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15 January 2021

Dear Scottish Ministers,

## **The closure of places of worship in Scotland**

We act for the ministers and church leaders whose names are set out at the foot of this letter. We have been instructed following the Scottish Ministers' decision to take measures to ensure that all places of worship would close from Friday 8 January 2021.

Many of those who we represent are also signatories to the letter of 11 January 2021 addressed to the First Minister of Scotland. A copy of that letter accompanies this letter, and it can be taken as read that the concerns expressed therein are adopted and repeated. We have also seen the Cabinet Secretary for Communities and Local Government's reply of 13 January 2021.

What follows is a respectful request that Scottish Ministers reconsider the decision in respect of the closure of all places of worship and reverse the measures that have been taken by revoking the Regulations that gave effect to the decision.

If this request is rejected, then our clients intend to challenge the lawfulness of the Regulations by petitioning for judicial review. We anticipate that Scottish Ministers will require to take advice on the content of this letter but with churches being closed for worship, this is an urgent matter and so we ask that a response be received by no later than 5.00 pm on Thursday 21 January 2021.

## **Background**

At the outset our clients wish to emphasise that they fully understand the seriousness of the COVID-19 pandemic and they appreciate that the Scottish Government is required to make difficult decisions as it seeks to take steps to decreased the spread of the virus. Our clients do not doubt that the measures taken by the Scottish Government and the regulations made by Scottish Ministers are motivated by a desire to act for the common good. Despite that, our clients consider that the Scottish Ministers have failed to appreciate that the closure of places

of worship is a disproportionate step, and one which has serious implications for freedom of religion. Scotland is the only nation in the United Kingdom that has closed places of worship at this present time and that action is also out of step with the restrictions that have been put in place in other countries (for example Germany and the United States).

### **Scottish constitutional issues**

Separation of church and state is a fundamental feature of the constitution of Scotland. The church does not interfere in the affairs of state and the state has no place in governing the affairs of the church. The doctrine of the "two kingdoms" was well-established by 1592 when the General Assembly Act was passed. The Act gave the church authority over all matters ecclesiastical, with the monarchy merely having the right to attend or send their commissioner to attend the meeting at the General Assembly. The 1592 Act also gave the elders of each church a specific legal responsibility to ensure that regular worship; particularly the preaching and the ministry of the sacraments, continued. The present prohibition on the conduct of sacraments of baptism and the Lord's Supper and on meeting together violates the Act of 1592.

The freedom of the church was confirmed in the 1921 Church of Scotland Act:

*"This Church has the inherent right, free from interference by civil authority, but under the safeguards for deliberate action and legislation provided by the Church itself, to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements, and to define the relation thereto of its office-bearers and members, but always in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the said Confession, of which agreement the Church shall be sole judge, and with due regard to liberty of opinion in points which do not enter into the substance of the Faith."*

There has been no attempt to close churches since the Stuart kings made it a capital offence to meet for worship and listen to preaching other than that in the established church.

It should also be noted that the majority of churches in Scotland hold to theology which believes that interference in matters sacred by the secular authority, is a direct threat to their independence. This is true not only of Presbyterians but also Baptists, Brethren and newer independent churches.

It is contrary to the principle of legality that basic constitutional duties and powers involving independence of religious organisations and freedoms of religious people are purportedly removed by powers conferred under general language of enabling legislation and regulations that have not even been laid before a legislative body. At the minimum measures of such consequence should have been subject to democratic debate.

Even if regulations interfering with the autonomy of religious institutions and freedom of worship were to be considered lawful (which our clients dispute) this can only be to the extent reasonably necessary to serve the public health objectives. The measures which have been introduced here are more intrusive than reasonably necessary.

### **The Scottish provisions and the European Convention on Human Rights**

In terms of the Human Rights Act 1988 s.6, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. To this end, it is contended that the regulations that came into force on 8 January 2021 are in violation of Article 9, read with Article 11, of the European Convention on Human Rights ('the Convention') in so far as they require the closure of places of worship. The Human Rights Act gives particular emphasis in s.13 to rights under Article 9.

Article 15 gives member-states a right to derogate from the Convention in the event of a national emergency, by giving notice to the Secretary General of the Council of Europe. The United Kingdom has chosen not to avail itself of that right. Any decision of the Scottish Ministers accordingly falls to be examined on the basis of the Convention.

Section 49 and schedule 19 of the Coronavirus Act 2020 empowers Scottish Minister to make health protection regulations for 'the purpose of preventing, protecting against, controlling or providing a public health response to incidence or spread of infection or contamination in Scotland.'

The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 ('Local Levels Regulations') came into effect on 2 November 2020. These regulations revoked several earlier regulations and implemented the level-based approach across Scotland. Those regulations did not close places of worship.

On 8 January 2021, the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) (No 11) Regulations 2021 (SSI 2021/3) came into force. Those regulations amended the Local Levels Regulations.

Regulation 4 inserted paragraph 1A into schedule 5 of the Local Level Regulations. That paragraph states:

**"Requirement to close places of worship in a level 4 area to members of the public**

**1A.—(1)** A person who is responsible for a place of worship must close that place of worship, except for a use permitted in paragraph (2).

(2) A place of worship may be used—

(a) for a funeral,

(b) for a commemorative event for a person who has died but is not a wake or a funeral tea,

(c) to broadcast an act of worship, whether over the internet or as part of a radio or television broadcast,

(d) for a marriage ceremony or civil partnership registration which—

(i) consists of no more than 5 persons, or

(ii) where an interpreter is required to attend, consists of no more than 6 persons, or

(e) to provide essential voluntary services or urgent public support services (including the provision of food banks or other support for the homeless or vulnerable people, blood donation sessions, vaccination centres or support in an emergency), provided that, in each case, the premises are used in accordance with the requirements of paragraph 8.

(3) Sub-paragraph (1) does not prevent the use of premises, while those remain closed to members of the public, to take preparatory steps in pursuance of a requirement in paragraph 8.”

The introduction of this provision has had the effect of closing places of worship in level 4 areas for all uses, except for those explicitly listed. This means that now it is unlawful for people in level 4 areas to gather in person to worship and practice their religion. Level 4 extends to the whole of mainland Scotland.

Prior to this provision coming into law, churches in Scotland had been working carefully and consistently to ensure that social distancing measures were being followed and that other sensible and workable restrictions, such as limitations on the number of people who could be in attendance at a place of worship, were in place and being strictly followed. Where anti-infection precautions could not be put in place churches imposed their own voluntary ‘lockdown’.

### **Disproportionate interference with Article 9 rights**

It must be undisputed that the new restrictions are a significant interference with freedom of religion and religious assembly.

We respectfully draw to the Ministers’ attention the comments of the European Court of Human Rights in the case of *Metropolitan Church of Bessarabia v. Moldova* (2002) 35 E.H.R.R. 13 at §114:

“The Court recalls its standing case law that freedom of thought, of conscience and of religion, as safeguarded by Article 9, is one of the foundations of a “democratic society” within the meaning of the Convention. In its religious dimension, it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”

The Court noted in the same case (at §118) :

“Furthermore, since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards freedom of association against any unjustified interference by the State. This being so, the right of believers to freedom of religion, which includes the right to manifest one’s religion collectively, presupposes that believers may associate freely, without arbitrary interference by the State. The autonomy of religious communities is in fact indispensable to pluralism in a democratic society and is therefore at the very heart of the protection afforded by Article 9.”

It is these freedoms that are removed by SSI 2021/3.

Even if the interference with our clients’ fundamental rights and freedoms is “prescribed by law” and intended to serve a legitimate aim, they do respectfully question whether there are relevant and sufficient reasons for complete closure. It is a matter for the Scottish Ministers to justify

such a serious interference with Article 9 rights. Our clients maintain that the regulations are a disproportionate response to the current situation.

Only convincing and compelling reasons can justify restrictions on a fundamental Convention freedom, *Wingrove v. United Kingdom*, 1996 E.C.H.R. 1937, 1956. The broader the impact of the restriction on the Convention rights, the more compelling must be the justification. For interference with freedom of worship to be legitimate, the interference in question must be *necessary in a democratic society*. The term 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'. *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 § 116 (Eur. Ct. H.R. June 14, 2007).

There are severe limits on acceptable restrictions on religious freedom under Article 9. The Court has made it clear that such restrictions, call for "very strict scrutiny" (*Manoussakis and Others v. Greece*, 23 EHRR 387 § 44, 47 54-53). Further, it is not open to the state to determine whether religious beliefs or the means used to express them are legitimate.

The nature and the severity of any sanction is also taken into account when the court assesses the proportionality of interference (*Biblical Centre of the Chuvash Republic v Russia* (Application no. 33203/08) 12 June 2014. Here Scottish Ministers have imposed criminal sanctions on persons seeking to exercise their right to worship together.

At the beginning of the pandemic, and while emergency steps were being taken in March 2020, there was perhaps a recognition that a wide margin of appreciation needed to be given to Scottish Ministers as society and government tried urgently to come to terms with what was being faced. This was in the context of a global response to an unprecedented situation. Now, some 10 months later a different global consensus has emerged in relation to freedom to worship.

Proportionality requires to be assessed having regard to international consensus and common values (see *Batatyán v Armenia* (2012) 54 E.H.R.R. 15 at §[122]). No other part of the United Kingdom is currently requiring places of worship to close, much less criminalising, public worship.

There is an emerging international jurisprudence in France, Germany, the United States and South Africa holding that bans and restrictions on religious services are unlawful. To cite but a few:

- In *MW et al* the highest Administrative Court in France, the Council of State, found that the blanket ban on religious services in France was a "serious and manifestly illegal infringement" of religious rights under Article 9 and other French and international provisions.
- The Federal Constitutional Court of Germany considered the matter in *F* (1BBQ 44/20), 29 April 2020. The Court granted interim relief permitting Friday prayers in a mosque, on the grounds that a blanket ban with no mechanism to apply for exemptions was a disproportionate interference with constitutional rights.

- In November 2020 the Supreme Court of the United States considered the matter in *Roman Catholic Diocese of Brooklyn v Cuomo* and relief was granted against the New York governor's restrictions on religious services.
- In *De Beer v The Minister of Cooperative Governance and Traditional Affairs* a South African court sustained a challenge against lockdown generally, where this could not be shown to be rationally connected to legitimate aims.

In order to justify the regulations completely closing places of worship, the Scottish Ministers would be required to show that the previous regulations which required measures to be taken to minimise risk, were insufficient to protect public health. To be clear, our clients are perfectly prepared to continue to adhere to the restrictions in Schedule 5, para 8 of the Local Levels Regulations.

On 8 January 2021, when being questioned by the Scottish Parliament's Covid-19 Committee, the Deputy First Minister John Swinney could not point to any established connection between worship responsibly organised in accordance with the provisions of the Local Levels Regulations prior to their amendment and the spread of the virus.

Indeed there is no evidence that there is any causal connection between churches remaining open and the spread of the virus. This in part must be the reason that during the third English national lockdown whilst schools closed (unlike the second lockdown) churches did not.

In Scotland, with suitable restrictions in place, public transport continues to operate; essential shops remain open; people are still attending their places of work; exercise may be taken – including golf; professional sport is permitted, and the court system remains open. Yet, places of worship are closed. The closure is arbitrary, inconsistent and disproportionate when looked at in light of the Convention. The closure of places of worship and the criminalisation of collective manifestation of religion which takes place under carefully and responsibly controlled conditions goes too far.

None of the activities we list, save the courts, directly involve fundamental rights and freedoms. The courts have remained open in recognition of rights relating to access to justice in terms of Article 6, and Article 8 (family courts) yet the 1998 Act, in s.13, gives Article 9 rights priority even over Article 6. The decision of the Court in *Metropolitan Church of Bessarabia v. Moldova* gives some insight into why Article 9 rights are given such fundamental importance.

Our clients therefore ask that Scottish Ministers rethink this restriction. They maintain that churches have responded effectively to the public health threat and that there is no lawful justification for interference in such dramatic fashion. Any interference needs to be proportionate and necessary in a democratic society. The ban imposed since 8 January 2021 does not meet those requirements.

## Summary

In Romans 12:18 the Bible says "If it is possible, so far as it depends on you, live at peace with everyone". Our clients have no wish to bring this matter before the courts but the freedom to

worship is, and has always been, of central importance to the Christian faith. They ask with humility, please will Scottish Ministers reconsider.

Our clients make this respectful request that Scottish Ministers reconsider the steps taken to impose closure on places of worship in Scotland. They believe the decision to be entirely disproportionate and incompatible with rights enshrined in the Convention. They ask that in relation to SSI 2021/3, that Regulation 4(b), which inserted paragraph 1A into schedule 5 of the Local Level Regulations be revoked; that Regulation 4(e)(i) be revoked and that Regulation 4(f)(i) be revoked. With regard to the additional provisions made to the Loch Level Regulations by SSI 2021/1 they ask that there be added to paragraph 18 of schedule 5 an additional provision, namely "to attend a place of worship".

We look forward to your early response to this request but have instructions to present a petition to the Court of Session, if a positive outcome cannot be achieved. We will commence steps to that effect from 5.00 pm on Thursday 21 January 2021.

Yours faithfully,

[Redacted signature]

Schedule

Andrew Baldock , Minister, Kilwinning Evangelical Church, [Redacted]  
[Redacted]

Gerald White, Pastor, Hope Church Bingham, [Redacted]

Rev Nathan Owens, [Redacted]

David Dickson, Associate Pastor, [Redacted]  
[Redacted]

John-William Noble, Pastor, Grace Baptist Church Aberdeen, [Redacted]  
[Redacted]

Garry Brotherston, Minister, Bishopbriggs Free Church of Scotland, [Redacted]  
[Redacted]

Angus R. Cameron, Pastor, Cumnock Baptist Church, [Redacted]

Rev William Macleod BSc, ThM, Knightswood Free Church of Scotland (Continuing), [Redacted]  
[Redacted]

Geoffrey de Bruin, Senior Pastor, CRC Edinburgh, [Redacted]  
[Redacted]

Rev Dr Rupert Hunt-Taylor MRCVS, Edinburgh North Church, [REDACTED]  
[REDACTED]

Rev Greg MacDonald, Minister of the Cross congregation [REDACTED]  
[REDACTED]

William Philip, Senior Minister, The Tron Church [REDACTED]

Paul Harkess, Assistant Minister, Maxwell Church, [REDACTED]  
[REDACTED]

James MacKenzie, Elder, Edinburgh North Church [REDACTED]

Arthur O'Malley, Pastor, East Gate Church, [REDACTED]

Rev Graeme Craig, Ayr Free Church of Scotland (Continuing), [REDACTED]  
[REDACTED]

Andrew R Allan, Minister, Partick Free Church of Scotland (Continuing), [REDACTED]  
[REDACTED]

John MacKenzie, Session Clerk: Assynt & Eddrachillis congregation of the Free Church of  
Scotland (Continuing) and Clerk of the Northern Presbytery [REDACTED]  
[REDACTED]

Daniel Titus, Pastor, Bethany Evangelical Church Dumfries, [REDACTED]  
[REDACTED]

Rev James S. Haram, Shettleston Free Church of Scotland, [REDACTED]  
[REDACTED]

Maurice Roberts, Minister (Retired), [REDACTED]

Colin Wilson, Editor, Christians Together [REDACTED]

Tom Malone, Pastor, Foundation Church [REDACTED]

Rev Kenneth Macdonald, Stornoway Free Church [REDACTED]  
[REDACTED]

Tom Budgen, Minister, Kilmuir and Stenscholl Free Church of Scotland (Continuing), [REDACTED]  
[REDACTED]

Rev Alexander James MacInnes, Lochalsh & Strath Free Church of Scotland (Continuing),  
[REDACTED]



Alisdair S Smith, Elder, Knox Church Perth

[REDACTED]

[REDACTED]

Edith Forrest, Elder, St Columba Church (Church of Scotland)

[REDACTED]

[REDACTED]

Yerik Kellet-Smith, Elder, Ruchill Parish Church

[REDACTED]

Rev Alasdair Macleod, Knock & Point Free Church (Continuing)

[REDACTED]

[REDACTED]

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