject to sub-paragraph (b), the rear side of an individual's badge must contain a close-up digital photograph of the head and shoulders of the badge holder. The photograph must have a strong definition between face and background and must be:

...

(vi) of the full head of the holder (without any other person visible or any covering, unless it is worn for religious beliefs or medical reasons) –

**Personal Licence (Scotland) Regulations 2007/77, regulation 3**

(1) A personal licence application or a personal licence renewal application is to be—

...

(b) accompanied by—

...

(ii) two photographs of the applicant which comply with paragraph (2) and one of which has a statement on it in accordance with paragraph (3).

(2) The two photographs of the applicant must—

...

(d) show the full face of the applicant, without the applicant wearing sunglasses or any head covering (unless the applicant wears such a covering on account of a religious belief).

The possession of blades, points, swords and other suchlike potentially offensive weapons is variously accommodated and acknowledged in criminal law, when such items are carried for religious purposes.

**Criminal Justice Act 1988, section 139**

(1) Subject to subsections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.

(2) Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed except a folding pocketknife.

(3) This section applies to a folding pocketknife if the cutting edge of its blade exceeds 3 inches.

(4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.

(5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had the article with him—

- (a) for use at work;
- (b) for religious reasons; or
- (c) as part of any national costume.

Similar provisions are made in the Criminal Law (Consolidation) (Scotland) Act 1995, sections 49(5)(b) (blade or point in public), 49A(4)(c) (offensive weapons in schools), and 49C(3)(c) (offensive weapons in prisons).

**Criminal Justice Act 1988, section 141ZA**

(1) This section applies where the Scottish Ministers make an order under subsection (2) of section 141 directing that the section shall apply to swords.

(2) The Scottish Ministers may include in the order provision for or in connection with modifying section 141 in its application to swords.

(3) The Scottish Ministers may in particular—

- (a) provide for defences (including in particular defences relating to religious, cultural or sporting purposes) to offences;

**Criminal Justice Act 1988 (Offensive Weapons) Order 1988/2019,  
schedule 1, paragraph 5A**

It shall be a defence for a person charged—

- (a) with an offence under section 141(1) [offensive weapons] of the Criminal Justice Act 1988; or
- (b) with an offence under section 50(2) or (3) [improper importation of goods] of the Customs and Excise Management Act 1979, in respect of any conduct of his relating to a weapon to which section 141 of the Criminal Justice Act 1988 applies by virtue of paragraph 1(r) to show that his conduct was for the purpose only of making the weapon available for the purposes of use in religious ceremonies.

**Criminal Law (Consolidation) (Scotland) Act 1995, section 49C**

(1) Any person who has with him in a prison—

- (a) an offensive weapon, or
- (b) any other article which has a blade or is sharply pointed, commits an offence.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the person had a reasonable excuse or lawful authority for having the weapon or other article with him in the prison.

(3) A defence under subsection (2) includes, in particular, a defence that the person had the weapon or other article with him in prison—

- (a) for use at work,
- (b) for religious reasons, or
- (c) as part of any national costume.

The slaughter of animals by religious methods is permitted under UK regulations, and such administrative provisions are generally acknowledged in the Treaty on the Functioning of the European Union.

**Welfare of Animals (Slaughter or Killing) Regulations 1995/731, part 4, regulation 21**

Schedule 12 shall have effect in relation to the slaughter of any animal by a religious method.

Schedule 12 to these Regulations consists of 15 paragraphs relating to the slaughter of animals by religious methods in accordance with the requirements of the Jewish and Muslim faiths. According to the Explanatory Note, these 1995 Regulations “which extend to Great Britain, give effect to the provisions of Council Directive 93/119/EC on the protection of animals at time of slaughter or killing.”

**Treaty on the Functioning of the European Union, article 13**

In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

The display of human remains for religious purposes is accommodated both in the Anatomy Act 1984 and in the Human Tissue Act 2004.

**Anatomy Act 1984, section 6A**

(1) Subject to subsections (2) to (8), no person shall publicly display—

- (a) an anatomical specimen,
- (b) a body or part of a body which has been used for anatomical examination, or
- (c) a body or part of a body which has been used outwith Scotland for anatomical examination or examination which has the characteristics of anatomical examination,

whether or not it has undergone a process to preserve it.

...

(13) For the purposes of this section, public display, in relation to the body or part of the body of a deceased person (including an anatomical specimen) does not include—

(a) display of the body or part for the purposes of enabling people to pay their final respects to the deceased or which is incidental to the deceased's funeral,

(b) use of the body or part for the purpose of public display at a place of public religious worship, or at a place associated with such a place, if there is a connection between the body or, as the case may be, the part and the religious worship which takes place at the place in question.

#### **Human Tissue Act 2004, section 40**

(1) This section applies—

(a) to the use of—

(i) the body of a deceased person, or

(ii) relevant material which has come from a human body,

for the purpose of public display at a place of public religious worship or at a place associated with such a place, and

(b) to the storage of—

(i) the body of a deceased person, or

(ii) relevant material which has come from a human body,

for use for the purpose mentioned in paragraph (a).

(2) An activity to which this section applies is excluded from sections 14(1) [concerning the remit of the Human Tissue Authority] and 16(2) [concerning the licensing of various activities involving human tissue] if there is a connection between—

(a) the body or material to which the activity relates, and

(b) the religious worship which takes place at the place of public religious worship concerned.

(3) For the purposes of this section, a place is associated with a place of public religious worship if it is used for purposes associated with the religious worship which takes place there.”

Persons within religious organisations are variously exempted from provisions surrounding the disclosure of information in relation to gender recognition.

**Gender Recognition (Disclosure of Information) (Scotland) Order  
2005/125, article 4**

(1) It is not an offence under section 22 of the [Gender Recognition] Act [2004, c.7] for a person who acquired protected information in an official capacity in relation to an organised religion to disclose that information to any other person acting in such a capacity if the conditions set out in paragraphs (2) and (3) are met.

(2) The disclosure is made for the purpose of enabling any person to make a decision in relation to—

- (a) whether to solemnise or permit the marriage of the subject;
- (b) the validity or dissolution of a marriage of the subject;
- (c) the admission or appointment of the subject—
  - (i) as a minister of religion;
  - (ii) to any employment, office or post for the purposes of an organised religion;
  - (iii) to any religious order or community associated with an organised religion; or
  - (iv) to membership, or any category of membership, of an organised religion;
- (d) the validity, suspension, termination or revocation of any admission or appointment mentioned in sub-paragraph (c); or
- (e) the eligibility of the subject to receive or take part in any religious sacrament, ordinance or rite, or take part in any act of worship or prayer, according to the practices of an organised religion.

(3) The disclosure is made for the purpose of enabling any person to make a decision in relation to the matters specified in paragraph (2)(c), (d) or (e) and the person who makes the disclosure reasonably believes that the person to whom the disclosure is made may require the information in order to make a decision in a way which complies with the doctrines of the religion or avoids

conflicting with the strongly held convictions of a significant number of the followers of the religion.

(4) It is not an offence under section 22 of the Act for a person who acquired protected information in an official capacity in relation to an organised religion, and who requires to make a decision in relation to the any of the matters specified in paragraph (2), to disclose that information to any person responsible for the supervision of the person making the disclosure.”

Religious communities are not obliged to pay resident members of such communities the National Minimum Wage.

#### **National Minimum Wage Act 1998, section 44A**

(1) A residential member of a community to which this section applies does not qualify for the national minimum wage in respect of employment by the community.

(2) Subject to subsection (3), this section applies to a community if—

- (a) it is a charity or is established by a charity,
- (b) a purpose of the community is to practise or advance a belief of a religious or similar nature, and
- (c) all or some of its members live together for that purpose.

(3) This section does not apply to a community which—

- (a) is an independent school or an alternative provision Academy that is not an independent school, or
- (b) provides a course of further or higher education.

(4) The residential members of a community are those who live together as mentioned in subsection (2)(c).

### **11. 6 Conclusions**

As explained in the Introduction, the aim of this Chapter is not to explain or analyse equality law in depth but simply to set out key statutory provisions as part of a General Audit of contemporary law as it relates to religion or belief. To draw any conclusions would not be appropriate. Some general comments can however be made simply on the basis of the range and extent of statutory provision.

One key distinction can be made between provisions which seek to establish formal equality on the basis of equal treatment and those which seek to promote substantive equality and which may require different treatment where that is required by the different needs of particular individuals. Both approaches are evident in the provisions set out above. There is also something of a distinction between traces of “old style” religion – evident perhaps in the special treatment of denominational schools – and traces of “new style” religion – emerging in the equivalence between religion and belief.

It is clear in this Chapter, that there is “quite a lot of law”. Or at least, there are numerous statutory provisions. There have been, however, relatively few cases and in particular there is little guidance from the higher courts in many of these areas. To date no equality cases concerning religion or belief have been heard by the Court of Justice of the European Union (CJEU) in contrast to other protected characteristics where the Court has been a significant source of guidance. It is therefore a largely untested area of law where there is potential for considerable further development.

# Chapter 12

## Family law

### Chapter 12 Family law

#### 12.1 Introduction

#### 12.2 Divorce

#### 12.3 Social work, care and adoption

#### 12.4 Conclusions

### 12.1 Introduction

Family law is an area of Scots law where the links with religion were historically clear and very strong. Key elements of what we now think of as “family law” were governed according to Canon law and, even after the Reformation, many of the principles continued relatively unchanged. Scots family law has been transformed over the last century or so by a process of extensive statutory reform and it might be argued that obvious links to religion have disappeared from what is a “modern” system of secular family law.

The legal regulation of marriage has been considered in detail in chapter 3. This chapter brings together a range of other provisions in family law where there is some acknowledgement or accommodation of religion.

### 12.2 Divorce

Against a trend of secularisation, it is perhaps rather surprising to find a new provision being introduced as recently as 2006, which takes account explicitly of religious divorce. The Divorce (Scotland) Act 1976 was amended in 2006<sup>6</sup> concerning postponement of a decree of divorce where a religious impediment to remarry exists. This was intended to address a particular problem concerning Jewish

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<sup>6</sup> By the Family Law (Scotland) Act 2006, s. 15.

religious divorces which the British legislature had already addressed for England and Wales but the statutory language is broad. The provision, in section 3A of the 1976 Act is in the following terms:

(1) Notwithstanding that irretrievable breakdown of a marriage has been established in an action for divorce, the court may—

(a) on the application of a party (“the applicant”); and

(b) if satisfied—

(i) that subsection (2) applies; and

(ii) that it is just and reasonable to do so,

postpone the grant of decree in the action until it is satisfied that the other party has complied with subsection (3).

(2) This subsection applies where—

(a) the applicant is prevented from entering into a religious marriage by virtue of a requirement of the religion of that marriage; and

(b) the other party can act so as to remove, or enable or contribute to the removal of, the impediment which prevents that marriage.

(3) A party complies with this subsection by acting in the way described in subsection (2)(b).

(4) The court may, whether or not on the application of a party and notwithstanding that subsection (2) applies, recall a postponement under subsection (1).

(5) The court may, before recalling a postponement under subsection (1), order the other party to produce a certificate from a relevant religious body confirming that the other party has acted in the way described in subsection 2(b).

(6) For the purposes of subsection (5), a religious body is “relevant” if the applicant considers the body competent to provide the confirmation referred to in that subsection.

(7) In this section—

“*religious marriage*” means a marriage solemnised by a marriage celebrant of a prescribed religious body, and “*religion of that marriage*” shall be construed accordingly;

*“prescribed”* means prescribed by regulations made by the Scottish Ministers.

(8) Any reference in this section to a marriage celebrant of a prescribed religious body is a reference to—

- (a) a minister, clergyman, pastor or priest of such a body;
- (b) a person who has, on the nomination of such a body, been registered under section 9 of the Marriage (Scotland) Act 1977 (c.15) as empowered to solemnise marriages; or
- (c) any person who is recognised by such a body as entitled to solemnise marriages on its behalf.

(9) Regulations under subsection (7) shall be made by statutory instrument; and any such instrument shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

Scots law is not alone in having introduced such a provision and it may be seen as part of a move towards recognising the multiple obligations – civil and religious – which some spouses may make on marriage. It can be argued in particular to be a provision which protects women who might otherwise remain tied to their husbands in the eyes of their religious community. Nonetheless, it is a somewhat surprising reintroduction of religion into the law of divorce.

### **12.3 Social work, care and adoption**

In the area of social work, residential care homes, and adoption, various statutory and regulatory provisions are found in Scots law concerning the religious persuasions of children. This appears to be one of the few areas of law where the beliefs of children are taken into account in their own right, rather than being considered primarily in the light of a child’s parent’s belief, as is the case for example in education law, although that is not to say that the beliefs of parents are not taken into account. The emphasis on the beliefs of children within this context is entirely to be expected, the usual bond between parent and child having been broken by factors such as the death of a child’s parents, or by the intervention of government agencies.

The Secretary of State for Scotland may make regulations in respect of the functions of a local authority in providing for children in need in order to take account of a child's religious background. This is set out in the Social Work (Scotland) Act 1968, section 5 as follows:

(2) The Secretary of State may make regulations in relation to—

- (a) the performance of the functions assigned to local authorities by this Act;
- (b) the activities of voluntary organisations in so far as those activities are concerned with the like purposes;
- (c) the performance of the functions of local authorities under any of the enactments mentioned in paragraphs (b), (d), (e), (g), (h), (i), (l), (o), (p), (q) and (s) of subsection (1B) above.

(3) Without prejudice to the generality of subsection (2) above, regulations under this section may make such provision as is mentioned in subsection (4) of this section as regards—

- (a) the boarding out of persons other than children by local authorities and voluntary organisations, whether under any enactment or otherwise; and
- (b) the placing of children under paragraph (a), or the making of arrangements in respect of children under paragraph (c), of section 26(1) of the Children (Scotland) Act 1995, by local authorities.

(4) The provision referred to in subsection (3) of this section is—

...

- (c) for securing that, where possible, the person with whom a child is so placed or with whom such arrangements are made is either of the same religious persuasion as the child or gives an undertaking that the child shall be brought up in that persuasion;

...

and that he shall be removed from the place in question if his welfare appears to require it.

A child's religious persuasion is often mentioned in statutory provisions, together with a child's racial origin and cultural and linguistic background, as shown in the following provisions:

**Children (Scotland) Act 1995, section 17**

(1) Where a child is looked after by a local authority they shall, in such manner as the Secretary of State may prescribe—

- (a) safeguard and promote his welfare (which shall, in the exercise of their duty to him be their paramount concern);
- (b) make such use of services available for children cared for by their own parents as appear to the authority reasonable in his case; and
- (c) take such steps to promote, on a regular basis, personal relations and direct contact between the child and any person with parental responsibilities in relation to him as appear to them to be, having regard to their duty to him under paragraph (a) above, both practicable and appropriate.

...

(4) In making any such decision a local authority shall have regard so far as practicable—

- (a) to the views (if he wishes to express them) of the child concerned, taking account of his age and maturity;
- (b) to such views of any person mentioned in subsection (3)(b) to (d) above as they have been able to ascertain; and
- (c) to the child's religious persuasion, racial origin and cultural and linguistic background.

**Children (Scotland) Act 1995, section 22**

(1) A local authority shall—

- (a) safeguard and promote the welfare of children in their area who are in need; and
- (b) so far as is consistent with that duty, promote the upbringing of such children by their families,

by providing a range and level of services appropriate to the children's needs.

(2) In providing services under subsection (1) above, a local authority shall have regard so far as practicable to each child's religious persuasion, racial origin and cultural and linguistic background.

**Adoption and Children (Scotland) Act 2007, section 14**

(1) Subsections (2) to (4) apply where a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The court or adoption agency must have regard to all the circumstances of the case.

(3) The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.

(4) The court or adoption agency must, so far as is reasonably practicable, have regard in particular to—

- (a) the value of a stable family unit in the child's development,
- (b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity),
- (c) the child's religious persuasion, racial origin and cultural and linguistic background, and
- (d) the likely effect on the child, throughout the child's life, of the making of an adoption order

Generally, local authorities, adoption agencies and care homes must have regard to the religious persuasion of children, and must ensure that a child continues to be brought up in accordance with their religious persuasion.

**Looked After Children (Scotland) Regulations 2009/210 (Scottish SI), part 2, reg. 4 ((1)(k))**

(1) The local authority must make an assessment of—

- (a) the child's immediate needs and how those needs can be met;
- (b) the child's long term needs and how those needs can be met;
- (c) proposals for safeguarding and promoting the child's welfare;

- (d) proposals for making sustainable and long term arrangements for the care of the child;
- (e) the nature of the services proposed for the child in the immediate and long term with particular regard to the information specified in Schedule 1;
- (f) alternative courses of action including the possibility of making an arrangement in accordance with regulation 8 or approving a person as a kinship carer;
- (g) whether the local authority should seek a change in the child's legal status;
- (h) the arrangements which require to be made for the time when the child will no longer be looked after by the local authority;
- (i) the existing health arrangements for the child and whether there is a need to change such arrangements taking into account the information specified in paragraph 9 of Schedule 1;
- (j) having regard to the information specified in paragraph 10 of Schedule 1, the child's educational needs, the proposals for meeting those needs, and the proposals for achieving continuity in the child's education;
- (k) the child's religious persuasion and the need for the child to continue to be brought up in accordance with their religious persuasion; and
- (l) any other matter relating to the welfare of the child either in the immediate or long term as appears to the local authority to be relevant.

**Adoption Agencies (Scotland) Regulations 2009/154 (Scottish SI),  
schedule 1, part 1 (Information about prospective adopters), paras. 16 &  
17**

16. Religious persuasion including the degree of religious observance.

17. The ability of the prospective adopter to have regard to a child's religious persuasion, racial origin and cultural and linguistic background.

**Adoption Agencies (Scotland) Regulations 2009/154 (Scottish SI),  
schedule 1, part 2 (Information about the child), paras. 4 & 15**

4. Religious persuasion of the child including details of any baptism, confirmation or equivalent ceremonies and level of current religious observance.

15. The child's views in relation to adoption and whether an application should be made for a permanence order with authority for the child to be adopted under section 80 of the [Adoption and Children (Scotland)] Act [2007, asp 4] taking into account the age and maturity of the child and any wishes in respect of their religious persuasion, racial origin and cultural and linguistic background.

The religious background of a child is a relevant factor to be considered in the context of placing the child for adoption. This can be seen, for example, in the Adoption Agencies (Scotland) Regulations 2009/154, part 4, regulation 12:

- (1) This regulation applies where an adoption agency is considering adoption for a child.
- (2) The adoption agency must, so far as is reasonably practicable and in the child's best interests—
  - (a) consult and take into account the views of—
    - (i) the child, taking account of their age and maturity; and
    - (ii) the child's parents and guardians if their whereabouts are known;
  - (b) take account of the child's religious persuasion, racial origin and cultural and linguistic background where known;

The religious persuasion of the parents and relations of children put up for adoption, together with any wishes such family members have in respect of a child's religious upbringing, must be compiled by adoption agencies, as provided by the Adoption

Agencies (Scotland) Regulations 2009/154, schedule 1, part 3 (Information about the child's family), paragraph 8:

8. Religious persuasion of the child's parents, guardian and other relatives including any wishes they have expressed as to the child's religious upbringing.

It is made clear, however, that such wishes are not binding, since any decisions will be guided by the welfare principle. This is explained in the following terms:

**Adoption Agencies (Scotland) Regulations 2009/154, schedule 2  
(Memorandum), paragraph 1**

This memorandum is addressed to the parent or guardian of a child for whom an adoption application is to be made....

1. If the court makes an adoption order, your responsibilities and rights (including financial obligations) as a parent or guardian will be transferred to the adopters and they will become in law your child's parents. You will then have no further right to see your child, unless voluntary contact is agreed by the adopters. You may however apply to the court for a contact order although leave of the court to make the application must be granted. You will cease to be the child's parent and will have no right to have your child returned to you.
2. If you wish your child to be brought up in a particular religious faith or have any other views on the upbringing of your child which you wish to be taken into account you should inform the adoption agency. The adoption agency is obliged, however, to make the welfare of the child its paramount consideration.

Nevertheless regard must be had to a child's religious persuasion, as well as to a child's racial original, cultural background and linguistic background. In this it may be the case that, as regards adoption, the wishes of children as to religious upbringing enjoy greater force than the wishes of parents and other family members, although the age of a child may have a bearing on the extent to which a child can be deemed to

have sufficiently clear wishes which will prevail over parental wishes. Be that as it may, decisions are ultimately governed by what is deemed to be best for the welfare of a child, and this guiding principle is capable of overriding considerations as to religion.

The importance of a child's ethnic, religious and cultural background is also found in regulations and statutory provisions concerning adoptions with a foreign element or inter-country adoptions.

**Adoptions with a Foreign Element (Scotland) Regulations 2009/182, part 3, regulation 46**

(1) The adoption panel must consider the proposed placement referred to it by an adoption agency under regulation 45(7) and make a recommendation to the agency as to whether—

- (a) the Convention prospective adopter is suitable to be an adoptive parent for the child; and
- (b) the proposed placement is in the best interests of the child.

(2) In considering what recommendation to make under paragraph (1), the adoption panel—

- (a) must have regard to—
  - (i) the child's upbringing and ethnic, religious and cultural background; ...

**Adoption (Intercountry Aspects) Act 1999**

**Schedule 1: Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption, Article 16**

1. If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall—

- (a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;

- (b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
- (c) ensure that consents have been obtained in accordance with Article 4; and
- (d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

In residential care homes, regard must be had to a child's wishes, and provision ought to be made so far as practicable to for children to receive religious instruction and to attend religious services in conformity with the religious persuasion of such children.

The Health and Social Services and Social Security Adjudications Act 1983, schedule 4, part 1, paragraph 19 provides that:

(1) The Secretary of State may make regulations as to the conduct of residential care homes, and in particular—

...

- (h) making provision for children under the age of 18 years who are resident in such homes to receive a religious upbringing appropriate to the religious persuasion to which they belong;

Further provision is made in respect of facilitating a child in residential care in practicing their religion through collective worship and religious education:

**Residential Establishments - Child Care (Scotland) Regulations  
1996/3256, part 2, regulation 14**

The managers of a residential establishment shall, so far as is practicable and having regard to the child's wishes and feelings, arrange that every child resident in the establishment is able to attend such religious services and to receive such religious instruction as may be appropriate to the child's religious persuasion.

**Residential Establishments - Child Care (Scotland) Regulations  
1996/3256, schedule 1 (Matters to be included in a statement of functions  
and objectives), paragraph 1**

Arrangements to meet the needs and development potential of all children resident in the establishment, including the child's emotional, spiritual, intellectual and physical needs and which give due regard to the child's religious persuasion, cultural and linguistic background and racial origin.

## **12.4 Conclusions**

To a large extent, religion has little explicit influence within contemporary Scots family law. Its changing place within marriage has been explored in some detail in chapter 4 of this Report and it might be argued that the legal acceptance of same sex relationships, both in terms of same sex marriage and civil partnership, is clear evidence of secularisation of family law. There is certainly little evidence of one particular religious tradition or one predominant religious body, but there is ongoing recognition of the importance to particular individuals of religious belief and religious obligation.

# **Chapter 13**

## **Immigration, Asylum, Refugees and Extradition**

Chapter 13 Immigration, Asylum, Refugees and Extradition

- 13.1 Introduction
- 13.2 Asylum claims
- 13.3 Refugee status
- 13.4 Transit visas
- 13.5 Detention centres
- 13.6 Extradition
- 13.7 Conclusions

### **13.1 Introduction**

The main focus of this Report is on Scots law as it applies within Scotland and therefore the focus is predominantly inward looking. Legal systems, however, sometimes also have to look outwards to other jurisdictions. There are two situations where Scots (or UK) law may have to look at other countries and their legal systems, and where religion may be an issue: in the area of international private law and in the context of immigration, asylum and extradition.

International private law encompasses the rules and principles which govern questions of jurisdiction and of choice of laws. How do the Scottish courts decide which law to apply when faced with a situation involving foreign nationals, foreign legal systems and a choice of laws. How should a Scottish court proceed, for example, when presented with a question concerning the validity of a divorce procedure gone through in Pakistan by Pakistani nationals who are now living in Scotland? Such questions sometimes raise issues not only of foreign laws but of foreign religious laws but, IPL is a very detailed and complex area of law which is beyond the scope of this relatively short Report.

The second area of law is, however, predominantly statute-based and therefore well suited to inclusion in our Report. Decisions about which individuals may be permitted to enter and remain in the UK and decisions about extradition to other jurisdictions sometimes include consideration of religion. As with many other areas mentioned in this Report, the law and in particular the practice of decision making is complex and often controversial. We have not attempted to deal with the practice but simply to highlight key provisions which give some indication of the ways in which religion features. These provisions are significantly different to the other provisions set out in this Report in that they refer to the way that religion is treated in other jurisdictions.

### **13.2 Asylum claims**

Various characteristics of persons seeking asylum in the UK are to be taken into account when deciding the validity of claims for asylum based on human rights, such characteristics including religion among many others. The range of statutory provisions highlight an awareness of the potential issues which might make it dangerous for individuals to return to the country from which they came or in which they have a right to reside.

The Nationality, Immigration and Asylum Act 2002, section 94, deals with the power of the Secretary of State to declare “a protection claim or human rights claim” as “clearly unfounded”. The underlying function of this provision is to ensure that individuals of a certain description are not forced to return to a state in which they have a right to reside if there is a serious risk of persecution. The relevant description of the individual at risk relate to:

s94(5C) ...

- (a) gender,
- (b) language,
- (c) race,
- (d) religion,
- (e) nationality,
- (f) membership of a social or other group,

- (g) political opinion, or
- (h) any other attribute or circumstance that the Secretary of State thinks appropriate.

A range of statutory provisions, regulating the process for dealing with asylum and immigration claims, share a particular formula of words. Part of the test for whether or not an individual may be removed from the UK focuses on whether or not the state to which he or she would be returned would be a place where life and liberty would be threatened by reasons including religion. This formula can be seen, for example, in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, schedule 3, part 2, paragraph 3:

- (1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed—
  - (a) from the United Kingdom, and
  - (b) to a State of which he is not a national or citizen.
- (2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place—
  - (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
  - (b) from which a person will not be sent to another State in contravention of his Convention rights, and
  - (c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

The same wording forms part of the various stages of the application and appeal process as seen in the following provisions:

**Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,  
schedule 3, part 2, paragraph 6**

A person who is outside the United Kingdom may not bring an immigration appeal on any ground that is inconsistent with treating a State to which this Part applies as a place—

- (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
- (b) from which a person will not be sent to another State in contravention of his Convention rights, and
- (c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

**Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,  
schedule 3, part 3, paragraph 8**

(1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim may be removed—

- (a) from the United Kingdom, and
- (b) to a State of which he is not a national or citizen.

(2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place—

- (a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and
- (b) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

**Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,  
schedule 3, part 3, paragraph 11**

A person who is outside the United Kingdom may not bring an immigration appeal on any ground that is inconsistent with treating a State to which this Part applies as a place—

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and

(b) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

**Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,  
schedule 3, part 4, paragraph 13**

(1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim may be removed—

(a) from the United Kingdom, and

(b) to a State of which he is not a national or citizen.

(2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place—

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and

(b) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

**Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,  
schedule 3, part 4, paragraph 16**

A person who is outside the United Kingdom may not bring an immigration appeal on any ground that is inconsistent with treating a State to which this Part applies as a place—

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and

(b) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

**Asylum and Immigration (Treatment of Claimants, etc.) Act 2004,  
schedule 3, part 5, paragraph 17**

This Part applies to a person who has made an asylum claim if the Secretary of State certifies that—

- (a) it is proposed to remove the person to a specified State,
- (b) in the Secretary of State's opinion the person is not a national or citizen of the specified State, and
- (c) in the Secretary of State's opinion the specified State is a place—
  - (i) where the person's life and liberty will not be threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and
  - (ii) from which the person will not be sent to another State otherwise than in accordance with the Refugee Convention.

**13.3 Refugee status**

In deciding whether or not a person is a refugee, the religion of the person may be taken into account, including such a person's theistic, non-theistic, and atheistic beliefs.

**Refugee or Person in Need of International Protection (Qualification)  
Regulations 2006/2525, reg. 6**

(1) In deciding whether a person is a refugee:

- (a) the concept of race shall include consideration of, for example, colour, descent, or membership of a particular ethnic group;
- (b) the concept of religion shall include, for example, the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

...

(d) a group shall be considered to form a particular social group where, for example:

(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; ...

### 13.4 Transit visas

Key to many of these provisions about asylum and immigration is the various ways in which people may be classified and the different characteristics which feature in their identity. In a specific provision relating to transit visas, it is notable that religion is not an accepted means of categorizing passengers. Transit visas may not describe persons in respect of their race, colour, or religion, as set out in the Immigration and Asylum Act 1999, section 41:

(1) The Secretary of State may by order require transit passengers to hold a transit visa.

(2) “*Transit passengers*” means persons of any description specified in the order who on arrival in the United Kingdom pass through to another country without entering the United Kingdom; and “*transit visa*” means a visa for that purpose.

(3) The order—

(a) may specify a description of persons by reference to nationality, citizenship, origin or other connection with any particular country but not by reference to race, colour or religion; ...

### **13.5 Detention centres**

The provisions set out above all relate to what can be a very lengthy decision making process concerning the status of individuals entering, or seeking to enter, the UK. One very practical aspect of this process relates to their possible physical detention during the process. Detention centres, rather like prisons and young offenders' institutions, make provision for the persons detained in such centres to continue to practise their religion. The following Rules indicate a range of ways in which religion and religious practices are respected:

#### **Detention Centre Rules 2001/238, part 2, rules 13, 14, 20-25**

##### 13. Food

(1) Subject to any directions of the Secretary of State, no detained person shall be allowed, except as authorised by the medical practitioner to have any food other than that ordinarily provided.

(2) No detained person shall be given less food than is ordinarily provided, except with his written consent and upon the written recommendation of the medical practitioner.

(3) The food provided shall:

- (a) be wholesome, nutritious, well prepared and served, reasonably varied, sufficient in quantity and
- (b) meet all religious, dietary, cultural and medical needs.

##### 14. Alcohol

No detained person shall be allowed to have any intoxicating liquor except:—

- (a) by written order of the medical practitioner, specifying the quantity and the name of the detained person and the medical reason for the order; or
- (b) for the observance of religious festivals, and for sacraments, with the prior agreement of the manager.

##### 20. Diversity of religion

The practice of religion in detention centres shall take account of the diverse cultural and religious background of detained persons.

#### 21. Religious denomination

If a detained person wishes to declare himself to belong to a particular religion, the manager shall upon that person's reception at the detention centre record the religion to which the detained person wishes to belong.

#### 22. Manager of religious affairs and ministers of religion

(1) Every detention centre shall have a manager of religious affairs whose appointment shall be approved by the Secretary of State.

(2) Where in any detention centre the number of detained persons who belong to a particular religion is such as in the opinion of the Secretary of State to require the appointment of a minister of that religion, the Secretary of State may appoint such a minister to that detention centre.

(3) The manager of religious affairs shall make arrangements for a minister of religion to meet with every detained person of his religion individually soon after the detained person's reception into the detention centre if the detained person so wishes.

(4) A minister of religion shall visit daily all detained persons of his religion who are sick, under restraint, in temporary confinement, or undergoing removal from association, as far as he reasonably can and to the extent that the detained person so wishes.

#### 23. Regular visits by ministers of religion

(1) The manager shall make arrangements for a minister of religion to visit detained persons of his religion as often as he reasonably can and to the extent that the detained person so wishes.

(2) Where a detained person belongs to a religion for which no minister of religion has been appointed the manager will do what he reasonably can, if so requested by the detained person, to arrange for him to be visited by a minister of that religion as often as he reasonably can and to the extent that the detained person so wishes.

#### 24. Religious services

The manager shall make arrangements for ministers of religion to conduct religious services for detained persons of their religions at such times as may be arranged.

#### 25. Religious books

There shall, so far as reasonably practicable, be available for the personal use of every detained person such religious books recognised by his religion as are approved by the Secretary of State for use in detention centres.

### **13.6 Extradition**

In asylum and immigration claims, provision is made, as shown above, for the UK to seek to protect individuals against persecution on grounds of a range of factors including religion. This is a way of the UK seeking to ensure that it abides with international human rights conventions. Similar considerations apply in the context of extradition. Put simply, the UK may not extradite persons to states in which such persons are entitled to reside, if such persons may be variously at risk in such states on the grounds of various characteristics, including religion. This position can be seen clearly in the Extradition Act 2003, section 13 of which provides that:

A person's extradition to a category 1 territory is barred by reason of extraneous considerations if (and only if) it appears that—

- (a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or
- (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.

Related and similar provision is made in sections 40 and 81 of the Extradition Act 2003.

### **13.7 Conclusions**

The presence of religion as a factor within statutory provisions relating to asylum and refugee status is not surprising as it reflects the operation of both the human right to freedom of conscience and religion and the position of religion as a protected characteristic in terms of equality. It is perhaps more surprising that these provisions all refer only to religion and not to the increasingly prevalent category of religion or belief.

# Chapter 14

## Oaths

### Chapter 14 Oaths

- 14.1 Introduction
- 14.2 Oaths of allegiance
- 14.3 Solemn affirmation
- 14.4 Lack of religious belief
- 14.5 Armed services
- 14.6 Conscientious objection
- 14.7 Conclusions

### **14.1 Introduction**

While a search for the particular term “oath” was not undertaken as part of this report, results for oaths have variously been generated by other search terms used. The use of oaths is common in almost all legal systems and has a long and complex history, with various explanations as to their significance.<sup>1</sup> The words of individual oaths clearly reference particular religions and to some extent there is recognition of religious diversity in the form of permitted variations. Provision is also made in most circumstances for the use of “affirmation” as an alternative to an oath.

### **14.2 Oaths of allegiance**

As is noted in Chapter 2, concerning the Church of Scotland, oaths still form a procedural part of the appointment of the British Head of State, and include oaths to uphold both the Church of England and the Protestant religion as established in Scotland. The Regency Act 1937 adds a little more detail to this picture, as a regent’s oath involves explicit mention of various historical Scottish Acts relating to the place of Protestantism in Scotland. The Regency Act 1937 provides in section 4 that:

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<sup>1</sup> A fascinating and detailed historical and comparative account of the use of oaths can be found in H. Silving, “The Oath: I” (1959) 68(7) *The Yale Law Journal* 1329; “The Oath: II” (1959) 68(8) *The Yale Law Journal* 1527.

(1) The Regent shall, before he acts in or enters upon his office, take and subscribe before the Privy Council the oaths set out in the Schedule to this Act, and the Privy Council are empowered and required to administer those oaths and to enter them in the Council Books.

(2) The Regent shall not have power to assent to any Bill for changing the order of succession to the Crown or for repealing or altering an Act of the fifth year of the reign of Queen Anne made in Scotland entitled “An Act for Securing the Protestant Religion and Presbyterian Church Government.

One of the oaths taken by a Regent runs (Sched 1, para 3):

I swear that I will inviolably maintain and preserve in England and in Scotland the Settlement of the true Protestant religion as established by law in England and as established in Scotland by the laws made in Scotland in prosecution of the Claim of Right, and particularly by an Act intituled “An Act for Securing the Protestant Religion and Presbyterian Church Government” and by the Acts passed in the Parliament of both Kingdoms for Union of the two Kingdoms, together with the Government, Worship, Discipline, Rights, and Privileges of the Church of Scotland. So help me God.

It may be noted that Oaths of Allegiance are routinely administered to members of the House of Lords, the House of Commons, the Scottish Parliament, members of the Scottish judiciary, various officers of state – such as the First Minister of Scotland, and to members of the Armed Forces. While Oaths of Allegiance are often taken to be simply a matter of formality, in law they enshrine the principle that persons in positions of trust and responsibility within the British State must be loyal to and acknowledge the heirs and successors of the British sovereign according to law. The line of succession is still governed by religious considerations dating back to the Bill and Claim of Rights and the constituting documents of the United Kingdom of Great Britain. As such, all those who take this oath accept the principle that only Protestants

may stand in the line of succession to the British Crown until such time as Westminster legislates otherwise.

### **14.3 Solemn affirmation**

In general, any person who objects to taking an oath may make a solemn affirmation instead. The Oaths Act 1978, section 5 provides that:

- (1) Any person who objects to being sworn shall be permitted to make his solemn affirmation instead of taking an oath.
- (2) Subsection (1) above shall apply in relation to a person to whom it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief as it applies in relation to a person objecting to be sworn.
- (3) A person who may be permitted under subsection (2) above to make his solemn affirmation may also be required to do so.
- (4) A solemn affirmation shall be of the same force and effect as an oath.

### **14.4 Lack of religious belief**

A lack of religious belief on the part of a person by whom an oath is taken does not invalidate such an oath. This is provided in section 4 of the Oaths Act 1978:

- (1) In any case in which an oath may lawfully be and has been administered to any person, if it has been administered in a form and manner other than that prescribed by law, he is bound by it if it has been administered in such form and with such ceremonies as he may have declared to be binding.
- (2) Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking it, no religious belief, shall not for any purpose affect the validity of the oath.

## **14.5 Armed services**

Oaths are variously mentioned in Regulations affecting the armed services as shown in the provisions set out below. Although it is clear that religious belief is central to the various oaths, provision is nonetheless made to accommodate diversity of belief as evidenced by this provision in the Armed Forces (Service Inquiries) Regulations 2008/1651, schedule 1, para. 3:

If none of the forms of oath provided in this Schedule is appropriate to the religious beliefs of the person taking the oath, an oath may be administered in such form and manner as the person taking the oath declares to be binding on his conscience in accordance with his religious beliefs.

This same clause is also used in:

Courts-Martial (Royal Navy) Rules 2007/3443, schedule 4, part 1, para. 3;  
Naval Custody Rules 2000/2367, schedule 4, part 1, para. 3;  
Summary Appeal Court (Navy) Rules 2000/2370, schedule 5, part 1, para. 3;  
Summary Appeal Court (Air Force) Rules 2000/2372, schedule 5, part 1, para. 3;  
Administration of Oaths (Summary Appeal Court) (Navy) Order 2000/2376, schedule 1, para. 3;  
Administration of Oaths (Summary Appeal Court) (Air Force) Order 2000/2378, schedule 1, para. 3;  
Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009/2056, schedule 2, para.3;  
Courts-Martial (Royal Air Force) Rules 2007/3444, schedule 4, part 1, para. 3.

The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009/2056, schedule 2, paras. 1 & 5 provide:

1. The service policeman taking the oath shall hold the New Testament, or if a Jew the Old Testament, in his uplifted hand and shall say, or repeat after the person administering it, the oath provided in paragraph 5 of this Schedule.

5. The oath shall be sworn in the following form:

“I swear by Almighty God that I shall truthfully answer any questions I am asked.”

The clause found in para. 1 above, is also used in:

Armed Forces (Service Inquiries) Regulations 2008/1651, schedule 1, para. 1;  
Courts-Martial (Royal Navy) Rules 2007/3443, schedule 4, part 1, para. 1;  
Courts-Martial (Royal Air Force) Rules 2007/3444, schedule 4, part 1, para. 1;  
Naval Custody Rules 2000/2367, schedule 4, part 1, para. 1;  
Summary Appeal Court (Navy) Rules 2000/2370, schedule 5, part 1, para. 1;  
Summary Appeal Court (Air Force) Rules 2000/2372, schedule 5, part 1, para. 1;  
Administration of Oaths (Summary Appeal Court) (Navy) Order 2000/2376, schedule 1, para.1;  
Administration of Oaths (Summary Appeal Court) (Air Force) Order 2000/2378, schedule 1, para.1.

The use of solemn affirmation as an alternative to oath is shown, for example, in the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009/2056, part 2, art. 11:

(1) Before a judge advocate asks any question which a service policeman would be required under article 8(6) to answer on oath, an oath shall be administered to the service policeman.

(2) If—

(a) a service policeman required under article 8(6) to answer on oath objects to being sworn, or

- (b) it is not reasonably practicable without inconvenience or delay to administer an oath to a service policeman in the manner appropriate to his religious belief,  
he shall be required to make a solemn affirmation instead of taking an oath.
- (3) An oath or affirmation required to be administered under this Order shall be administered in the form and manner set out in Schedule 2 by the judge advocate or by another person acting on his behalf.

The availability of affirmation as an alternative to oath is also shown in the Armed Forces (Service Inquiries) Regulations 2008/1651, reg. 11(8):

- (8) Where the president would, apart from this paragraph, require a witness to give oral evidence on oath and—
  - (a) the witness objects to taking an oath; or
  - (b) it is not reasonably practicable without inconvenience to, or without delaying the proceedings of, the panel to administer an oath to a witness in the manner appropriate to his religious belief,  
he must be required to make a solemn affirmation instead of taking an oath.

Similar permission, although in this case the language is permissive rather than obligatory, is set out in the Courts-Martial (Royal Navy) Rules 2007/3443, part 9, rule 56:

- (3) If—
  - (a) a person required to take an oath for the purposes of proceedings before the court objects to being sworn, or
  - (b) it is not reasonably practicable to administer an oath to such a person as aforesaid in the manner appropriate to his religious belief,  
he shall be permitted to make a solemn affirmation instead of taking an oath...

A similar provision is also to be found in:

Courts-Martial (Royal Air Force) Rules 2007/3444, part 9, rule 59

Summary Appeal Court (Navy) Rules 2000/2370, part v, rule 31(4)

Naval Custody Rules 2000/2367, part v, rule 27(2)

Summary Appeal Court (Air Force) Rules 2000/2372, part v, rule 31(4)

## **14.6 Conscientious objection**

The use of oaths in the context of establishing conscientious objection is well established and is evidenced, for example, in the context of assisted reproduction.

The Human Fertilisation and Embryology Act 1990, section 38 provides that:

(1) No person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty, however arising, to do so.

(2) In any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(3) In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in a particular activity governed by this Act shall be sufficient evidence of that fact for the purpose of discharging the burden of proof imposed by subsection (2) above.

## **14.7 Conclusions**

The use of oaths in the legal and constitutional setting has a very long and complex history and there are many explanations for their significance; these include ideas that the modern judicial oath may stem from pagan or pre-religious periods. In Scotland, and the UK more broadly, contemporary versions of oaths clearly reference religion and religious belief but provisions have been introduced to ensure that, in general, no one religion dominates but that there should be accommodation of diversity of religious belief. There is also provision for solemn affirmation as an alternative to oath. Although the law has been amended in a relatively piecemeal way in order to make it more suitable for a pluralist society, there has been much less fundamental reconsideration of the nature, significance and impact of oaths.

# Chapter 15

## Religion or belief: statutory terms and definitions

Chapter 15 Religion or belief: statutory terms and definitions

15.1 Introduction

15.2 Individual rights and protections

15.3 Groups, organisations and bodies

15.4 Behaviour and beliefs

15.5 Conclusions

### 15.1 Introduction

A variety of terms including “religion”, “religion or belief”, “religion, belief or non-belief” and “religious group” are used in various places throughout the laws in force in Scotland. Generally there is a trend towards including “belief” in conjunction with the word “religion” although this is not universal. Even where “belief” is not juxtaposed with religion, it is often made clear that the word “religion” is to be interpreted as including other non-religious beliefs.

The following selection of statutory provisions, while not exhaustive, gives an indication of the range of terminology used and the various contexts in which it is used. The Scottish courts have had little opportunity to interpret these various statutory provisions and therefore the focus here is simply on setting out the words as they appear in statute. Some of these provisions are included in other sections of this report where they are looked at in the context of the particular substantive area of law but here they are set out simply to show the range of concepts and definitions which are used.

## **15.2 Individual rights and protections**

The terms religion or religion or belief are found in various UK and international measures aimed at protecting individual equality and human rights. A key starting point for individual rights is the European Convention on Human Rights which provides in Article 9 that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Individual rights are also protected in terms of equality or non-discrimination; concepts which form a fundamental element of the European Union. The Treaty on the Functioning of the European Union provides in Article 10 that:

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

That broad aspiration is given more precise focus in Article 1 of the EU Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation which provides that:

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

The European Directive is, in turn, implemented in the UK by means of the Equality Act 2010. For the purposes of the 2010 Act, the protected characteristic of “religion or belief” has been defined in such a way that “religion” includes a lack of religious belief, and “belief” includes religious and philosophical belief, as well as a lack or belief. Section 10 of the Equality Act 2010 provides that:

- (1) *Religion* means any religion and a reference to religion includes a reference to a lack of religion.
- (2) *Belief* means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
- (3) In relation to the protected characteristic of religion or belief—
  - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
  - (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

The Equality Act explicitly includes religion and belief but in other legislation, although the category of “religion” is set out without the addition of the phrase “or belief”, it is provided that the term can be defined to include “belief”. For example, the following Regulations provide that “religion” is taken to include the “holding of theistic, non-theistic, and atheistic beliefs”.

In addition to general protection against discrimination, as set out above, there is also provision in the specific context of the armed services. In the Armed Forces Act 2006, the format of the provision is slightly different with belief simply being listed as one of the protected characteristics, rather than being linked by “or” with religion. The Armed Forces (Service Complaints Commissioner) Regulations 2007/3352 provide at regulation 2:

- (1) For the purposes of section 338(1) of the [Armed Forces] Act [2006], a person has been wronged in a prescribed way if he has been the subject of:
  - (a) discrimination;
  - (b) harassment;

- (c) bullying;
- (d) dishonest, improper or biased behaviour.

(2) In this regulation “*discrimination*” means—

- (a) discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender re-assignment, status as a married person or civil partner, religion, belief or sexual orientation; ...

Where there is protection in respect of religion and religious beliefs, there is a trend towards defining the scope of protection broadly both in terms of the particular religion and non-religious beliefs. This can be seen, for example, in criminal law regulating offensive behaviour at football. Although this protection may have been conceived within the particular Scottish context of Protestant and Catholic sectarianism, the statutory language used in the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 7 is notably broad:

(1) For the avoidance of doubt, nothing in section 6(5) [*regarding threatening communications*] prohibits or restricts—

- (a) discussion or criticism of religions or the beliefs or practices of adherents of religions,
- (b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters,
- (c) proselytising, or
- (d) urging of adherents of religions to cease practising their religions.

(2) In subsection (1), “*religion*” includes —

- (a) religions generally,
- (b) particular religions,
- (c) other belief systems.

In various areas of Scots law, specific protection is given to individuals in order to respect their beliefs. This can be seen, for example, in the Data Protection Act 1998, which makes special provision for sensitive personal data. Information about religious or other beliefs is treated as “sensitive” in terms of section 2:.

In this Act “*sensitive personal data*” means personal data consisting of information as to—

...

(c) his religious beliefs or other beliefs of a similar nature,

It is interesting to note in this provision the inclusion of the phrase “of a similar nature” in contrast to the provisions set out above where no such explicit limitation is placed on “beliefs”.

There is a similarly broad definition in the Refugee or Person in Need of International Protection (Qualification) Regulations 2006/2525, regulation 6 which provides that:

1) In deciding whether a person is a refugee:

...

(b) the concept of religion shall include, for example, the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

The disclosure, or not of information about religion or belief, is also dealt with in the context of prisons and data about prisoners. The Prisons and Young Offenders Institutions (Scotland) Rules 2011/331 part 2, rule 13 provides that:

(1) Details about a prisoner's religion, belief or non-belief must be recorded by the Governor in accordance with this rule.

(2) A prisoner is to be treated as having a particular religion, belief or non-belief for the purposes of these Rules if he or she has declared this upon reception at the prison or at any other time.

(3) A prisoner is not obliged to give any information about having a particular religion, belief or non-belief at reception or at any other time.

(4) Any information provided in accordance with paragraph (2) must be recorded and passed to the chaplaincy team.

### **15.3 Groups, organisations and bodies**

Human rights and rights in respect of non-discrimination and equality are primarily individual rights but there is provision in several aspects of Scots law for religious groups or bodies. The Criminal Justice (Scotland) Act 2003 defines “religious group” as meaning persons defined by their adherence to their “religious belief, or lack of religious belief”.

In section 74(7) of the Act the term “religious group” is given the following meaning:

In this section, “*religious group*” means a group of persons defined by reference to their—

- (a) religious belief or lack of religious belief;
- (b) membership of or adherence to a church or religious organisation;
- (c) support for the culture and traditions of a church or religious organisation; or
- (d) participation in activities associated with such a culture or such traditions.

This definition highlights some of the nuances of individual behaviour in terms of association with a particular religion or belief, with references to the wide variety of links which sociologists of religion might describe in terms of “believing” or “belonging”.

The Marriage and Civil Partnership (Scotland) Act 2014 introduced the new concept of “religious or belief body” in respect of the authorisation of celebrants to solemnize marriage or register civil partnership. The definition is the same in both Acts and can be seen in section 135 of the Civil Partnership Act 2004, as amended by section 24 of the 2014 Act.

(1) In this Part, unless the context otherwise requires:

...

“*religious or belief body*” means an organised group of people—

- (a) which meets regularly for religious worship, or
- (b) the principal object (or one of the principal objects) of which is to uphold or promote philosophical beliefs and which meets regularly for that purpose;

#### **15.4 Behaviour and beliefs**

Religion, and now belief, is acknowledged in the context of functions or forms of behaviour in various statutes. Charity law and the idea of charitable functions or purposes was traditionally closely linked with religion but here too there is a trend towards the extension of religion to include other non-religious beliefs. In Scots charity law, the “advancement of any philosophical belief (whether or not involving belief in a god)” is now treated in statute as analogous to the advancement of religion.

The test for charitable status is set out in section 7 of the Charities and Trustee Investment (Scotland) Act 2005, in the following terms:

(1) A body meets the charity test if—

- (a) its purposes consist only of one or more of the charitable purposes, and
- (b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

(2) The charitable purposes are—

...

- (b) the advancement of education,
- (c) the advancement of religion,
- ...
- (p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

(3) In subsection (2)—

...

(f) for the purposes of paragraph (p), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c).”

In general, this Scottish Act accords with the UK Charities Act 2011, chapter 1 of which affects Scots law “in so far as it affects the construction of references to – (a) charities, or (b) charitable purposes” (s. 7(1)). Section 3(1)(c) of the 2011 Act states that “advancement of religion” is a charitable purpose, and defines “religion” as used in that subsection (1)(c) as including “(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god.”

The idea of administering an oath was tied up with ideas of religious belief and adherence. Although many of the provisions which have been cited in this chapter are relatively recent, the Oaths Act 1978 signals a well established practice to accommodate individuals who do not have a religious belief. Section 4 of the 1978 Act provides that:

- (1) In any case in which an oath may lawfully be and has been administered to any person, if it has been administered in a form and manner other than that prescribed by law, he is bound by it if it has been administered in such form and with such ceremonies as he may have declared to be binding.
- (2) Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking it, no religious belief, shall not for any purpose affect the validity of the oath.

## **15.5 Conclusions**

The terms and phrases highlighted in this chapter are certainly not widespread in Scots law but they do appear in a variety of contexts. As a general trend, where there is provision for “religion”, there is now also provision for “belief”. The trend is similar although the exact language is not always the same and in particular it is not always clear to what extent belief must in some way correspond to religion or whether

it is a completely freestanding concept. The provisions highlighted in this chapter also help to show the different ways in which religion and belief have entered Scots law. Some are current versions of quite long established presence: for example the provisions relating to charities. Other provisions are much more recent in origin: individual human rights and rights to equality and protection against discrimination.

# Chapter 16

## Sabbath in Scots Law

### Chapter 16 Sabbath in Scots law

- 16.1 Introduction
- 16.2 The reach of desuetude: Sunday commerce
- 16.3 Sunday church attendance
- 16.4 A “perpetuall commandment”?
- 16.5 Miscellaneous statutory provisions
  - 16.5.1 Employment on the Sabbath
  - 16.5.2 Sabbatarianism in local authority policy
- 16.6 Conclusions

### 16.1 Introduction

The Sabbath was, after the Reformation of 1560, to become a central test of conformity to the Presbyterian order of Scotland.<sup>1</sup> Initially opposed by John Knox, it emerged in the seventeenth century with geographical variations in the enforcement applied by Reformers, but from the 1640s it became a test of puritanical zeal in many places. So much so, that in the eighteenth and early nineteenth centuries, Sabbatarian strictures intensified. Battles over the application of Sunday closure applied to various branches of the industrialising economy: the running of Sunday trains and sailing of Sunday ferries, the opening of museums and art galleries, the playing of games and sports (which were mostly banned by local byelaws), and of course Sunday working

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<sup>1</sup> To read about the history of the Sabbath in Scotland, see R.D. Brackenridge, ‘Sunday observance in Scotland 1689-1900,’ unpublished PhD thesis, University of Glasgow, 1962; L. Leneman, ‘“Prophaning” the Lord’s Day: Sabbath breach in early modern Scotland,’ *History* vol. 74 (1989), pp. 217-31; J. Carter, ‘Sunday observance in Scotland 1560-1605’, unpublished PhD thesis, University of Edinburgh, 1957; C.J.A. Robertson, ‘Early Scottish railways and the observance of the Sabbath’, *Scottish Historical Review* vol. 57, 1978, pp. 143- 67; R.D. Brackenridge, ‘The “Sabbath war” of 1865-66: the shaking of the foundations’, *Records of the Scottish Church History Society* vol. xvi (1966-8); Callum G Brown, ‘Spectacle, restraint and the twentieth-century Sabbath wars: the “everyday” Scottish Sunday’, in L. Abrams and C.G. Brown (eds.), *A History of Everyday Life in Twentieth-century Scotland* (Edinburgh, Edinburgh University Press, 2010), pp. 153-80.

in factories. By the late Victorian period, families were accustomed to there being a restricted menu of “respectable” activities on a Sunday, which included walks in parks but not playing sport in them. But things were already changing. Though many local authorities continued to ban sport on their land until the 1960s (notably public golf courses and football playing fields), the statutory law on restricted Sunday pastimes was already falling into desuetude as social pressure increased (especially from working people whose only day for leisure was on a Sunday, and from non-protestants who were less inclined or not inclined at all to uphold Sabbatarian values). But it was in the 1960s and 1970s that the custom of, as distinct from the law enforcing, upholding the Christian holy day started to seriously collapsed with the full opening of shops and, very quickly, cinemas, playing fields, spectator sport venues, public houses and off licenses. In this story, custom and local authority bye laws, enabled by permissive legislation, were as important as statutory law.

## 16.2 The reach of desuetude: Sunday commerce

The place of the Sabbath in Scots law is usefully set out in one of the last-reported cases dealing with the subject in the Outer House of the Court of Session, namely *Brown v. Magistrates of Edinburgh* (1931, S.L.T., 456), which was heard by Lord MacKay. This case occurred some twenty-five years after the passage of the Statute Law Revision (Scotland) Act 1906 by which many of the older Scottish statutes dealing with the Sabbath had been repealed. In this *Brown* contained an analysis by Lord MacKay of precisely which statutes had been repealed, which statutes remained on the statute book, and, of those which had not been repealed, which could be considered to have fallen into desuetude.

*Brown* concerned an attempt by several members of the public to have the magistrates of Edinburgh, acting as a licensing authority, restrained from permitting cinema performances on Sundays. The pursuers based their action on various historical Scottish Acts, namely the Sunday Act 1579<sup>2</sup>, the Sunday Act 1661<sup>3</sup>, the Confession of Faith Act 1690,<sup>4</sup> and the Scottish Episcopalians Act 1711.<sup>5</sup>

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<sup>2</sup> I.e. the Act anent **Discharging of markets and labouring on Sundays or playing and drinking in time of sermon** (*RPS*, [1579/10/23](#)).

The Sunday Act of 1579 forbade the “halding and keiping of ... mercattis and fairis on Sondagis, using of handy laubor and working thairon as on the remanent dayis of the oulk, ... gamyng and playing, passing to tavernis and ailhouses, and wilfull remaning fra the paroche kirk in tyme of sermone or prayers on the Sondag” under various pecuniary pains, with an ultimate sanction of putting offenders in public stocks. The Sunday Act of 1661 inhibited and discharged “all salmond fishing, going of salt pans, milnes or kills, all hireing of shearers, carieing of loads, keeping of mercats or using any sorts of merchandice on the said day, and all other prophanation thairof whatsoever...”. The Confession of Faith Act 1690 in a sense incorporated the Westminster Confession of Faith into Scots law. The Scottish Episcopalians Act 1711, s. 8 ran “Provided always and it is the true Intent and Meaning of this Act That all the Laws made against Prophaness and Immorality and for the frequenting of Divine Services on the Lords Day commonly called Sunday shall be still in force and executed against all Persons that offend against the said Laws or shall not resort either to some Church or to some Congregation or Assembly of religious Worship allowed and permitted by this Act.”

While there had been a good many other historical Acts passed in favour of the Sabbath since the sixteenth century, those cited in *Brown* were the only Acts which had not been explicitly repealed by the Statute Law Revision (Scotland) Act 1906.

One of the points to which the Lord Ordinary, Lord Mackay, therefore had to devote his attention was whether or not those Acts touching upon the Sabbath which had not been repealed in 1906 had fallen in desuetude. While this point was not finally determined, Mackay’s judgment on this head is particularly helpful for understanding the parameters involved in trying to determine the status of historical Scottish Acts

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<sup>3</sup> I.e. the **Act for the due observation of the Sabbath day** (*RPS*, [1661/1/345](#)).

<sup>4</sup> I.e. the **Act ratifying the Confession of Faith and settling presbyterian church government** (*RPS*, [1690/4/43](#)).

<sup>5</sup> I.e. “10 Anne, cap. 7”. It must be noted that *Scots Statutes Revised* notes that what is referred to in the “common printed editions” as chapter 7 of the 10<sup>th</sup> year of the reign of Queen Anne is now referred to as chapter 10. That is to say, 10 Anne, cap. 7 is now referred to at 10 Anne, cap. 10, which is the Scottish Episcopalians Act 1711.

which remain on the statute book, a topic which also has considerable significance for the problem of the status of the Church of Scotland in law.

Lord Mackay made the following distinctions: Acts of the pre-Union Scottish parliament may fall into desuetude; Acts of the pre-Union English parliament may not, and as such must be repealed if they are to cease to be part of the law of England and Wales. Acts of the British parliament are treated in the same way as Acts of the pre-Union English parliament. In this respect Mackay held that the pre-1707 Scottish Sabbath Acts were capable of falling into desuetude, whereas Scottish Episcopalians Act 1711 could not fall into desuetude, but rather had to be repealed in order to cease to be law.

Lord Mackay then offered a definition of desuetude in Scots law: “I hold it clear in law that desuetude requires for its operation a very considerable period, not merely of neglect, but of contrary usage of such a character as practically to infer such completely established habit of the community as to set up a counter law or establish a *quasi*-repeal. I shall adopt the statements of its import given in Erskine (I. i. 45), Bell’s Dictionary under title Desuetude, and Paterson v. Just (6th December 1810, F.C.) (as corrective of Bankton’s statement). Erskine treats it as “a posterior custom repealing or derogating from a statute”; and assigns his reason, “for the contrary immemorial custom sufficiently presumes the will of the community to alter the law in all its clauses.””

This definition of desuetude was then applied in so far as possible within the confines of the process to the historical Acts cited by the pursuers. One point in effect granted by the pursuers’ council was that the compulsory attendance at church enjoined by the Sunday Act 1579 was no longer observed, from which it was concluded by Mackay that at least that part of the 1579 Act was in desuetude. The question of what might be termed “partial desuetude” of a pre-Union un-repealed Act was also addressed, in that Lord Mackay, following earlier precedent, stated that Acts may “go into desuetude in part and not in whole, providing the parts in question are sufficiently independent one of the other”. From this position, Lord Mackay declared himself “satisfied with the argument of the pursuer’s counsel that in this case the provisions are so distinct, and

therefore, in spite of his admission of part desuetude, he is entitled to found upon the remaining sections of the four Acts.” That the remaining parts of the four Acts were held not to be in desuetude resulted from the failure of counsel for the defence to provide sufficient arguments to that effect, such as could be admitted to proof.<sup>6</sup>

Despite the Lord Ordinary holding the “remaining sections of the four Acts” not to be in desuetude, in the event the contents of these Acts were not such as to render the pursuers’ plea in *Brown* relevant or competent and the action was accordingly dismissed, in that it was held that they did not prohibit the magistrates of Edinburgh from granting a licence for the cinema in question to show films on a Sunday, although it remained an open question whether or not some of the activities undertaken in the cinema while open on a Sunday might not fall within the terms of the fourth Act.

What then of the subsequent history of the four Acts in question? Both the 1579 Act and the 1661 Act were partially repealed by the Statute Law Revision (Scotland) Act 1964 c. 80. The title of the 1579 Act became simply “Discharging of markets on Sundays”, and nothing was left of the Act other than the general preamble concerning the common violation of the Sabbath, the actual legislative remedy of the 1579 Act being entirely repealed.<sup>7</sup> The 1661 Act was partially repealed so as to read “our sovereign lord, with advice and consent of his estates of parliament, ratifies and approves all former acts of parliament made for observation of the Sabbath day, and against the breakers thereof and, by this act, inhibits and discharges keeping of markets or using any sorts of merchandise on the said day, under the pains and penalties following, namely the sum of £10, and if the party offending be not able to pay the penalties foresaid then to be exemplarily punished in his body according to the merit of his fault.”<sup>8</sup> This prohibition on the “keeping of markets” on Sundays may

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<sup>6</sup> Generally speaking, it may be noted that there is a presumption in favour of un-repealed Acts still being regarded as being in force, although the presumption may be rebutted by demonstrating that an Act or part of an Act had fallen into desuetude.

<sup>7</sup> i.e. extent of repeal: “In the title the words “and Labouring” and the words “or playing and drinking in tyme of sermone”. In the Act from the beginning to the words “sonday Thairfoir” and from the words “nor yit within kirkis” to the end.”

<sup>8</sup> i.e. extent of repeal: “The words from “The Kings Maiestie” to “otherwise Thairfor”, the words from “salmond fishing going” to “carieing of loads”, the words “and all other prophanation thairof

reasonably be presumed to have either been repealed or to have fallen into desuetude, since the Christmas Day and New Year's Day Trading (Scotland) Act 2007, asp 13, according to the explanatory note appended thereto, which admittedly forms no part of the 2007 Act, “prohibits large shops from opening for the purpose of retail trading on Christmas day and confers power to prohibit such shops opening on New Year's day. At present there is no legislation in place in Scotland to stop shops of any size from trading on any day of the year.” From this it is tolerably clear that by 2007 the Scottish legislature at the least was not aware of any statute prohibiting Sunday trading, although it may be noted that legislatures within these islands have frequently erred on such matters in the past.

Separate legislation from at least 1828 has controlled the sale of alcohol on Sunday in Scotland. By the Licensing (Scotland) Act 1853 (commonly known as the Forbes Mackenzie Act), sale of alcohol in public houses was banned on Sundays, a ban not lifted until the Licensing (Scotland) Act 1976, which, as amended by subsequent legislation, had the effect of merging hours of opening across the days of the week. However, it may be noted that as to the sale of alcohol for consumption off the premises at which the alcohol was sold (i.e. supermarkets and the like selling alcohol in Scotland by virtue of “off-sales” licenses), until 2009 Sunday was slightly differentiated from other days of the week, in that sales of alcohol on Sundays could only occur at a later time than the other six days of the week. However, in 2009 it became lawful for such licensed premises to sell alcohol seven days a week between the hours of 10.00 and 22.00. The non-differentiation of Sundays was an original feature of the Licensing (Scotland) Act 2005 asp 16, s. 65(3),<sup>9</sup> although the 2005 Act was not fully implemented until 1 September 2009 (Licensing (Scotland) Act 2005 (Commencement No. 4) Order 2007/472 (Scottish SI), art. 3), hence the relative delay in the reform of Sunday off-sales of alcohol.

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whatsoever”, the words from “the summe of Tuentie pund” to “the said sume of”, and the words from “for everie other” to “justices of peace”.”

<sup>9</sup> i.e. “(3) If the off-sales hours proposed in the application are such that alcohol would be sold for consumption off the premises—

- (a) before 10am,
- (b) after 10pm, or
- (c) both,

on any day, the Board must refuse the application.”

### **16.3 Sunday church attendance**

The Scottish Episcopalians Act 1711, s. 8 has never been repealed by the British Parliament and as such must still be regarded as being in force. Yet the 1711 Act simply enacted that “all the laws made...for the frequenting of Divine Services on the Lords Day commonly called Sunday shall still be in force”, and it is tolerably clear from *Brown* that both the Lord Ordinary and the council for the pursuers held any historical Scottish Acts, or parts of such Acts, touching upon compulsory attendance at divine services on Sunday to be in desuetude by 1931. It is difficult to see that such a view could reasonably be dissented from today, and as such the 1711 Act may be understood to refer to pre-Union Scottish Acts either now repealed or in desuetude in respect of compulsory attendance at divine services on Sunday, and as such its provision, though still on the statute book, had been hollowed out in this respect.

### **16.4 A “perpetuall commandment”?**

This leaves the Confession of Faith Act 1690, which has never been repealed due to the difficulties concerning the constituting documents of the British State.

The Confession of Faith Ratification Act 1690, which was ratified by the Act for securing of the Protestant Religion and Presbyterian church government 1707, which was in turn appended to the Treaty of Union by the Scottish Act whereby the same was ratified in 1707, formally “ratified and established” the Westminster Confession of Faith “...as the public and avowed Confession of this Church [i.e. the Church of Scotland] containing the sum and substance of the doctrine of the reformed Churches...”. Part XXI, ss. 7 & 8 of the Westminster Confession concern the observance of the Sabbath, and run:

s. 7 As it is of the law of nature that in generall a due proportion of time be set apart for the worship of God so in his word by a positive morall and perpetuall

commandment binding all men in all ages he hath particularly appointed one day in seven for a Sabbath to be kept holy unto him which from the beginning of the world to the resurrection of Christ was the last day of the week and from the resurrection of Christ was changed into the first day of the week which in Scripture is called the Lords day and is to be continued to the end of the world as the Christian Sabbath.

s. 8 This Sabbath is then kept holy unto the Lord when men after a due preparing of their hearts and ordering of their common affairs before hand do not only observe a holy rest all the day from their own works words and thoughts about their worldly employments and recreations but also are taken up the whole time in the publick and private exercises of his worship and in the duties of necessity and mercy.

It is noted in the discussion of blasphemy case *Thomas Paterson* heard in the High Court of Justiciary in 1843 (see Chapter 6 above), that at that time the Lord Justice-Clerk, Lord Hope, maintained that the Westminster Confession of Faith formed part of the law of Scotland by virtue of the 1690 Act. But the manner in which the Confession formed part of the law of Scotland by virtue of that Act has also been considered within the context of *Paterson*, and it appears that the Westminster Confession is not a direct source of law, but rather a standard of religious belief incorporated into the law of Scotland as a standard against which the courts may judge offences and crimes against the historical Protestant faith of Scotland. And what is clear from the relevant sections of the Confession of Faith is that they do not enjoin the civil magistrate to punish those who fail to observe the Sabbath (in contrast to those sections of the Confession which enjoin the civil magistrate to punish blasphemers and heretics), and as such it is difficult to see that the Sabbatarian sections of the Confession amount to more than a religious exhortation binding upon the consciences of the Reformed Protestant faithful.

## 16.5 Miscellaneous statutory provisions

### 16.5.1 Employment on the Sabbath

Though a case in 1835 from Dundee had seemingly established a worker's right not to be forced to work on a Sunday (when an apprentice barber in *Phillips v Innes*, who refused to shave customers on a Sabbath on grounds of religious conviction, was successfully charged before the magistrates on breach of indenture, with the finding disputed through three courts, finally finding for the apprentice in the House of Lords),<sup>10</sup> by the twenty-first century, Scots law appears to have been so entirely free of any statutory laws concerning the observation of a Sunday day of rest in respect of commercial activities that the UK legislature had to intervene in order to prevent employees (specifically shop workers and betting shop employees) being compelled to work on Sundays in Scotland against their consciences. Accordingly the Employment Rights Act 1996, c. 18, was amended by the Sunday Working (Scotland) Act 2003, c. 18.

### 16.5.2 Sabbatarianism in local authority policy

The general lesson of *Brown* (1931) was that where a local authority sought to relax some aspect of restrictions historically placed upon commercial premises on Sundays, an attempt to bind a local authority to an historical pattern of Sabbatarian policy through recourse to statutory law did not enjoy a clear chance of success. As has already been discussed above, statutory provisions in respect of the Sabbath were already much reduced by the Statute Law Revision (Scotland) Act 1906, and that even the surviving statutory provisions founded upon in *Brown* were substantially repealed by the Statute Law Revision (Scotland) Act 1964 c. 80, which left only a rump of limited statutory provisions which could not readily be expected to place significant statutory obligations upon local authorities.

In this respect the ongoing implementation of Sabbatarian policies in Scotland was a matter for the discretion of local authorities which were relatively free of any clear

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<sup>10</sup> For a review of this and other cases, see Callum G Brown, 'Spectacle, restraint and the twentieth-century Sabbath wars: the "everyday" Scottish Sunday', in L. Abrams and C.G. Brown (eds.), *A History of Everyday Life in Twentieth-century Scotland* (Edinburgh, Edinburgh University Press, 2010), pp. 153-80.

statutory obligations in respect of historically limited Sunday activities, which ranged from opening golf courses run by councils, licensing cinemas, licensing premises in respect of the sale of alcohol, opening publicly owned harbours and ports, and so forth. Within the history of the rapid decline of the maintenance of Sabbatarian policies by local authorities in Scotland, the conflict over Sabbatarianism in Scotland did not revolve around statutory law, but rather around the policies of local authorities. In this respect, while Sabbatarianism declined rapidly in Scotland from the 1970s, it endured into the twenty-first century within the territory of the Western Isles Council (Comhairle nan Eilean Siar), particularly in respect to the islands of Lewis, Harris, and North Uist.<sup>11</sup>

In terms of case reports which appear to confirm this view, the following may be noted. In an action for judicial review, *Macdonald v Western Isles Licensing Board* (2001 S.C. 628), the Outer House of the Court of Session reduced a decision of the Western Isles Licensing Board which had refused the pursuer's application to extend the licensed hours of her hotel - the Doune Braes Hotel, Carloway, Isle of Lewis - from 11 pm on Saturday to 1 am on Sunday, and from 2.30 pm to 6.30 pm on Sunday. Although the Board had previously granted extended licensing hours to the pursuer in respect of Sunday afternoons in previous years (applications for such extensions having to be made annually), on this occasion the Board declined to grant the desired exception, in part because "they had taken into account their general knowledge and experience of the locality, in particular the strong tradition and body of public opinion in favour of Sabbath observance." In the event the decision of the Board was reduced without entering into any specific arguments about the status of the Sabbath on the Isle of Lewis. Rather, the Board was held to have acted against natural justice by failing to inform the hotelier "of the fact that observance of the Sabbath might be a live issue and possibly a determinative factor in the board's deliberations. Not only had the petitioner not been given such notice, but she was on one view justified in assuming that observance of the Sabbath was not a factor likely to prove adverse to her application, as she had been granted Sunday extensions in 1996–97, 1998–99, and 1999–2000."

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<sup>11</sup> Brown, 'Spectacle, restraint and the twentieth-century Sabbath wars', pp. 153-80.

In 1989 the Western Isles Council attempted to have a local byelaw confirmed by the Sheriff Principal sitting at Lochmaddy (*Western Isles Islands Council v Caledonian MacBrayne Ltd* (1990 S.L.T. (Sh. Ct.) 97)). The byelaw in question had been passed by virtue of the Harbours Docks and Piers Clauses Act 1847, s. 83, and purported “to prohibit the shipping or unshipping of goods or vehicles from or onto Lochmaddy pier at any time on Sundays”. In the event the byelaw was not confirmed, it being held that “a harbour authority, which had a duty under s. 33 of the 1847 Act to open the pier to all persons on payment of the harbour dues, was not entitled to restrict that right except for purposes related to the working of the harbour; and that in these circumstances the byelaw was *ultra vires* the harbour authority”. In effect, the attempt to prohibit the use of the pier at Lochmaddy in North Uist by enacting a byelaw which reflected the Council’s Sabbatarian policies was held to be *ultra vires* because such a restriction was contrary to statute. This case provides a contrast to *Brown* (1931) in which an unsuccessful appeal to statute was made in order to prevent a local authority from relaxing its Sabbatarian policies.

This 27 June 1989 case was immediately followed on 6 July 1989 by *Caledonian MacBrayne Ltd v Western Isles Islands Council* (1990 S.L.T. 441). In this case Caledonian MacBrayne sought interdict against the Western Isles Islands Council “from obstructing, by means of a gate secured with a padlock, a linkspan at Lochmaddy pier on Sundays” before the Outer House of the Court of Session. The case report sums up the case as follows:

“The council had a policy of preserving the peace on a Sunday and had endeavoured to prevent the arrival of vessels on a Sunday at inter alia Lochmaddy pier. The council had resolved that Sunday sailing of ferries should be opposed and had made a byelaw to restrict the shipping and unshipping of goods and vehicles from or onto the pier at Lochmaddy at any time on a Sunday. The sheriff principal had held that the byelaw was *ultra vires* and had refused to confirm it. The council had also instructed the harbour master to keep the gate to the linkspan closed and locked on Sundays, despite the presence of the company’s vessel. The company argued that the linkspan bridge was part of the harbour dock and pier and that they were statutorily entitled to access over it. They moved for interim interdict accordingly. The council argued that a

linkspan bridge was merely a facility provided under s. 40 of the Harbours Act 1964, which provision enabled the council to allow the use of such services and facilities subject to such terms and conditions as the council saw fit.

Held, that the linkspan bridge was clearly a work connected with the harbour, dock or pier and thus that s. 33 of the 1847 Act applied and the council had no right to obstruct access over it; and, the balance of convenience also favouring the company, interim interdict *granted*.”

In this, the Sabbatarian byelaw having been found to be ultra vires, what appeared to have been a very limited attempt to continue to maintain some vestige of Sabbatarianism in respect of Lochmaddy pier and harbour was deemed to be unlawful obstruction on the part of the council.

The evidence from the case reports from Scottish courts concerning the Sabbath permit only general conclusions. Generally, there does not appear to be a sufficient statutory basis for the Sabbath to prevent local authorities and their various boards from pursuing non-Sabbatarian policies. Conversely, it appears that at least some aspects of lingering Sabbatarian policies in the Western Isles may be contrary to statute. In this, what happens to still endure in respect of local authorities’ policies and the Sabbath are presumably based upon local demographics and the presence of Sabbatarians on local authorities and their various boards. From this view it is perhaps no more than a matter of local custom, and indeed, unlike local authority policy in respect of religion in schools, is not a custom enjoying any statutory recognition, nor is it a custom reflecting any statutory obligation.

## **16.6 Conclusions**

With the decay of statutory provisions concerning upholding a Christian Sabbath in Scotland in terms of employment, commerce and licensing, it seems to be the case that in 2016 most lingering Sabbatarian strictures in Scottish society are the product of local authority decisions, many instituted many decades ago, which, when

confronted by legal challenge, are found to conflict with other rights - to freedoms to trade and leisure, for instance.

# Chapter 17

## Tax law

### Chapter 17 Tax law

#### 17.1 Introduction

#### 17.2 Income tax

#### 17.3 Corporation tax

#### 17.4 Council tax

#### 17.5 Conclusions

### **17.1 Introduction**

A limited search has been conducted of tax legislation as it applies to ministers of religion and religious buildings etc. Taxation is a detailed and complex area of legal regulation and this Report can only highlight key aspects of it. More detailed guidance on particular aspects, such as income tax, can be found in the guidance provided by HMRC.<sup>1</sup>

### **17.2 Income tax**

There are various provisions in tax law, which take account of the common practice whereby ministers of religion are provided with accommodation tied to their position or with some form of accommodation allowance. Some of these include further provision to take account of the low-paid status of certain ministers. The key provisions are set out in the Income Tax (Earnings and Pensions) Act 2003, Part 4, Chapter 8, as follows:

#### **s290 Accommodation benefits of ministers of religion**

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<sup>1</sup> See eg <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim60001>.

(1) No liability to income tax in respect of a person employed as a full-time minister arises by virtue of—

(a) the payment or reimbursement of a statutory amount payable in connection with qualifying premises, or

(b) the reimbursement of a statutory deduction made in connection with qualifying premises.

(2) No liability to income tax in respect of a person employed as a full-time minister arises by virtue of the payment or reimbursement of expenses incurred in connection with providing living accommodation in qualifying premises if the employment is excluded employment.

(3) Subsection (1) does not apply if or to the extent that the amount or deduction is properly attributable to a part of the premises for which the minister receives rent.

(4) Premises are qualifying premises in relation to a person employed as a minister if—

(a) an interest in them belongs to a charity or an ecclesiastical corporation, and

(b) because of that interest and by reason of holding the employment, the minister has a residence in them from which to perform the duties of the employment.

(5) In this section— ...

“full-time minister” means a person in full-time employment as a minister of a religious denomination,

“statutory amount” means an amount paid in pursuance of a provision in, or having the force of, an Act, and

“statutory deduction” means a deduction made in pursuance of such a provision.

### **s290A Accommodation outgoings of ministers of religion**

(1) No liability to income tax arises in respect of a person in lower-paid employment as a minister of a religious denomination by virtue of the payment or reimbursement of accommodation outgoings.

(2) Subsection (1) does not apply if the minister is paid an allowance intended to be used, wholly or in part, for paying accommodation outgoings (as to which see section 290B).

(3) In this section—

“accommodation outgoings” means amounts incurred by the minister in—

- (a) heating, lighting or cleaning qualifying premises; or
- (b) maintaining a garden forming part of qualifying premises;

“lower-paid employment” has the meaning given by section 217;

“qualifying premises” has the same meaning as in section 290

### **s290B Allowances paid to ministers of religion in respect of accommodation outgoings**

(1) This section applies where a person in lower-paid employment as a minister of a religious denomination is paid an allowance intended to be used, wholly or in part, for paying accommodation outgoings.

(2) No liability to tax arises by virtue of the payment of the allowance to the extent that it is used for paying accommodation outgoings.

(3) In this section—

“accommodation outgoings” and “lower-paid employment” have the same meanings as in section 290A;

“qualifying premises” has the same meaning as in section 290.

### **s290D Meaning of “lower-paid employment as a minister of religion”**

(1) For the purposes of this Part an employment is “lower-paid employment as a minister of religion” in relation to a tax year if—

- (a) the employment is direct employment as a minister of a religious denomination, and
- (b) the earnings rate for the employment for the year (calculated under section 290E) is less than £8,500.

(2) An employment is not “direct employment” for the purposes of subsection (1)(a) if—

- (a) it is an employment which is treated as existing under—

- (i) section 56(2) (deemed employment of worker by intermediary), or
  - (ii) section 61G(2) (deemed employment of worker by managed service company), or
  - (b) an amount counts as employment income in respect of it by virtue of section 554Z2(1) (treatment of relevant step under Part 7A (employment income provided through third parties)).
- (3) Subsection (1) is subject to section 290G.

Further detailed provision is made in section 290E as to the formula for calculating the earnings rate for a tax year; in section 290F for account to be taken of any benefits relating to the provision of a car or other vehicle, and in section 290G for the situation where a person is employed in two or more related employments.<sup>2</sup>

Various rents and expenses incurred by ministers of religion in respect of premises used in whole or in part for the performance of the religious duties of such persons are tax allowable for the purposes of Income Tax. The key statutory provision is found in the Income Tax (Trading and Other Income) Act 2005, section 159 which provides that:

- (1) This section applies for the purpose of calculating the profits of the profession or vocation of a minister of a religious denomination.
- (2) If the minister pays rent in respect of a dwelling-house and any part of the dwelling-house is used mainly and substantially for the purposes of the minister's duty, a deduction is allowed for—
  - (a) one-quarter of the rent, or
  - (b) if less, the part of the rent that, on a just and reasonable apportionment, is attributable to that part of the dwelling-house.
- (3) If—
  - (a) an interest in premises belongs to a charity or an ecclesiastical corporation,

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<sup>2</sup> Some of these provisions are not yet in force but will take effect from 6 April 2016.

(b) because of that interest, the minister has a residence in the premises from which to perform the minister's duty, and

(c) the minister incurs expenses on the maintenance, repair, insurance or management of the premises,

a deduction is allowed under this subsection for part of those expenses.

(4) The amount of the deduction under subsection (3) is—

$A/4 - B$

where—

A is the amount of the expenses, and

B is the amount of the expenses for which a deduction is otherwise allowable.

### **17.3 Corporation tax**

The profits and gains of contemplative religious communities are exempt from corporation tax as provided for in sections 508A and 508 B of the Income and Corporation Taxes Act 1988.

#### **s508A Contemplative religious communities: profits exempt from corporation tax**

(1) Subsection (2) applies in a case where members of a qualifying contemplative religious community transfer all their income and assets, or covenant all their income, to the community (“the independent community”) (and for this purpose it is irrelevant whether or not the community is part of an order or religious institution).

(2) As respects each chargeable period of the independent community, and each person who is a qualifying member of the independent community at any time in that period, the independent community shall be treated for the purposes of corporation tax as if an amount of its profits for the chargeable period equal to the relevant amount (see subsections (5) to (7)) were income of the qualifying member.

(3) Subsection (4) applies in a case where—

(a) one or more qualifying contemplative religious communities (“constituent communities”) are part of an order or religious institution (“the parent body”), and

(b) members of the constituent communities transfer all their income and assets, or covenant all their income, to the parent body.

(4) As respects each chargeable period of the parent body, and each person who is a qualifying member of a constituent community at any time in that period, the parent body shall be treated for the purposes of corporation tax as if an amount of its profits for the chargeable period equal to the relevant amount (see subsections (5) to (7)) were income of the qualifying member.

(5) For the purposes of subsections (2) and (4), the relevant amount, in relation to a chargeable period, is the amount of the annual personal allowance for persons [born after 5 April 1948] 2 (see section 35 of ITA 2007) for—

(a) the tax year which begins in the chargeable period, or

(b) if no tax year begins in the chargeable period, the tax year which is current when the chargeable period begins.

(6) But, if the chargeable period is less than 12 months, the relevant amount is—

$P/365 \times A$

where—

P is the number of days in the chargeable period; A is the amount determined under subsection (5) in relation to the chargeable period.

(7) If, during the chargeable period, an individual ceases to be a qualifying member of the independent community or a constituent community (otherwise than on death), the relevant amount, in relation to the chargeable period and that qualifying member, is—

$Q/P \times B$

where—

Q is the number of days in the chargeable period for which the individual is a qualifying member of the independent community or constituent community;

P is the number of days in the chargeable period;

B is the amount determined under subsection (5), or subsections (5) and (6), in relation to the chargeable period.

(8) So far as the exemption from corporation tax conferred by this section calls for repayment of tax, no repayment shall be made except on a claim made by the independent community or parent body.

(9) In a case where a member of an independent community or constituent community—

(a) has transferred or covenanted income to the community (in the case of an independent community) or the parent body (in the case of a constituent community), and

(b) has income for a tax year which does not exceed 20% of the annual personal allowance for persons [born after 5 April 1948] 2 (see section 35 of ITA 2007) for that tax year,

the member is, for the purposes of this section, to be taken to have transferred or covenanted all his or her income for that tax year to the community or parent body.

(10) For the purposes of this section a contemplative religious community is a “qualifying” contemplative religious community if—

(a) the community is established in the United Kingdom,

(b) the members of the community live and practise their religion in a communal establishment, and

(c) the community is not a charity, but the religion that is professed by the members of the community does not prevent the community from being a charity.

(11) In this section—

“member”, in relation to a religious community, means an individual who—

(a) is living in the community, and

(b) has taken vows or made equivalent commitments (whether probationary or not);

“qualifying member”, in relation to a religious community, means a member of the community who—

(a) has been a member of the community for a period of at least six months, and

(b) has transferred all his or her income and assets, or covenanted all his or her income, to the community (in the case of an

independent community) or the parent body (in the case of a constituent community).

**508B Contemplative religious communities: gains exempt from corporation tax**

(1) Subsection (2) applies if, as respects a chargeable period—

- (a) section 508A(2) applies in relation to an independent community,
- (b) the profits of the independent community in the chargeable period are less than the total of the amounts that fall to be treated as income of the qualifying members of the community in accordance with section 508A(2), and
- (c) the independent community has chargeable gains in the chargeable period.

(2) As respects the chargeable period and each qualifying member of the independent community, the community shall be treated for the purposes of corporation tax as if the relevant amount of its chargeable gains for that period were income of the qualifying member.

(3) Subsection (4) applies if, as respects a chargeable period—

- (a) section 508A(4) applies in relation to a parent body,
- (b) the profits of the parent body in the chargeable period are less than the total of the amounts that fall to be treated as income of the qualifying members of the constituent communities in accordance with section 508A(4), and
- (c) the parent body has chargeable gains in the chargeable period.

(4) As respects the chargeable period and each qualifying member of a constituent community, the parent body shall be treated for the purposes of corporation tax as if the relevant amount of its chargeable gains for that period were income of the qualifying member.

(5) For the purposes of subsections (2) and (4), the relevant amount, in relation to a qualifying member of the independent community or a constituent community, is the smaller of—

- (a) the shortfall in profits, and
- (b) the average gain.

- (6) The shortfall in profits is the difference between—
- (a) the relevant amount determined under section 508A(5) to (7) in relation to the qualifying member, and
  - (b) the amount that has actually been treated as the income of the qualifying member.
- (7) The average gain is—
- $$G/N$$
- where—
- G is the amount of the chargeable gains which the independent community or parent body has in the chargeable period;
- N is the number calculated by adding together the relevant value for each qualifying member of the independent community or constituent communities who, under section 508A(2) or (4), falls to be treated as having income.
- (8) For the purposes of calculating “N” in subsection (7)—
- (a) the relevant value for a qualifying member is 1;
  - (b) but, if section 508A(7) applies in relation to the qualifying member, the relevant value for that member is—
- $$1 \times Q/P$$
- where
- Q and P have the same meanings as in section 508A(7).
- (9) So far as the exemption from corporation tax conferred by this section calls for repayment of tax, no repayment shall be made except on a claim made by the independent community or parent body.

## 17.4 Council Tax

Manses, presbyteries etc are not exempt from the payment of Council Tax when they are occupied by either a minister of religion, a tenant, or a caretaker.<sup>3</sup> However, when a manse, presbytery etc is unoccupied, it is exempt from Council Tax. Council Tax

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<sup>3</sup> Although such dwellings may in specific circumstances now qualify for a 50% discount along with all ‘job-related dwellings’ as per Council Tax (Variation for Unoccupied Dwellings) (Scotland) Regulations 2013 (SI, 2013/45), schedule 1, paragraph 2, sub-paragraph 6.

(Exempt Dwellings) (Scotland) Order 1997 (SI 1997/728), schedule 1, paragraph 9 provides that:

A dwelling which (a) is not the sole or main residence of any person; and (b) is held by or on behalf of a religious body for the purpose of being available for occupation by a minister of religion as a residence from which to perform the duties of his office.

Various other types of dwelling are also exempted from Council Tax when unoccupied, including those owned or rented by charities (schedule 1, paragraph 3), although in the case of charities it appears that the exemption lasts for only six months:

An unoccupied dwelling— (a) in respect of which— (i) a body established for charitable purposes only is a qualifying person; and (ii) less than 6 months have elapsed since the last occupation day; and (b) which was on that day occupied in furtherance of the objects of the body in question.

Generally, unoccupied and unfurnished dwellings are exempt from Council Tax for six months (schedule 1, paragraph 4), although the six month limit does not apply when the dwellings in question are unfurnished “agricultural dwellings” that is to say are in effect tied cottages and the like on estates and farms (schedule 1, paragraph 14).

New regulations governing reductions in Council Tax have come into force in Scotland since 1 April 2013 (Council Tax (Variation for Unoccupied Dwellings) (Scotland) Regulations 2013 (SI, 2013/45)). Schedule 1, paragraph 2 concerns “Job-related dwellings” and states that various such dwellings are entitled to a 50% discount when the person residing there owns or rents another property, and lives in the job-related dwelling for the purposes of discharging his or her work related duties, including sub-paragraph (6):

A dwelling is job related for a person if that person or that person's spouse or civil partner is a minister of religion and the dwelling is inhabited by that

person as a residence from which that person performs the duties of that person's office.

## **17.5 Conclusions**

As with many areas of law, there are remnants of special treatment of religion with a long historical past and there are more recent attempts to situate contemporary regulation of religious clergy and religious organisations within broader areas of policy. There is, for example, little evidence of churches and religious organisations being privileged as of right in terms of different forms of taxation but, rather, where there are empty church buildings they are treated in a similar way to other empty properties and manses are, broadly speaking, treated in the same way as other forms of “tied accommodation”.

## **Chapter 18**

### **Miscellaneous**

This section contains a disparate collection of miscellaneous results generated by the search terms used. The items concern liability for damage caused by riotous assemblies, where the list of places specifically includes religious premises; the employment status of choristers; the ineligibility of members of religious orders in respect of Universal Credit; the duty of ships' masters to make provision for any religious dietary requirements of seafarers aboard their ships; a note about companies limited by guarantee and provision for exemption from non-domestic rates.

#### **Riotous Assemblies (Scotland) Act 1822, section 10**

Provision for recovering damages sustained in Scotland.

In every case where any damage or injury shall be done to any church, chapel, or building for religious worship, or to any house, shop, or other building whatsoever, or any fixtures attached thereto, or any furniture, goods, or commodities therein, by the act or acts of any unlawful, riotous, or tumultuous assembly of persons, or by the act or acts of any person or persons engaged in or making part of such unlawful, riotous, or tumultuous assembly, the party injured or damnified thereby shall be entitled to recover full compensation for the loss or injury, by summary action against the council (being a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994) within whose area the loss or injury shall have been sustained; which action shall and may be brought before any competent court in Scotland”

#### **Children and Young Persons (Scotland) Act 1937, section 37**

For the purposes of the foregoing provisions of this Part of this Act and of any byelaws made thereunder—

...

(f) A chorister taking part in a religious service or in a choir practice for a religious service shall not, whether he receives any reward or not, be deemed to be employed.

**Universal Credit Regulations 2013/376, part 2, regulation 19**

(1) Entitlement to universal credit does not arise where a person is—

(a) a member of a religious order who is fully maintained by their order; ...

**Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014/1613, part 8, regulation 34**

(1) The shipowner and the master of a ship must ensure that food and drinking water are provided on board the ship which—

(a) are suitable in respect of quantity, quality and, in relation to food, nutritional value and variety, taking account of—

(i) the number of seafarers on board and the character, nature and duration of the voyage; and

(ii) the different religious requirements and cultural practices in relation to food of the seafarers on board; ...

**Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015/17, part 2, regulation 3**

Private companies limited by guarantee do not need to use ‘limited’ in their title, in effect if the purpose of such companies is the “promotion or regulation of commerce, art, science, education, religion, charity or any profession, and anything incidental or conducive to any of those objects” although other conditions also apply.

**Valuation and Rating (Scotland) Act 1956, section 22**

(1) No non-domestic rate shall be levied on any premises to the extent that they consist of—

(a) a building occupied by a religious body and used for the purpose of religious worship;

- (b) a church hall, chapel hall or similar premises used in connection with a building such as is referred to in paragraph (a) above for the purposes of the religious body which occupies that building; or
- (c) any premises occupied by a religious body and used by it—
  - (i) for carrying out administrative or other activities relating to the organisation of the conduct of religious worship in a building such as is referred to in paragraph (a) above; or
  - (ii) as an office or for office purposes, or for purposes ancillary to its use as an office or for office purposes.

# **Part IV**

## **Chapter 19**

### **Conclusion**

#### Chapter 19 Conclusion

##### 19.1 Current state of Scots law

##### 19.2 Directions of change

#### **9.1 Current state of Scots law**

The principal objective of this project was to provide a snapshot of the current state of Scots law in terms of the place that religion has within it. It is by no means a perfect picture – it is limited by the fact that it focuses mainly on primary legislation and includes little on cases, secondary legislation, policy or practice - but it is nonetheless a significant beginning as this is an aspect of Scots law which has attracted relatively little attention in recent decades. In some areas - the Church of Scotland, marriage and education - we have moved beyond a simple presentation of what the legislation says now, to explore how and why legal regulation has evolved, and to trace pathways of legal reform which have led to the current position. These case studies are examples of the kind of exploration which might be undertaken in respect of other areas of Scots law.

Having completed this project, what can we say about the current state of Scots law in respect of religion? We might say that, on the surface at least, it shows relatively little evidence of current religious influence, or of the prioritisation of a single dominant religion. Undoubtedly, there are remnants of earlier systems where religion, generally,

and Protestantism and the Church of Scotland more specifically, had much stronger and more clearly defined legal standing, but these remnants are relatively few. We might say that, for a secular system, religion is surprisingly present in various aspects of law. To a large extent, however, the examples of current statutory provisions which in some way reference religion are the result not of historical power or privilege, but of a much newer individual rights-based framework. We might also say that there are areas of uncertainty and some inconsistency. To some extent that is a comment, which is not particular to the treatment of religion within Scots law, but which might be said of the legal system as a whole. Despite substantial statutory reform, Scotland is a small jurisdiction with a fairly low level of cases, and therefore legislation can be left untested, with the result that areas of uncertainty may long remain unexplored and relatively undefined.

Law changes with the society where it applies. This change can, however, sometimes be rather slower than the pace of change in government, economy, societal values and structures. Much of the law we have set out in this report is relatively recent, but some of it is very old. Some elements of law may not be repealed but left to fall into disuse: still “in force” but not enforced. They might remain unchanged due to neglect, or sometimes change may be viewed as simply too difficult. This might be the result of constitutional complications; at various points in this Report, for example, we have noted that the **Confession of Faith Ratification Act 1690** may still have bearings upon issues as diverse as the established status of the Church of Scotland, the maintenance of laws against Sabbath profanation, and the law against blasphemy.

Much of the current statutory framework is, however, relatively new. Contemporary Scots law has in place protection for the religious rights of the individual, and of religion and belief groups. Many of these rights are of recent vintage; often with their origins in European or international law. Most striking, there has been distinct movement to protect the position of those without a religion in a way that had formerly been inadequately considered in Scots law. As society and its values have changed, so new freedoms have been envisaged and enacted. Though clear legislative principles and precedents have already been set, these are relatively new areas of regulation and as yet there have been few decisions, particularly of the higher courts

and there are many uncertainties as to scope, application and interaction. This is likely to be a dynamic area of law for some time.

In some areas, the law has remained substantially the same over a period of time, but social changes increasingly question its suitability. One such area is Education. The legal framework in Scotland is based around a structure of “non-denominational” and “denominational” public-funded schools; drawn up in an era (1872 and 1918) when that division matched a perceived social need. The legal framework was devised to reflect what was, at that time, the new reality of a society in which, as a result of large-scale immigration from Ireland and Europe, Scottish Christianity was divided between two main groups – Reformed Protestant and Roman Catholic. Each group required recognition in order to establish some form of equity of treatment by the state. Since then, a newer social reality has now dawned, manifest in the results of the national censuses of 2001 and 2011 in which there is revealed a large bloc in Scottish society composed of people who have indicated that they do not adhere to any church or religion. (In 2011, this bloc amounted to 37.5 per cent of people responding to the census question, excluding those who made no indication). This group is currently without a clear place in education law (with the exception of the longstanding conscience clause), where the assumption remains that religion is present in all state schools and the choice is simply between “denominational” and “non-denominational”.

The pattern of legal change often reflects social demand, and it may also reflect the changing nature of religions and religious institutions within Scotland. In our study we were concerned in particular with what might be regarded, for various reasons, as the dominant religious institution, that is, the Church of Scotland. What was its place within Scots law and how had it changed? There are remaining areas of uncertainty as to the precise legal status of the Church of Scotland but the theoretical question of whether a church is an “established” church needs to be considered in the context of what that status might mean in practice. There is no single accepted definition of “establishment”, and in contemporary Scots law there is relatively little evidence that the Church of Scotland is in a significantly different legal position to any other religious organisation or indeed other voluntary association. In terms of the law

relating to the solemnisation of marriage, it retains a separate statutory category which may reflect an assumption that it is an “established” church or a “national” church. In some ways it continues to have a special place in law by means of the Declaratory Act of 1921. But in other ways, it is difficult to see that it enjoys a legal status significantly at variance with that enjoyed by any church or religious group, or indeed by any other voluntary association.

Scotland has been transformed since the 1960s by the rise of other churches and religions, many as a result of immigration from the former British Commonwealth, and others as a result of the freedom of movement attendant upon the development of the European Union in the last quarter of the twentieth century. A multi-faith society has brought areas of change in relation to human rights, and may bring new areas of demand for those religious groups which conceive of the need to establish legal processes and accommodations in agreement with their faith positions.

Beyond a move from dominant church to pluralist religious beliefs, there is a further striking shift from “religion” to “religion or belief”. There has been a foundational shift in law in recent years from viewing religion as meaning one dominant religion, to recognising equally all religions, and now to treating religion and non-religious belief as a single category. This is a trend which is most obvious in Scots law within the context of the solemnisation of marriage. The process began in 2005, with the temporary authorisation by the Registrar General of Humanist celebrants within the, broadly defined, category of “religious” celebrants. With the reforms of the Marriage and Civil Partnership (Scotland) Act 2014, this pragmatic development of law in practice has been given statutory footing by the introduction of a new category of “religious or belief” celebrant. The precise parameters of the “religious or belief” groups have yet to be agreed but nonetheless this is a very significant example of the way in which law reform can come about to reflect changing social needs and demands.

## 9.2 Directions of change

It would be foolhardy to predict the future of the relationship between Scots law and religion or belief, but we can at least highlight some of the patterns of change to date. One broad distinction which might be drawn is between “old style” religion and “new.” If we think in Scots law of “old style” religion, then pre-Reformation it was the Roman Catholic Church, whilst post-Reformation it has been Protestantism in various forms institutionalised as the Church of Scotland. Here, the direction of change in legal terms is quite clearly one of decline. There is relatively little remaining evidence of the protection, privileging or place of one single religious doctrine or institution within Scots law. But in focusing only on the decline of “old style” religion, we risk missing developments in the new.

“New” religion is the religion of individual human rights and of equality, and in these regards the direction of change is towards increased presence. Since the mid-twentieth century, and particularly in the last few decades, new rights for individuals have been introduced, designed to ensure that they have their religious and other beliefs respected and protected. This is an area where there has been considerable legislative reform and where it seems likely we will now see many more cases in years to come. The trend towards a human rights agenda is clearly the most significant to have emerged in Scots law in recent decades, much of it the result of protection of human rights on global and European levels. Rights in regard to religious, gender, racial and sexual identities have their bearing upon the sphere of religion and belief, and how these rights will develop and be accommodated is still far from clear.

In looking at change, we have concentrated on the substance rather than the process by which that change is achieved. Much reform of Scots law has tended to be piecemeal in nature. There have been large-scale reform projects, but much change happens bit by bit and often it is reactive. While being responsive clearly has benefits, there can be dangers too, in reform which is too quick or too political. This project has not touched upon the wider moral landscape in Scotland and the influence of individual beliefs in the law-making process – in areas, for example, such as sexual

practices, sexualities, medicine, censorship. The direction of travel in the law's dealings with moral issues in the West – ranging from same-sex marriage, assisted dying, advances in medical genetics and teaching – is generally towards taking account of pluralism, the rights of the individual to freedom of speech and action, and the prevention of hate crimes. There can be conflicts between these rights, different jurisdictions may move at different speeds on individual issues, and occasionally may move contrary to established trends.<sup>1</sup> Scotland has already established a strong tradition in recent decades of enhancing individual rights, removing restrictions upon religion and belief, and creating equal treatment in law between religion and belief positions. The Scottish Parliament has committed itself to a system of law making which places great emphasis on the process of consultation with the public. While Scots law no longer reflects the dominance of one single religion or religious institution, it does offer considerable scope for the influence and protection of individual religious, or non- religious, beliefs.

END

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<sup>1</sup> As in the case of Ireland in relation to its new law on blasphemy introduced in 2009.