

**Opinion on Marriage (Definition of Marriage) Amendment Act
2013,
and related decisions of General Assembly 2012**

Introduction:

1. The Assembly Executive Secretary has asked the Book of Order Advisory Committee to provide an opinion on questions arising from certain resolutions considered at the General Assembly 2012 (GA 2012) in light of the enactment by Parliament of the Marriage (Definition of Marriage) Amendment Act 2013 (which is to take effect on 19 August 2013).

2. At the time of GA 2012 the Marriage (Definition of Marriage) Amendment Bill was before the House.

3. The general policy statement of the Explanatory Note to the Bill stated:

"This Bill amends the Marriage Act 1955 (the principal Act) to ensure its provisions are not applied in a discriminatory manner.

The principal Act does not define marriage and makes no reference to a marriage being between a man and a woman. Essentially the principal Act sets out the technical requirements for the civil regulation of marriage. However, couples, other than a man and a woman, have not been permitted to obtain a marriage licence under the principal Act. This Bill will make it clear that a marriage is a union of two people regardless of their sex, sexual orientation, or gender identity. It will ensure that all people, regardless of their sex, sexual orientation, or gender identity will have the opportunity to marry if they so choose.

Marriage, as a social institution, is a fundamental human right and limiting that human right to one group in society only does not allow for equality. This Bill will ensure that there is equality for people wishing to marry regardless of their sex, sexual orientation, or gender identity and will be in accordance with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993."

4. This was the context in which various issues were considered at GA 2012. Thus:

(a) A number of resolutions were considered relating to proposals as to "liberty of conviction", and in respect of which it was proposed that

section 9.1(1A) of the Book of Order be deleted. That regulation states:

"Sexual relations outside marriage.

In accordance with the supreme and subordinate standards of the Church, Sessions, Parish Councils, Presbyteries and the United District Councils shall not accept for training, licence, ordain or induct anyone involved in a sexual relationship outside of the faithful marriage between a man and a woman. In relation to homosexuality, and the interests of natural justice, this ruling shall not prejudice anyone who, as at 29 September 2006, had been accepted for training, licence, ordained or inducted."

The relevant resolutions (12.087, 12.115, 12.090, and 12.091) were lost.

- (b) In connection with the definition of marriage, four resolutions were considered; the first three (12.107, 12.108, and 12.109) were carried; the fourth (12.110) was lost.

The three resolutions which were carried state:

"[12.107] That General Assembly declares that it upholds the historic Christian understanding of marriage as the loving, faithful union of a man and a woman (reflecting the complementarity of male and a woman created in God's image), which is grounded in nature and in Scripture, is supremely revealed in Jesus' teaching about marriage, and is given by God for the well-being of human society and that this be communicated to our Government.

[12.108] That, in faithfulness to the historic Christian understanding of marriage as grounded in the Bible and the teachings of Jesus, and in consistency with previous resolutions of the General Assembly relating to marriage (1991 and 2004), General Assembly resolves that the Presbyterian Church of Aotearoa New Zealand does not support same-sex 'marriage' and urges Parliament not to proceed with the proposed amendment to the Marriage Act, and that this be communicated to Parliament through the select committee process, as the majority view of the General Assembly.

[12.109] That General Assembly urges Parliament not to alter or confuse the meaning of marriage, which has always

been about the union of male and female, and is of deep spiritual significance for New Zealanders of many faiths and cultures; and the General Assembly also asserts that, with regard to equality, the Civil Union Act (2004) already provides for clear societal recognition and legal protection of same-sex relationships."

The fourth resolution which was lost stated:

"[12.110] That, for the sake of the unity and good order of the Presbyterian Church of Aotearoa New Zealand, and since the General Assembly upholds the historic Christian understanding of marriage as the union of a man and a woman and has not endorsed same-sex 'marriage', General Assembly declares that it authorizes ministers of the Church to conduct a marriage service only for the union of a man and a woman."

The Marriage Act amendments:

5. In April 2013 the Bill was passed. It amended section 2 by providing *"marriage means the union of two people, regardless of their sex, sexual orientation or gender identity"*.

6. Prior to its enactment, a concern had arisen as to whether a marriage celebrant could be in breach of the Human Rights Act if that celebrant chose not to solemnise a marriage on the basis that such would contravene his or her religious beliefs. To put the issue beyond doubt, Parliament amended section 29 by the addition of a new subsection (2). Section 9 will thus state:
 - "(1) A marriage licence shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates.*

 - (2) Without limiting the generality of subsection (1), no celebrant who is a Minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnise marriages by an approved organisation, is obliged to solemnise a marriage if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation."*

7. The Advisory Committee is of the view that section 29(2) (which will take effect when the Amendment Act takes effect on 19 August 2013) is to ensure that no marriage celebrant acting on the basis of the religious beliefs of the religious body to which he or she belongs will infringe the provisions of the

New Zealand Bill of Rights Act 1990 or Human Rights Act 1993, by refusing to marry a same sex couple.

8. PCANZ is an authorised religious body enumerated in Schedule 1 of the Marriage Act. Each year the Registrar of Marriages is supplied with a list of PCANZ Ministers which the Church recognises as marriage celebrants under the Marriage Act. In this way each Minister becomes an approved marriage celebrant. Section 13(1)(c) of the Act requires the Registrar-General to remove the name of any marriage celebrant from the list of authorised marriage celebrants if the Church no longer wishes that person to be a marriage celebrant.
9. Once the Amendment Act takes effect:
 - (a) All Ministers of PCANZ whose names have been provided to the Registrar of Marriages will be permitted to conduct a marriage ceremony for the purposes of the Marriage Act, whatever the sex, sexual orientation or gender identity of the couple to be married.
 - (b) If solemnising a particular marriage would contravene a religious belief of PCANZ, then a Minister is not obliged to solemnise that marriage; and would not be in breach of the relevant freedom of religion provisions (sections 13 and 15) of the New Zealand Bill of Rights Act 1990, and would not be in breach of the prohibited grounds of discrimination (whether as to sex, or sexual orientation or religious belief) under section 21 of the Human Rights Act 1993.

The GA 2012 resolutions:

10. Each of the resolutions referred to in paragraph 4 of this opinion were considered clearly in the context of Parliament considering a Bill as to the nature of marriage. Each of the resolutions that were passed were exhortations either to "the Government" or to "Parliament through the select committee process" where Parliament had yet to consider whether it would approve the proposed legislation.

11. The resolutions which were passed by GA 2012 make it clear that it upheld "... *that historic Christian understanding of marriage is the loving, faithful union of a man and a woman*" (resolution 12.107), that this is "*grounded in the Bible and the teachings of Jesus ...*" (resolution 12.108) and that this "... *of deep spiritual significance for New Zealanders of many faiths and cultures ...*" (resolution 12.109). That understanding is also reflected in section 9.1(9A), which GA 2012 declined to repeal, thereby deciding the provision should continue to apply.
12. Those statements are statements of "religious belief", as referred to in section 29(2) of the Marriage Act. It is thus open to an approved marriage celebrant who is an ordained PCANZ Minister, to conclude that a marriage of persons who are not a man and woman, "... *would contravene the religious beliefs of ...*" the Church. Such a person would be protected for civil law purposes under section 29(2).
13. But whilst a PCANZ Minister is not obliged to solemnise same sex marriage under civil law, what is the position under Church law? That is, notwithstanding the "religious belief" of PCANZ, do its rules nonetheless allow for an individual viewpoint on this issue.
14. For three reasons, the Advisory Committee considers that the statements of principle contained in 12.107-12.109 do not prevent a Minister of the Church from conducting a marriage service for persons other than a man and a woman, ie a same sex marriage. The three reasons are in summary:
 - (a) Resolution 12.110 was an attempt to *require* that Ministers of the Church conduct a marriage service only for the union of a man and a woman, but was not passed.
 - (b) Until the General Assembly determines otherwise, a decision on the part of a Minister to solemnise same sex marriages is a decision that falls within the scope of "*liberty of conscience and the right of private judgment*", as referred to in the Declaratory Act 1892-3.

- (c) Given the importance and significance of the issue, before a limitation to this effect could bind all Ministers it would be necessary for the General Assembly to enact an appropriate regulation utilising the Special Legislative Procedure (section 9:14 of the Book of Order); this has not occurred to this point.

15. It is appropriate to deal with each of these points in more detail.

Resolution 12.110:

16. GA 2012 was required to consider a number of relevant resolutions dealing not only with marriage but also sexual relationships outside of marriage. The debate was clearly wide ranging, as were the scope of resolutions which were considered. But the General Assembly was not persuaded to approve resolution 12.110. The decision not to do so must be regarded as significant. It is part of the relevant legislative history and context. If the Church intended to bind all Ministers, it would be expected to make this crystal clear and to consider an appropriate regulation. This has not occurred.

Liberty of conscience and right of private judgment:

17. The Declaratory Act 1892-3 states:

"That this Church disclaims intolerant or persecuting principles, and does not consider her office bearers, in subscribing the Confession, committed to any principles inconsistent with liberty of conscience and the right of private judgment.

That while diversity of opinion is recognised in this Church on such points in the Confession as do not enter into the substance of the Reformed Faith therein set forth, the Church retains full authority to determine, in any case which may arise, what points fall within this description, and thus to guard against any abuse of this liberty to the detriment of sound doctrine or to the injury of her unity and peace."

18. This statement is reflected in the Formula, and is referred to in section 1.1(4) of the Book of Order which describes the Standards of the Church.

19. In 1988, the Book of Order and Judicial Committee was required to report to a Special Assembly which had been called to consider the extent issues of

liberty of conscience with regard to the administration of baptism. The Committee stated in its Report:

- "22. *It is the opinion of members of this Committee, as it was of members of the 1982 Committee that "it would be for the Church through its appropriate Courts to determine whether the liberty of conscience, the right of private judgment and the diversity of opinion referred to in the Declaratory Act impinged, in any particular case, on the matters referred to in the second and third sentences of the Formula". To our knowledge, the only decision, prior to 1988, as to the obligation to administer infant baptism, is the 1919 decision. That decision did not permit the Minister exercise any liberty of conscience in the matter of infant baptism.*
23. *The decision of the 1988 Assembly to allow Ministers to practise liberty of conscience by refusing to administer baptism to infants is, in the view of the Committee contrary to the decisions of the 1919 and 1920 Assemblies. No Assembly since then has approved an exception. Viewed from this perspective the 1988 decision was an innovation."*

20. The Committee went on to advise the General Assembly that any relevant exception to the principle of infant baptism should be the subject of a regulation, submitted to Presbyteries under the Barrier Act. The Committee said:

"Consequently, if regulations are to set out all relevant principles, then exceptions to them should also take regulatory form, rather than any lesser form (such as a resolution only of an Assembly), not least because such a proposed regulation receives the full scrutiny of the Church before it can be enacted. Once enacted, the exception becomes part of the "binding rule and constitution of the Church". (354)

21. The 1988 Special Assembly resolved that any proposal that sought an exception to the traditionally understood obligation of the Formula, required a specific regulation granting such exception to be considered by the General Assembly and referred under the Barrier Act.
22. On that occasion, it was necessary to consider whether there were any previous relevant decisions of the Church pertaining to the exercise of liberty of conscience in the matter of infant baptism. The Advisory Committee has considered the same question with regard to the issue of solemnising of marriages.

23. From a thorough review of previous General Assembly decisions, it is clear that the main issue in the past with regard to marriage has been whether divorced persons could be married within the Church, and/or ordained. In 1937 Instructions to Ministers were passed reaffirming the unity of one man with one woman for life to the exclusion of all others, and indicating that the Assembly repudiated as opposed to Christian teaching the increased modern tendency to approve divorce by mutual consent. As a guide to Ministers and people of the Church, it declared that remarriage of divorced persons would only be approved in certain cases. In 1968 a report of the Doctrine Committee was accepted, relating to the issue of whether a divorced man was acceptable or unacceptable for the Ministry, it being concluded that no general rule could be laid down. In 2004, a new regulation (now section 9.1(1A) was submitted to Presbyteries and enacted at GA 2006.
24. These decisions obviously did not refer to the issue of solemnising of same sex marriages because until very recently that it was not a relevant consideration for the Church.
25. There have of course been previous decisions of General Assemblies that have related to same sex relationships, and indeed resolution 12.108 referred to two of them – those of 1991 and 2004. As to each:
- (a) The reference to the "1991" decision was not specific as to which of various decisions were made by the General Assembly in 1991. It is assumed the reference was to the first clause of a 3-fold resolution, which referred to God's intention that sexual relationships should be within the confines of a marriage between a man and a woman. (Significantly the same General Assembly recognised any relevant resolution would have to proceed under the Barrier Act.)
 - (b) The reference to the "2004 decision" is presumably a reference to decision 04.069 which related to the suitability of persons for training, licensing, ordination or induction if involved in a sexual relationship outside a faithful marriage between a man and a woman.

(Significantly, it was recognised that it would be necessary for that innovation to be necessary under the Barrier Act procedure.)

26. In short, whilst the resolutions which were carried in 1991 and 2004 are important, the Church was not required to consider the possibility that a Minister would solemnise a same sex marriage. The thrust of resolution 12.108 was to emphasise the historic Christian understanding of marriage, including with reference to the 1991 and 2004 decisions, leading to a resolution that the majority view of that General Assembly was a resolution that the majority of commissioners did not support the same sex marriage proposal and urged Parliament therefore not to proceed with the proposed amendment.
27. Accordingly, the Advisory Committee concludes that the General Assembly has not passed any express resolution that binds an officiating Minister, because until now it has not been necessary to consider such an issue.
28. Accordingly until the General Assembly determines otherwise, it is open to a Minister to conclude that a decision to solemnise a same sex marriage falls within his or her principles of liberty of conscience and the right of private judgment. An express decision would be necessary stating that diversity of opinion would not apply to this issue.

Special Legislative Procedure:

29. The third reason which falls for consideration relates to how the Church should pass a regulation that would bind all Ministers.
30. Section 14.9 of the Book of Order describes the Special Legislative Procedure; that rule describes the procedure of referral of a proposed regulation to Presbyteries and Church Councils, passing the proposal as an interim provision if it wishes to do so until the next General Assembly meets.
31. Although no specific reference is made to the Barrier Act, it is reasonable to conclude that the Special Legislative Procedure is intended to replicate the

historic Barrier Act procedure. The Advisory Committee considers that in a novel situation, the General Assembly should respect the principles of the Barrier Act.

32. There is well established case law (*Free Church of Scotland v Overtoun* [1904] AC 515 (HL)) emphasising the importance of the Barrier Act. It is the means by which "*binding rules*" become part of the constitution of the Church. The Barrier Act itself emphasises that General Assemblies must be very deliberate with regard to innovations, and that the procedure is to prevent "... *any sudden alteration or innovation, or other prejudice to the Church, in either doctrine or worship, or discipline, or a Government ...*".
33. Section 14.9 refers to the Special Legislative Procedure where there is to be a proposal to "... *alter, amend or delete a provision of the Book of Order that cannot be accomplished ...*" otherwise.
34. The Advisory Committee advises that a rule binding all officiating Ministers would involve a potential innovation, and a potential amendment to rule 6.4 which is the provision defining the means by which a Minister exercises leadership in worship; a marriage ceremony which incorporates religious beliefs and is held in a Church by an officiating Minister is plainly an act of worship.
35. In summary, because the GA 2012 did not institute a proposal of this kind for submission to the Church or adopt a relevant regulation ad interim, the Advisory Committee considers there is no limitation on an officiating Minister who in the context of public worship wishes to solemnise a same sex marriage. Were a General Assembly to consider such an innovation, it would need to do so under the Special Legislative Procedure.
36. Against the foregoing, the questions raised by the Assembly Executive Secretary may now be considered.

Can and under what circumstances can a Presbyterian Minister conduct a marriage for a couple of the same sex?

37. Given the conclusion reached that the issue falls within liberty of conscience and the right of private judgment, then:

- (a) An officiating Minister who believes the officiating of a same sex marriage is an issue of liberty of conscience and private judgment may perform such a ceremony; a person who believes that to do so would contravene a religious belief of PCANZ is not obliged to solemnise a same sex marriage, and will not be in breach of civil law if he or she acts accordingly.
- (b) The Advisory Committee considers that the Moderators' press release of 11 October 2012 accurately describes the position:

"While there was support for a proposal to prohibit Ministers from conducting same sex marriage ceremonies, it narrowly failed to get the 60% majority required to pass into Church law. [Rev Ray Coster] said that ... should legislation to allow same sex marriage be passed into NZ law, Ministers will have the flexibility to marry same sex couples."

Would there be grounds for complaint under disciplinary procedures?

38. In light of the three reasons discussed above, there could not be grounds for a complaint under the disciplinary procedures.

39. Indeed, the Church needs to consider what the appropriate position would be, were it to rule its Ministers could not conduct same sex marriages. Section 13(1)(c) of the Marriage Act requires the Registrar-General of Marriages to remove the name of any marriage celebrant from the list of authorised marriage celebrants if the Church no longer wishes that person to be a marriage celebrant. If the Church resolves that Ministers are not authorised to marry same sex couples, then the appropriate mechanism for any breach could involve section 13(1)(c) of the Marriage Act 1955, rather than the invoking of disciplinary procedures under Chapter 15 of the Book of Order. But these are policy issues which a General Assembly would need to consider.

What is the relationship between the Church's stated policy on the nature of marriage, and a Minister's subscription to the Formula and/or his or her obligations to a congregation, Presbytery of the Church that might be described elsewhere in the Book of Order?

40. As indicated above, the issue for a given Minister, is one of liberty of conscience and private judgment. The effect of the "right of pulpit" regulations (sections 6.4, 6.8(1), 7.2(3) and 7.15) is that ultimately it is the responsibility of a Minister to determine the appropriate worship which will take place, albeit in conjunction with the Church Council.
41. If a Church Council did not wish a Minister to carry out same sex marriage ceremonies, it would be unwise for a Minister to go against the wishes of the Council – but this issue will require careful consideration of section 42 of the Human Rights Act as considered below.

Would it be competent for a Presbytery to direct its Ministers in relation to decisions regarding the conducting of same gender marriages?

42. It would not be competent for a Presbytery to direct its Ministers on this topic. There is no authority in the Book of Order for the Presbytery to take such action when the General Assembly has not authorised the Presbytery to issue such a ruling; and has not itself been prepared to bind its Ministers.

What is the relationship between the Church's policy on the nature of marriage and a Church Council's decisions regarding the use of both its buildings (1) commonly used for worship services and (2) those which it may hire out to the public, or allow the public to use for more general purposes?

43. Potential discrimination with regard to buildings is covered by section 44 of the Human Rights Act 1993. It relevantly states:

"Provision of goods and services.

- (1) *It shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public –*
- (a) *To refuse or fail on demand to provide any other person with those goods, facilities, or services; or*
- (b) *To treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case –*

By reason of any of the prohibited grounds of discrimination.

..."

44. The key language of the section relates to the offering of facilities to the public, or to any section of the public.
45. If there was a refusal having regard to, for example, sexual orientation, there would be a deemed discrimination under the Human Rights Act.
46. Although there are exceptions under the Human Rights Act for certain matters relating to religious beliefs (such as employment for the purposes of an organised religion – see section 28) there is no such exception with regard to section 44.
47. In short, the statement of principle referred to at GA 2012 as to the nature of marriage is irrelevant if a particular Church building is offered to the public for use.
48. A Minister and Church Council who do not wish their facilities to be utilised for same sex marriages will have to resolve not to offer those facilities to the public.
49. Section 44 will apply even if the Minister of the particular congregation is not the officiating Minister of the proposed same sex marriage ceremony.
50. Section 44 will apply whether or not a particular Church Council requires payment for the use of the facilities to be made. That is because the section focuses on the supply of goods, facilities or services. It does not state that the supply is limited to supply for reward. The heading of the section refers to "provision" of services. Given that the stated purpose of the Act is to "provide better protection of human rights" (the Long Title) and that section 44 is clearly a general anti-discrimination provision, a Court is likely to adopt a wide interpretation in section 44 and regard the absence of limiting language as being significant.

Could a Church Council's decision to allow its buildings to be used for the conducting of same sex weddings be appealed on the basis of the Assembly's decision regarding the nature of marriage?

51. If particular buildings are made available to the public, then section 44 applies. Challenging a decision to make buildings available would be inconsistent with the Human Rights legislation.

Is it within the power of the General Assembly to direct its Ministers not to conduct weddings for couples of the same gender?

52. Given the provisions of the Declaratory Act, which makes it clear the Church retains full authority to determine in any case what falls into the substance of the Reformed Faith, it is open to a General Assembly to direct its Ministers not to conduct weddings for couples of the same gender.
53. However, as discussed above:
- (a) This would require the enactment of a relevant regulation.
 - (b) Such a regulation should be considered under the Special Legislative Provisions.
 - (c) Consideration would need to be given as to what a breach of such provision would entail, and in particular whether the relevant regulation would make reference to section 13(1)(c) of the Marriage Act.

In a similar way can the General Assembly direct a Church Council not to allow same sex marriages to be conducted in any Church owned or controlled building?

54. Whilst it would be competent for the General Assembly to give such a direction the consequences would be very significant. Such a direction would in effect amount to an instruction to all Church Councils not to hire their facilities in order to avoid the application of section 44 of the Human Rights Act; there would be obvious implications for community standing and revenue, and the issue could cause long term debate and dissension.

Under what circumstances could a Church Council, or its agents, decision not to allow same gender marriage to be conducted in its buildings be challenged under the Human Rights Act or any other legislation?

55. If the buildings are available for public hire, it would be discriminatory for a Church Council to refuse to allow same sex marriages were this to be challenged; it would be possible for proceedings to be instituted in the Human Rights Review Tribunal seeking an appropriate declaration, damages and/or injunction.

In a similar way can a Church Council legally have a policy which excludes same gender marriages in buildings over which it has control?

56. Provided the building concerned is not able to be hired for public use and is therefore a "private" building, a Church Council could have such a policy.

Book of Order Advisory Committee
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