

GENERAL SYNOD

DRAFT CHURCH OF ENGLAND MARRIAGE MEASURE

EXPLANATORY MEMORANDUM

Background and objects

1. The object of the draft Church of England Marriage Measure (“the Measure”) is to make it possible for couples to marry according to the rites of the Church of England, without the need for an Archbishop’s Special Licence, in certain parishes where they cannot at present do so, but with which one or both of the couple can demonstrate that they have a “qualifying connection” of a type specified in the Measure.

The Marriage Law Working Group

2. The Measure was prepared by the Marriage Law Working Group chaired by the Bishop of Newcastle. The Group was set up by the Archbishops’ Council and the Business Committee in December 2002 and last reported to the Synod in July 2004. The current membership of the Group and a brief account of its work, so far as that is relevant to the background to the Measure, are set out in the Appendix to this paper.

How the draft Measure would change the present law and the reasons for the changes

3. Most of the legal rules on the places where a marriage according to the rites of the Church of England may lawfully take place and the preliminary steps which are needed before it can be solemnised – usually referred to as “the preliminaries” – are laid down by the Marriage Act 1949 (“the 1949 Act”). Other provisions of the 1949 Act, and more recent Parliamentary legislation, regulate the same matters in relation to purely civil marriages and marriages according to the rites of other Christian Churches and other faiths.
4. Under the present law, subject to certain exceptions¹, a couple have the right to be married according to the rites of the Church of England,

¹ The main exception is where one or both of the couple have previously been married and have a former spouse still living.

following the calling of banns, in a parish where one or both of them are resident or have their “usual place of worship”². Under the 1949 Act, the “usual place of worship” requirement is satisfied if, but only if, the person concerned has his or her name on the church electoral roll of the parish³. In general⁴, it is not possible for a couple to marry in any other parish unless they obtain an Archbishop’s Special Licence.

5. The Marriage Law Working Group, and the previous groups whose work it continued,⁵ were satisfied that, in the interests of encouraging couples to marry according to the rites of the Church of England, there should be some relaxation of these requirements. Given the changing patterns of people’s lives, including increased mobility, and the less restrictive requirements for a purely civil marriage, the rules for Church of England marriages (which some people clearly believed were imposed by the Church itself rather than by Act of Parliament) were now seen by many people as legalistic and restrictive. For example, couples saw no good reason why they should have to comply with the additional formalities and meet the additional costs of the Special Licence procedure if the bride wished to be married from her parental home, even in cases where she herself was no longer resident in the parish, or where the couple had some other strong connection with the church where they wished to marry.
6. Thus the Measure **extends the right referred to in paragraph 4 to be married following the calling of banns to cases where one or both of the couple can show a “qualifying connection” with the parish concerned of a kind specified in the Measure**; in some cases, this can consist of a connection through a relative. The types of “qualifying connection” which the Measure covers are set out in paragraph 16 below. The Measure sets out the churches and places of worship in which a marriage may take place under these extended rights. It covers parish churches, parish centres of worship and certain other places of

² The basic right is not a statutory one but derives from the common law, laid down by the judges, although it has been extended by the 1949 Act. However, the 1949 Act contains the legal rules which normally prevent a marriage by banns in other places. The couple do not have the right to insist on a marriage on a particular date or at a particular time; this is a matter for arrangement with the minister.

³ Section 72(1).

⁴ The main exceptions relate to extra-parochial places; united benefices and benefices held in plurality; parishes where there is no church or building licensed for marriages, or none with regular Sunday services at which banns can be called; parishes where the normal place of Anglican marriage is closed for repairs or rebuilding; licensed military chapels; and chapels licensed under section 20 of the 1949 Act, which are referred to in paragraph 19.

⁵ See paragraph 1 of the Appendix.

worship. However, it excludes cathedrals, even if they are or contain a parish church, because of the problems which it is understood that at least some cathedrals might experience in maintaining their regular pattern of worship and ministry if the number of persons with a legal right to marry there was substantially increased. The Measure also lays down the procedure to be followed where the couple wish to take advantage of the new provisions.

7. In formulating these provisions, the Newcastle Working Group asked the Legal Advisory Commission for advice on the possible implications of the Human Rights Act 1998. The advice received on behalf of the Commission stressed that if the new provisions left the clergy with a discretion whether to allow or refuse marriage in a particular place on personal or subjective grounds, that would leave them open to challenge under Article 14 of the European Convention on Human Rights (which deals with discrimination). Thus the advice given on behalf of the Legal Advisory Commission, which the Working Group accepted and followed, was that any new and extended criteria for churches and parochial places of worship where a marriage may take place should not merely give the clergy a discretion to marry the couple there but should confer a right to marry there provided the couple could prove factually that they came within the criteria they relied on.
8. As a result of its work the Working Group recognised that it was not possible to frame new criteria which were sufficiently clear and definite to operate without giving rise to real difficulties in practice but which at the same time would cover every possible situation where a couple might legitimately say that one or both of them had a genuine connection with a parish or parish church. However, the Group was also satisfied that it was not essential for the new provisions to cover every conceivable situation of this kind. If special circumstances arise where the couple cannot satisfy the criteria laid down by the Synod, the other possible courses of action which are now open to couples who wish to marry in a place which falls outside the present rules will remain – namely habitual attendance by one or both of them at public worship in the parish for six months followed by entry on the church electoral roll, or applying for an Archbishop’s Special Licence with the support of the member of the clergy concerned, subject to the normal criteria applied in deciding whether such a licence may be granted.
9. However, the Measure **also makes it possible to apply for a common licence authorising a marriage without the need to call banns in a parish where one of both of the couple can establish a qualifying**

connection. In most cases⁶ a common licence is issued on behalf of the diocesan bishop; at present it can normally be granted only where at least one of the couple has had his or her usual place of residence in the parish where the marriage is to take place for 15 days immediately before applying for the licence, or wishes to marry in his or her usual place of worship. Because the common licence dispenses with the need for banns, it can be used where, for example, one of the couple is temporarily resident abroad and cannot have banns called in his or her place of residence.

The General Synod’s powers and consultation with the Government

10. As will be seen from paragraphs 3 and 4 above and the detailed clause by clause explanation of the Measure set out below, the Measure would affect a number of provisions of the 1949 Act. Under section 3(6) of the Church of England Assembly (Powers) Act 1919⁷, a Measure of the General Synod may “relate to any matter concerning the Church of England” and, provided that requirement is satisfied, a Measure may amend or repeal the whole or part of an Act of Parliament as well as amending or repealing a previous Measure.
11. However, as most of the existing law relating to Church of England marriages which the present Measure would amend is to be found in legislation by Act of Parliament which also governs other marriages, the Department for Constitutional Affairs has been consulted on the proposals embodied in the Measure, and has no objection.

The Church in Wales

12. The Church in Wales, for which the present legal position is essentially the same as for the Church of England but which would not be affected by the changes in the Measure, has been kept informed of the work on the draft legislation.

⁶ The Archbishop of Canterbury has a right to grant common licences throughout England and Wales, and the Archbishop of York may grant them throughout the Province of York.

⁷ And section 2 of the Synodical Government Measure 1969.

The Measure

13. The following paragraphs set out a more detailed explanation of the individual clauses of the Measure.

Clause 1

14. **Clause 1(1)** contains the basic provision of the Measure, namely that a person intending to be married has the same right (although no greater right) to have the marriage solemnised in a parish church of a parish with which he or she has a “qualifying connection” within clause 1(3) as that person would have in relation to the parish church of the parish where he or she resides or has his or her usual place of worship. Under clause 1(10)(b), “parish” for this purpose, and throughout clause 1, includes a conventional district. Clause 1(10)(c) also makes it clear the section deals only with marriage according to the rites of the Church of England.
15. Under **clause 1(2)**, the new provisions apply in the same way to a place of worship which is not a parish church but which has been designated as a parish centre of worship⁸.
16. **Clause 1(3) and (4)** set out the circumstances in which a person has a “qualifying connection” with a parish. Read in the light of the interpretation provision in clause 1(10)(c), these are as follows:-
- (a) The person concerned –
 - has at any time in the past been on the church electoral roll of the parish; or
 - was baptised on confirmed according to the rites of the Church of England in the parish; or
 - has at any time been resident in the parish; or
 - habitually attends, or has at any time habitually attended, public worship according to the rites of the Church of England in the parish; or
 - has at any time attended a school in the parish; or
 - (b) A “relative” of the person concerned –
 - is, or has at any time been, resident in the parish;
 - is, or has at any time been, enrolled on the church electoral roll of the parish; or

⁸ Under section 29(2) of the Pastoral Measure 1983.

- was married according to the rites of the Church of England in the parish.

“Relative” for this purpose means a parent (including an adoptive parent), a grandparent, a step-parent, a guardian, a foster-parent or person who has undertaken the care and upbringing of the person concerned, or a godparent.

17. **Clause 1(5), (6) and (7)** deal with the calling of banns where a person wishes to exercise the right under clause 1(1). He or she is entitled to have the banns called in the church or place or worship where clause 1 gives him or her the right to have the marriage solemnised, and the banns must be called there and also in the parish(es) where each of the couple are resident. The notice asking to have the banns called in the church or place of worship where the marriage is to take place must be given to the “minister of the parish”, and the person concerned must provide whatever written or other information the minister of the parish needs in order to satisfy him- or herself that the necessary qualifying connection exists.
18. These provisions have to be read together with clause 1(10)(a), under which the “minister of the parish” for this purpose is the incumbent or priest-in-charge or, if there is no incumbent or priest in charge but the benefice has a team ministry, any team vicar who has a special cure of souls for the area including the church or place of worship where the marriage is to take place. If there is no one in any of those categories to fulfil the role of “minister of the parish”, clause 1(10)(a) provides for the rural dean to do so.
19. **Clause 10(8)** deals with cases where a public “chapel” or place of worship (other than parish church or parish centre of worship) is licensed by the bishop under section 20 of the 1949 Act for the calling of banns and marriages in cases where one or both of the couple are resident in the “district” or geographical area specified in the bishop’s licence. The district may lie within a single parish, or may take in part of more than one parish. Where a person who wishes to marry has a “qualifying connection” with any parish which lies wholly or partly within the district specified for such a chapel, the new provisions apply in relation to the chapel in the same way as to a parish church of that parish, and the person concerned has the same right to be married there.

20. **Clause 10(9)** provides that “church” does not include a cathedral, so that the clause does not confer any new right to have a marriage solemnised in a cathedral, whether or not it is a parish church.
21. **Clause 1(10)** contains interpretation provisions for clause 1, which have been mentioned in paragraphs 14, 16 and 18 above.

Clause 2

22. **Clause 2** deals with marriage by common licence. It provides that a common licence may be granted to a person for the solemnisation of his or her marriage in a church or chapel in which he or she could be married under clause 1.
23. Clause 2 goes on to deal with the procedure for obtaining a common licence in these cases. Under the 1949 Act, a person applying for a common licence must make a sworn statement dealing with certain matters; normally one of these is that he or she has fulfilled the residence or “usual place of worship” qualification explained in paragraph 4 above. However, in a case under the Measure, the sworn statement must instead set out that the person concerned has the necessary qualifying connection with the parish in question, and he or she must provide the person who has authority to grant the licence on the bishop’s behalf with the information he or she needs in order to satisfy him- or herself that the qualifying connection exists.

Clause 3

24. **Clause 3** is a further interpretation provision, dealing with references to the 1949 Act and expressions used in it which also appear in the Measure.

Clause 4

25. **Clause 4** deals with the citation, commencement and extent of the Measure.

The Marriage Law Working Group and its work The background to the draft legislation

Background

1. The Marriage Law Working Group (“the Group”) was established by the Archbishops’ Council and the Business Committee in October 2002 to continue a process begun by an earlier Working Group chaired by the Bishop of St Edmundsbury and Ipswich. That Group had been set up in 1999 to consider various aspects of the law on the formation of marriage according to the rites of the Church of England, including the system of banns and the places where Church of England marriages may be solemnised. Its proposals, which took account of the results of wide consultation, were presented to the General Synod in the report *Just Cause or Impediment?* (GS 1436) in November 2001. The work was then carried forward by a smaller group of bishops, with the Rt Worshipful Sheila Cameron QC (the Dean of the Arches and Auditor and Master of the Faculties), and was chaired by the Bishop of London; its report, *The Challenge to Change* (GS 1448), was debated by the Synod in July 2002.
2. So far as potential legislation was concerned, the background against which these two earlier Groups carried out their work was that the Government had previously raised objections to proposals for the Synod to make amendments to the Marriage Act 1949 by Measure. The legal staff of the Synod had always been clear that the mere fact that a proposed piece of legislation would amend or repeal part of the 1949 Act would not, as a matter of law, prevent its being effected by Measure rather than by Act of Parliament, provided the subject-matter fell within the expression “a matter concerning the Church of England” in section 4 of the Church of England Assembly (Powers) Act 1919⁹. Indeed, the Pastoral Measure 1983, while it did not make any amendments to the text of the 1949 Act, had modified its application in certain circumstances¹⁰. However, even on the basis that the Church of England would be entitled to pass legislation in this area if it so wished, the line taken at that time was that it would not wish to press the issue in the face of Government opposition, not least because of the

⁹ See paragraph 10 of the Explanatory Memorandum to which this is an Appendix.

¹⁰ See section 29 and paragraph 14 of Schedule 3.

risk of the Measure's being defeated in one or other House of Parliament.

3. Nevertheless, at around the same time as the Group chaired by the Bishop of St Edmundsbury and Ipswich was set up, the Government announced a review of the civil registration system, including, it was understood, the registration of marriages. It was thought to be beneficial to link the two reviews, and the St Edmundsbury Working Group, which was assisted by the presence of staff from the Office for National Statistics, developed its proposals in the expectation that it would be possible to achieve much of what the Group thought desirable regarding preliminaries to marriage and the registration, time and place of marriages through or following on from secular legislation to change the 1949 Act as part of wider changes to the civil registration system.
4. By the time *The Challenge to Change* was published, the Government had issued a White Paper *Civil Registration: Vital Change*, which formally set out the Government's proposals for a wide-ranging reform and modernisation of the civil registration system, which would include the repeal or amendment of large parts of the 1949 Act. This would leave areas on which there was no civil regulation and where the Church of England would be free to lay down its own rules. The White Paper proposed that the changes to the 1949 Act, as part of the wider "package" of legislation relating to the civil registration system as a whole, should be implemented by Regulatory Reform Order under the Regulatory Reform Act 2001, rather than by primary legislation by Act of Parliament.
5. Against that background, the recommendations in GS 1448 were as follows:
 - (a) The application of the principle of "demonstrable connection"¹¹ to all places of worship;
 - (b) The introduction of a locally regulated licensing system, based on nationally agreed criteria, to deal with marriages in non-parochial places of worship¹²;

¹¹ i.e. permitting marriage in places of worship where one or both of the couple could demonstrate a substantial connection of a type specified in criteria laid down by the Synod.

¹² In particular chapels of institutions such as schools, colleges etc.

- (c) That marriage be permitted outside places of worship subject to the Special Licence procedure operated by the Faculty Office of the Archbishop of Canterbury;
- (d) The adoption of a new Church/State preliminary as proposed at paragraphs 13 and 14 [of GS 1448]¹³;
- (e) The introduction of “marriage announcements” to continue the tradition of banns;
- (f) That church marriage registers should be retained alongside the new procedures, although they would no longer constitute legal evidence that the parties had been married¹⁴;
- (g) That marriage be permitted outside the current legally permitted times (8.00 a.m. – 6.00 p.m.)¹⁵ in negotiation between the Minister and the couple, together with those responsible for the venue;
- (h) That good quality marriage preparation be made available in all cases and that couples be encouraged to take advantage of it;
- (i) That in the light of changes to civil law, clergy be encouraged to review the pastoral and practical aspects of preparing for and solemnising marriage;
- (j) That dioceses ensure that appropriate programmes of continuing ministerial education are available to assist clergy in adjusting to the changes recommended in this Report.

The Synod debate in 2002, the setting up of the Group and the 2004 debate

6. Following the debate in General Synod in July 2002 on *The Challenge to Change* (GS 1448), the Synod passed the following motion:

That this Synod:

- a. welcome the report’s proposals for a positive response from the Church that is faithful to its theological and pastoral understanding of ministry, and that fully recognises the mission opportunities presented by the proposals on marriage in the Government White Paper *Civil Registration: Vital Change*;

¹³ This would involve replacing banns and common licences with the new joint preliminary.

¹⁴ This was because the Government proposals involving the creation of a new computerised system for registration of all marriages.

¹⁵ Under the 1949 Act this restriction applies to all marriages, with very minor exceptions, whether the marriage is purely civil, is according to the rites of the Church of England or takes place according to some other religious rite. (An Archbishop’s Special Licence can permit marriages outside the hours laid down by the 1949 Act.)

- b. endorse the recommendations in the report; and
 - c. request the Archbishops' Council and the Business Committee to establish a Working Party to take forward, in consultation with the House of Bishops, the process of:
 - (i) working together with Government Departments in the outworking of the White Paper, and in particular in securing legislation to amend or replace the relevant provisions of the Marriage Act 1949 in accordance with the recommendations in the report;
 - (ii) in the light of (i), preparing draft legislation and other material for submission to the Synod to implement those recommendations in the report which require action by the Synod; and
 - (iii) initiating proposals to implement the other recommendations in the report and the proposed new legislation on marriage, including support for clergy and parishes.
7. The Working Group was set up in response to that motion, and began its work on that basis. It returned to Synod in July 2004 for confirmation that Synod still wished it to pursue with Government the introduction of Church/State preliminaries to replace the calling of banns (and common licence) and to test whether Synod was content with the emerging list of “demonstrable connections” (called “qualifying connections” in the draft Measure now before Synod). The Synod agreed the proposed system of Church/State preliminaries and offered some thoughts for the Working Group’s consideration on what constituted a ‘demonstrable connection’¹⁶.

The change in direction

8. As will be seen from the previous paragraphs, the Group’s proposals and the form of the legislation which the Group envisaged to give effect to them were inextricably linked to Government proposals for changing and modernising the civil registration system, including the civil law relating to marriage, by Regulatory Reform Order. However, when the first of two proposed Orders (dealing with registration of births and deaths) came before the Lords and Commons Select Committees dealing with Regulatory Reform, both Committees

¹⁶ An amendment proposing that the present right should be extended to any parish church or parochial place of worship of the couple’s choice was defeated, by a very narrow majority in each house, on a division by Houses.

reported unfavourably¹⁷ and, as a result, the Government decided not to proceed with the first Order and or to take forward the second (which was intended to include the provisions on the preliminaries to and registration of marriage). It also decided against pursuing its “package” of changes to the civil registration system by primary legislation, although it hoped to be able to pursue individual elements¹⁸.

9. This decision meant that the Marriage Law Working Group was obliged to look again at what it had been established to do and how that might be achieved, including at the Church’s own powers to legislate. So far as this was concerned, officials at the Department for Constitutional Affairs indicated that, in the circumstances, there were unlikely to be objections in principle to considered proposals for amendment to the 1949 Act by Measure, at any rate so long as they did not impinge on matters that were common to the overall system for the preliminaries to and the solemnisation and registration of marriages under the 1949 Act. The areas which the Working Group considered included preliminaries, ecumenical issues and the time and place of marriage; its conclusions are set out in the paragraphs below.

Preliminaries

10. The advice of the Legal Office on the question of preliminaries was that the Church could legislate in this area, but that it would not be an entirely straightforward matter and Church legislation alone might not be able to cover all relevant aspects. The Working Group was also of the view that for any new system of preliminaries to be worth considering, it would have to be appreciably better than the present system, and the work done by earlier groups made it very doubtful that the Church could produce such a system without the need for assistance from Government.
11. On further reflection, the Working Group was not convinced that the present system of ecclesiastical preliminaries (banns, Common Licence and Special Licence) was so badly in need of replacement that further resources should be committed to finding an alternative. It has not, therefore, pursued further work in this area.

¹⁷ The two Committees did not question the need for modernisation of the civil registration system but, referring to concerns about the particular proposals before them, did not consider the use of the 2001 Act was an appropriate way of implementing them and also expressed doubts as to whether, in some respects, they fell within the powers conferred by the Act.

¹⁸ It is understood that the aspects which are likely to be taken forward are matters such as the employment status of civil registrars.

Ecumenical issues

12. The legal position in respect of ecumenical partners is a complex one, not least because more than one piece of legislation is involved. Successive groups decided to pursue only one possible change, namely to allow the use of Church of England parish churches by other Churches within the Church of England (Ecumenical Relations) Measure 1988 for marriages according to their own rites in the same way and subject to the same conditions as they are permitted to use Church of England parish churches for their other services.
13. The Working Group requested the Legal Office to advise how far making such changes as might be necessary in this area lay within the Church of England's powers and how far other action would be needed. On the basis of that advice, the Working Group decided that it would certainly be possible and beneficial to pursue changes in this area, but that doing so at the present time, given the complexity involved and the need for full consultation with the Church's ecumenical partners, would delay the introduction of a draft Measure even further.
14. The Working Group therefore recommends that changes to the present legislation to allow the use of Church of England parish churches by other Churches within the Church of England (Ecumenical Relations) Measure 1988 for marriages according to their own rites in the same way and subject to the same conditions as they are permitted to use Church of England parish churches for their other services should be pursued separately from the present draft legislation.

Time of marriage

15. The Working Group also considered proposals to relax the times between which marriages may be solemnised (the Marriage Act 1949 specifies that a marriage may be solemnised "at any time between the hours of eight in the forenoon and six in the afternoon") and making this a matter for local negotiation. The Government's proposals included removing the general restriction in the law relating to marriage and this would have enabled the Church to make its own regulations.
16. However, now that the Government's proposals for a general relaxation have been withdrawn, this remains a restriction which applies to all marriages, civil and religious, and discussions with Government officials have indicated that the Government would not wish the Church of England to make exceptions to the general rule for

its own marriages. Moreover, there appears to be no evidence that the present legislation is causing major problems in practice for the Church of England. The Working Group did not, therefore, pursue this any further and no proposals for change are included in the draft Measure.

Place of marriage

17. The Working Group was well advanced with its proposals in respect of “demonstrable connection” when the Government withdrew its proposed legislation. The advice of the Legal Office was that this was an area which lay within the Church’s power to legislate and it seemed desirable to bring forward proposals for legislation in this area.

Conclusion

18. The Group took its thinking on these matters to the Archbishops’ Council in 2005, and the Council supported the Group’s recommendations and confirmed that work should continue on the preparation of Church legislation in relation to the place of marriage. Thus it is a draft Measure on that subject alone, based on the principle of “qualifying connection”, which the Group has prepared for submission to the Synod for First Consideration.

Membership of the Marriage Law Working Group

The Rt Revd Martin Wharton, Bishop of Newcastle (Chair)

The Revd Canon Tim Barker (Member of the House of Clergy for Lincoln to 2005)

The Rt Worshipful Sheila Cameron, Dean of the Arches & Auditor (and Master of the Faculties) (*Ex officio* member of the General Synod)

Mrs Ruth Dunnett (Member of the House of Laity for Chichester to 2005)

The Ven David Lowman (Archdeacon of Southend) (Member of the House of Clergy for Chelmsford to 2005)

The Very Revd George Nairn-Briggs, Dean of Wakefield (Member of the House of Clergy – Deans)

The Revd Brian Tubbs (member of the House of Clergy for Exeter to 2005)

Canon Stella Vernon (Member of the House of Laity for York)