

## MARRIAGE IN CHURCH AFTER DIVORCE

### A Report from the House of Bishops

1. “Marriage is intended by God to be a creative relationship, as his blessing enables husband and wife to love and support each other in good times and bad, and to share in the care and upbringing of children. For Christians, marriage is also an invitation to share together in the spirit of Jesus Christ. It is based on the solemn, public and life-long covenant between a man and a woman, declared and celebrated in the presence of God and before witnesses<sup>1</sup>.”

The marriage service in *Common Worship* is consistent with Christian teaching down the centuries, which has always held that marriage is lifelong. The more recent teaching document from the House of Bishops on marriage<sup>2</sup> provides a fuller understanding of the doctrine of marriage as the Church of England has received it. While the Church has always upheld the permanence of marriage, it is also evident that since New Testament times the

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<sup>1</sup> From the Pastoral Introduction to the Marriage Service in *Common Worship*

<sup>2</sup> *Marriage* A teaching document from the House of Bishops of the Church of England, Church House Publishing 1999.

Church has struggled to come to terms with divorce. The Church of England has sought both to uphold the principle of life-long marriage and to provide a pastoral ministry to divorced persons who seek a further marriage<sup>3</sup> in church. The latest proposals are an honest attempt to do just that. They reflect the current practice in many parishes and dioceses and are intended to bring greater openness; and one consequence of their adoption would be to bring increased consistency of advice to clergy to what is already well developed but in a largely unregulated way. This paper sets out the basis of the thinking behind them and indicates ways in which they have been adapted in the light of wider consultation in the dioceses.

2. A number of dioceses expressed concern that the Winchester Report's proposals might be regarded as undermining marriage, and particularly sought to reaffirm Canon B30 (in which the Church of England's traditional understanding of marriage is set out<sup>4</sup>). The House of Bishops shares such concern

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<sup>3</sup> 'Further marriage' is taken to be marriage in church after divorce involving a partner whose former spouse is still living.

<sup>4</sup> Canon B30 (para 1) states that "The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union permanent and lifelong, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity."

and in its Statement Marriage (issued in advance of the Winchester Report) emphasised that "...the Church has a responsibility to safeguard the understanding of marriage as a lifelong vocation". The Synod's Legal Officers have been consulted as to whether the implementation of the Winchester proposals would require an amendment to Canon B30, and their unanimous advice was that this was not necessary, as the proposals were consistent with the Church's doctrine of marriage as reflected in the Canon. It is on this basis that the House therefore commends these proposals to the General Synod.

3. The House in its Statement, Marriage, went on to say that should the Church agree upon a procedure for further marriage after divorce, it should do so "...on the same principles that have guided it up to this point: that marriage is an unconditional commitment for life; that further marriage after a divorce is an exceptional act; that it must be approached with great honesty and circumspection; and that the Church itself, through its ministry, has a part in deciding whether or not a marriage in such circumstances should take place in the context of church worship."<sup>5</sup> For these reasons, the attached Advice (ANNEX 1) is offered to assist clergy in considering whether such marriages should take place in church. To marry all comers in such circumstances - as some have argued - would open the Church to the accusation that it has abandoned its principles. Some form of pastoral

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<sup>5</sup> Ibid, pp.17/18.

encounter, which should properly be part of marriage preparation for all, therefore seems essential if the couple are to engage with the nature of the commitment that they are to make before God and the community. Just as there cannot be true forgiveness without repentance, so there needs to be clarity for example that the couple are not taking into the new relationship inappropriate ties from a former marriage, and that the new relationship will not in practice consecrate an earlier infidelity. There is, also, a qualitative difference in considering a former marriage as opposed to cohabitation. Co-habitation, while it may be of profound significance to the couple concerned and to their immediate families, does not involve public vows before God and other people. It should not be confused with marriage, and its prevalence raises different questions than those we address here.

4. Concern has been expressed about the role of parish clergy in deciding whether the further marriage should be solemnised in church. Pastoral discernment about eligibility will be needed and we still hold to the view - one of the key recommendations of the Winchester Report<sup>6</sup> - that parish clergy are best placed to fulfil this task, just as they exercise such discernment in other aspects of the parochial ministry. Careful consideration has been given to the setting up of tribunals but we have serious doubts as

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<sup>6</sup> *Marriage in Church after Divorce*, [GS 1361] Church House Publishing 2000 para. 6.4

to their practicality, desirability and their capacity to witness to the Christian doctrine of marriage. We note that the Anglican Church in Canada in July 2001 decided to abandon its system of Matrimonial Commissions and to place the decision in the hands of the parish clergy on the basis that “the church’s pastoral role...is best performed by the clergy who are in personal contact with the couple”<sup>7</sup>.

5. In any event, consideration of the locus of decision-making needs to take account of the legal position pertaining in this country. Under civil law, clergy are required to marry those who comply with the necessary preliminaries, subject only to their right under s.8 of the Matrimonial Causes Act 1965 to decline to solemnise (or allow their church to be used for) the marriage of someone who has been divorced and has a former spouse still living. Clergy thus have the right to decide under civil law whether to conduct a further marriage or not, and neither a Resolution nor an Act of Synod – or a Canon - can lawfully take that responsibility away from them, either by requiring them to apply certain principles or to accept the decision of a third party (such as the bishop, or a tribunal). Only an Act of Parliament or a Measure could change the position in that respect. Given that the Winchester Report believed it was right on pastoral grounds that the locus of decision-making should rest with the parish clergy, it did not

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<sup>7</sup> *Marriage Canon Taskforce Report to the General Synod of the Anglican Church of Canada*, July 2001, pp. 15/16.

recommend seeking to alter the provisions of civil law in this respect: the House concurs with this view. The attached note for clergy has, moreover, been framed in the light of legal advice to the effect that such guidance should not seek improperly to interfere with the exercise of the judgement of the parish clergy in this matter. We are also advised that its contents are consistent with the provisions of the Human Rights Act. A memorandum dealing in more detail with the relevant legal issues is attached as ANNEX 2.

6. There were many questions raised during the consultation with dioceses about the reference of all cases to the diocesan bishop (originally proposed in the Winchester Report<sup>8</sup>). On reflection, we believe that such reference should be possible but not obligatory. The legal position of the clergy makes it impossible to demand this in any case. What is more appropriate is to enable parish clergy to refer cases of difficulty to the bishop for his advice. It will be up to each bishop how he wishes to deal with such cases: he might, for instance, refer cases to an adviser, or - in those dioceses where the culture is to handle matters at local level - he may feel able to deal with a relatively small number of referrals personally. Whatever system is in place will nevertheless have to recognise that for both pastoral and legal reasons, the decision rests with the parish clergy and that there can be no appeal procedure as such.

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<sup>8</sup> *Marriage in Church after Divorce*, para 6.4

7. We are conscious that the process of discernment is critical and remain committed to the importance of proper training for those involved. It will therefore be essential for dioceses both to have initial training in place to cover the process outlined in the advice for clergy (set out in ANNEX 1), but also to integrate this into on-going CME programmes for the clergy.
8. There has been an understandable desire on the part of many for there to be a mechanism whereby a couple seeking further marriage but who are resident in a parish where the clergy refuse to solemnise such marriages, or to make the parish church available, can be referred elsewhere. The legal position outlined above militates against any simple relaxation in this respect. We are however conscious that, if the proposals of the Aspects of Marriage Law Review<sup>9</sup> are accepted, the range of possible venues for a couple in this position will have been widened considerably to include any parish church where they have ‘a demonstrable connection’ rather than residency or membership of an electoral roll as at present.
9. Another observation made in the course of the recent discussions was that the wedding service in the case

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<sup>9</sup> A Church of England Working Group chaired by the Bishop of St Edmundsbury & Ipswich, circulated to General Synod members in November 2001 (ref. GS 1436). See also *The Challenge to Change* GS 1448 circulated for the July 2002 Synod.

of marriage after divorce should be different from that for first marriages. Just as the Church of England holds to one theology of marriage, we believe that there should not be different marriage rites for first and further marriages: in each case the couple will be setting out on a lifelong union, and the rite should reflect that. That is not to say that the officiating minister should not, as he or she feels appropriate, choose to refer to the circumstances in prefatory material, but we judge - as did the Winchester Working Party<sup>10</sup> - that this flexible approach is to be preferred to the attempts that have been made elsewhere to provide different liturgies.

10. Finally, the response of some to this matter has been to argue for universal civil marriage, followed by a religious ceremony for those that desire it. We resist this approach vigorously as we believe that it would be a significant departure from the Church's traditional role in solemnising marriage. As was stated in *An Honourable Estate*,

“The high and demanding doctrine of marriage set out in the formularies of the Church is a description of marriage as God has ordained for all. Whenever two people enter into ‘a union permanent and life-long, for better for worse, till death them do part...both in prosperity and

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<sup>10</sup> Ibid, paras. 2.9-2.11



adversity, they are entering marriage as understood by the Church<sup>11</sup>”.

We also resist the temptation that universal civil marriage would solve the problems that the Church faces in this area. It could not mean that all couples who wished to do so, whatever their history and circumstances, should come for a blessing or a service of prayer and dedication in church following a civil ceremony. There would still be a need for discretion about what is appropriate either in terms of the conduct of that act of worship or whether it should take place at all. If universal civil marriage was followed by church services that looked like marriage in all but name, the credibility of the doctrine of marriage would not be enhanced.

11. The Church needs to uphold its firm conviction that there is one type of marriage for all, and to continue to engage with all those who seek its ministry. The attached Advice to clergy has been framed with those principles very much in mind.

#### Ecumenical Implications

12. Any agreed change in the Church of England’s practice in respect of further marriage could have particular implications for the Methodist and United Reformed Churches for whom second marriages comprise a high proportion of their total number of

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<sup>11</sup> *An Honourable Estate*, Church House Publishing 1988. para 26. See paras. 24-42 for a fuller explication of this view.

marriages (see paras 5.2 & 5.4 of the Winchester Report).

### Resource Implications

13. If implemented, the need for an advisory mechanism and proper training in decision-making and for improvement to marriage preparation will have unquantifiable resource implications for dioceses. It is proposed that this aspect be pursued jointly with any changes resulting from the concurrent review of marriage law (in liaison with organisations such as the Family Life and Marriage Education Network and the Mothers' Union).

### Conclusion

14. The House accordingly asks Synod to

- a) Affirm – in accordance with the doctrine of the Church of England as set out in Canon B.30 – that marriage should always be undertaken as ‘a solemn, public and life-long covenant between a man and a woman’<sup>12</sup>;
- b) Recognise that some marriages regrettably do fail and that there are circumstances in which a divorced person may be married in church during the lifetime of a former spouse<sup>13</sup>;

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<sup>12</sup> Pastoral Introduction to the Common Worship Marriage Service.

<sup>13</sup> Closely mirroring the wording of para (b) of the General Synod's July 1981 Resolution.

- c) Recognise that the decision whether or not to solemnise such a marriage in church after divorce rests with the minister (or the officiating cleric if the minister is prepared to allow his/her church to be used for the marriage)<sup>14</sup>;
- d) Invite the House to issue its advice contained in ANNEX 1.
- e) Grant general approval to the rescission of paragraph 1 of the Marriage Resolutions of the Convocation of Canterbury dated 5 May 1957 and of paragraphs 1 to 4 of the Marriage Resolutions of the Convocation of York dated June 1938 (as set out in ANNEX 4)<sup>15</sup>.

(on behalf of the  
House of Bishops)  
+ GEORGE CANTUAR:  
May 2002

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<sup>14</sup> In accordance with s.8 of the Matrimonial Causes Act 1965.

<sup>15</sup> This section *only* is Article 7 business, and is not open to amendments.



## ANNEX 1

### **ADVICE TO CLERGY**

1.1 Marriage is created by God to be a lifelong relationship between a man and woman. The church expects all couples seeking marriage to intend to live together "for better for worse....till death us do part". It is not, then, a light matter to solemnise a marriage in which one partner has a previous partner still living. It is important that the decision you take as to whether to solemnise such a marriage should be on the basis of clear principles that are consistent with the church's teaching.

This advice has been issued by the House of Bishops to assist you as a member of the clergy, since it remains your decision under the Civil Law relating to marriage whether such a couple may be married in church. (It is also intended for use by the bishop and/or his adviser when cases of difficulty are referred to him for advice)

### **2. Principles**

#### **The Responsibility of the Parish Clergy**<sup>16</sup>

2.1 The responsibility for deciding whether or not to conduct a further marriage rests with you both for pastoral and legal reasons. Experience suggests,

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<sup>16</sup> This advice also applies to non-parochial clergy who have pastoral charge.

however, that clergy may welcome some support in making this decision and the following advice is accordingly intended to assist you in this difficult and sensitive task.

2.2 Under the Matrimonial Causes Act 1965 you are not compelled to officiate at such further marriages, nor to make your church available for them<sup>17</sup>. If you are unwilling to officiate at further marriages or to make your church available for such services, you should make this clear to enquiring couples at an early stage.

2.3 If, as a ‘minister’ of a church, you are unwilling to conduct such a wedding yourself you may invite a colleague to do so; but other clergy in the area cannot be required to conduct further marriages against their conscience. The decision as to whether or not to conduct the marriage will become theirs alone; and the issues discussed below will accordingly be as relevant to their decision as to your own.

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<sup>17</sup> S.8.2 of the Matrimonial Causes Act 1965 states, “No clergyman of the Church of England or the Church in Wales shall be compelled (a) to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living; or (b) to permit the marriage of such a person to be solemnised in the church or chapel of which he is the minister.”

### 3. **Issues and questions you may wish to consider in the light of the Church's doctrine of marriage**

3.1 It is your responsibility to form your own judgement as to whether to proceed with the proposed further marriage, in the light of the Church's teaching on marriage<sup>18</sup>. You may find it helpful to that end in the course of your interview with the couple to satisfy yourself in relation to the following questions, which are intended to draw out issues relevant to the Church's teaching:

(a) **Do the applicants have a clear understanding of the meaning and purpose of marriage?**

- Do the couple understand that divorce is a breach of God's will for marriage?
- Have they a determination for the new marriage to be a life-long faithful partnership?

(b) **Do the applicants have a mature view of the circumstances of the breakdown of the previous marriage and are they ready to enter wholeheartedly and responsibly into a new relationship?**

- Does the divorced person appear to be relatively free of self-deception and self-justification about the past?
- Did the divorced person take the first marriage seriously and has he/she learnt from mistakes?

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<sup>18</sup> See the House of Bishops' Teaching Document *Marriage*, CHP 1999.

- Is the other party aware of the possible cause(s) of the breakdown of their future partner's previous marriage?
  - Is there an attitude of repentance, forgiveness and generosity of spirit so that the applicants are free to build a new relationship?
- (c) **Has there been sufficient healing of the personal and social wounds of marriage breakdown?**
- Has there been enough time and distance for the parties concerned to recover emotional stability and good judgement?
  - Are there any extant court proceedings relating to the former marriage?
  - Are responsibilities to the children of any previous marriage being recognised and honoured?
- (d) **Would the effects of the proposed marriage on individuals, the wider community and the Church be such as to undermine the credibility of the Church's witness to marriage?**
- Would the new marriage be likely to be a cause of hostile public comment or scandal?
- (e) **Would permitting the new marriage be tantamount to consecrating an old infidelity?**
- While it would be unreasonable to expect that the couple should not even have known each other



during the former marriage(s), was the relationship between the applicants – so far as you can tell from the information made available to you - a direct cause of the breakdown of the former marriage?

**(f) Has either of the parties been divorced more than once?**

- In the case of multiple divorces, the sheer complexity of relationships that may have developed will inevitably make any assessment by you more difficult. However, the Church witnesses to lifelong marriage, and should not find itself being a party to “serial monogamy”, hence neither of the parties should normally have been married and divorced more than once.

**(g) Do the applicants display a readiness to explore the significance of the Christian faith for their lives so that their further marriage is not an isolated contact with the Church?**

- ⇒ Given that the provision of careful marriage preparation should be the norm for all couples seeking marriage in church, do the applicants possess an understanding of the need of God's grace in relationships and show a willingness to be open to Christian teaching?

## **4. Recommended Procedures**

### Dialogue with the Parish

4.1 As further marriage is likely to be a matter of concern within the parish, you will no doubt wish to inform your PCC of the general principles by which you intend to exercise your discretion. As part of the process of informing your own judgement in how to proceed in this sensitive area, you may wish to seek the PCC's views on your proposed approach. But if so, it is important for the PCC to understand that it has no power to direct you in this matter, and should not seek to do so.

### Relationships with fellow clergy

4.2 It will be helpful if there are occasional discussions at Deanery Chapter meetings on the issues raised, so that clergy are aware of the views of their colleagues, recognise each other's position, and respect the position of those parishes where such marriages are not allowed.

### Local Ecumenical Partnerships

4.3 Special consideration will need to be given to consultation with ecumenical partners in parishes where a Local Ecumenical Partnership is in operation.

### Documentation

4.4 The House of Bishops provides a leaflet on Marriage in Church after Divorce that is available to all enquirers. It includes both an explanatory statement and an application form to be completed by the couple together

with any other relevant material about the process to be followed. [to be prepared at a later date]

### Interviews

4.5 If the couple's request is to be taken further, the background of their case needs to be explored very carefully. When you come to consider the circumstances of the couple, the cause for the breakdown of the previous marriage may not be clear, so you will wish to handle each case with a great deal of sensitivity. It is recommended that this is done by at least two confidential interviews, using the application form as background material. It is desirable that the couple should understand the purpose of the interviews and that attending the interviews cannot imply an agreement to conduct a marriage. It is also desirable that both partners should attend the interviews, having been made aware in advance of the searching and personal nature of the issues to be discussed.

4.6 The interviews cannot have a standard form but the questions which are set out in Section 3 above may be of assistance in enabling you to decide whether the proposed further marriage would be consistent with the Church's teaching on marriage.

### Reference to the Bishop

4.7 Although the decision whether to conduct a further marriage rests with you, you may wish to seek the advice

of your Diocesan Bishop<sup>19</sup>. In these instances you should send the Bishop the couple's application form with a statement that you have drawn up based on the interviews including any provisional conclusions that you have reached. You will need to bear in mind that the couple will be entitled to see what you have written (under the Data Protection Act).

### The Decision

4.8 In deciding your response to the application (see 2.1 above), you need to ensure the maximum degree of consistency in your approach (as applicants are entitled to have their cases dealt with by you consistently) as well as bearing in mind the consequences of setting a precedent which it will be hard not to follow.

4.9 It will be best if you convey your decision to the couple in person. If you are declining to conduct the marriage, you may feel it appropriate to convey your reasons in writing and to copy this letter to the bishop if you have consulted him.

4.10 In cases where you agree to the couple's request, you will need to explain the need for marriage preparation (as for any marriage).

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<sup>19</sup> See para. 6.4 in the Report *Marriage in Church after Divorce* (GS 1361). It should be noted that bishops cannot give permission for couples to be married in church and that applicants should not approach the bishop direct.

## **5. Services of Prayer and Dedication**

5.1 There may be some cases when a marriage in church is deemed inappropriate, yet you will wish to offer the couple the possibility of beginning their life after a civil marriage in the context of Christian worship. Here a Service of Prayer and Dedication after a Civil Marriage could be appropriate, although it is not intended to be used as a substitute for the marriage service. However, the reasons for considering a further marriage inappropriate may also apply to this option.

5.2 In 1985 the House of Bishops approved and commended for use Services of Prayer and Dedication after Civil Marriage. The vows taken in a civil marriage are just as binding as those taken in church but the Service gives the couple an opportunity to express their commitment before God. The Church witnesses publicly to the permanence of their marriage, while also expressing in a more personal way the love and forgiveness of God.

5.3 You must of course be satisfied before conducting the Service that the civil marriage has been contracted

## 6. Legal Formalities<sup>20</sup>

### Divorce Documents

6.1 Clergy conducting the marriage must see and check the relevant divorce documents before arranging the marriage preliminaries. Particular note should be taken that a decree absolute has been obtained, not merely a decree nisi. The advice of the Diocesan Registrar and /or the civil registrars should be sought if there are any doubts about the document(s) presented.

6.2 The Church recognises a declaration of nullity made by the civil courts in the United Kingdom; that is, a declaration that there is no valid marriage in existence. A cleric has the same obligation to marry a parishioner whose marriage has been annulled in this way as would exist if the parishioner had never gone through a form of marriage. If in doubt, seek advice from the Registrar.

6.3 Marriage preliminaries are the responsibility of the priest and couple concerned. They follow the pattern applicable in all other marriages, and if there is any doubt the priest should contact the Diocesan Registrar or the Archdeacon.

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<sup>20</sup> Subject to changes in the light of the General Synod's consideration of proposed changes to Marriage Law in the Report *The Challenge to Change* [GS 1448].

## **7. Statistics**

7.1 So that accurate records can be kept of how this procedure works out, a quarterly return should be made to the diocesan bishop indicating the number of further marriages conducted and the number of applications refused.





## ANNEX 2

### **NOTE OF THE ADVICE GIVEN BY THE LEGAL OFFICERS OF THE GENERAL SYNOD**

The Legal Officers of the General Synod<sup>21</sup> were asked the following questions:

1. Would the implementation of the Winchester proposals, or others allowing marriage in church after divorce, require an amendment of Canon B 30, or would it suffice to declare an Act of Synod making new provision in place of the 1938 resolutions of the Convocations of Canterbury and York and the 1957 Act of Convocation of Canterbury (which effectively set out the Church's present formal position)?
2. If an amendment to Canon B 30 were required, would that amendment fall within

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<sup>21</sup> The Dean of the Arches (the Rt Worshipful Sheila Cameron QC), the Vicar-General of the Province of York (the Rt Worshipful Thomas Coningsby QC), Standing Counsel to the General Synod (Sir Anthony Hammond KCB QC) and the Legal Adviser to the General Synod (Mr Stephen Slack)

sections 1(1) or 2(1) of the Church of England (Worship and Doctrine) Measure 1974, so as to require two-thirds majorities in each House at the Final Approval stage?

3. Would implementation of the Winchester proposals (or others allowing marriage in church after divorce) be consistent with the duty of the General Synod as a public authority to comply with the requirements of the Human Rights Act 1998?

The answers of the Legal Officers to these questions was as follows:

### **1. Canon B 30**

It was unanimously agreed that it was not necessary to amend Canon B 30 in order to permit marriage in church after divorce involving a party whose former spouse is still living ('further marriage').

The intention at the time the Canon was passed was not relevant: what mattered was the Canon in the form in which it stood now. In the unanimous view of the Legal Officers the Canon did not clearly prohibit further marriage but was ambiguous, being capable of being understood as allowing it. The Legal Officers noted in particular that, instead of saying that marriage was "*a permanent union*", the Canon spoke of it as simply being "*in its nature [emphasis supplied] a union permanent*

*and lifelong". As the Lichfield report had expressed it in 1978, the expression "in its nature":*

*"could be taken to mean either the characteristic and normative nature of marriage or its determinative and invariable essence".*

It would be undesirable to seek to amend the Canon in order to make the position clearer. In addition to the practical difficulties involved in finding an appropriate form of words, it would be undesirable to do anything to suggest that the doctrine of the Church had changed. (In 1984 the House of Bishops confirmed their view that further marriage was not necessarily incompatible with the Church's doctrine of marriage. The Legal Officers were not aware of any change in that position.)

*The Legal Officers did not consider that paragraph 2 of Canon B 30 was inconsistent with their analysis. (It states that*

*"The teaching of our Lord affirmed by the Church of England is expressed and maintained in the Form of Solemnization of matrimony contained in The Book of Common Prayer".)*

The doctrine of marriage expressed in the Book of Common Prayer marriage service did not seem to the Legal Officers to be inconsistent with their interpretation of Canon B 30. Although the service makes it plain that marriage must be intended, when entered into, to be lifelong, it would not seem to preclude the possibility of

further marriage where an earlier marriage has ended in divorce.

## **2. Sections 1(1) and 2(1) of the Church of England (Worship and Doctrine) Measure 1974**

Since no amendment of the Canon was required the question whether, had it done so, sections 1(1) or 2(1) of the 1974 Measure would have applied, was an academic one.

However, the Legal Officers unanimously agreed that, had the issue arisen, sections 1(1) or 2(1) of the 1974 Measure would not have applied and special majorities in each House would not accordingly have been needed for the Final Approval of any amending Canon, because:

- the Canon would not be making provision "*with respect to worship*" (since it would not be proposing changes to the marriage service, but rather to the circumstances in which that service might be used); and
- nor would it be making provision "*for any matter ... to which any of the rubrics contained in the Book of Common Prayer relate*". (On this point, the position seemed to be analogous to that in *Brown v Runcie*<sup>22</sup>, in which the Court of Appeal had held that section 1(1)(b) did not apply.)

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<sup>22</sup> Unreported, 13<sup>th</sup> February 1991

### **3. Compliance with the Human Rights Act**

Before addressing the question of the application of the Human Rights Act, the Legal Officers considered it necessary to address another issue, namely that of the implications of the civil law position.

#### **(a) The implications of the civil law position**

The Legal Officers considered this issue to be of fundamental importance for the implementation of the Winchester group proposals (or, for that matter, any others relating to marriage in church after divorce).

The Legal Officers recognised that a couple have a legal right to marry in the parish church of one or both of them, subject only to (a) compliance with the necessary preliminaries and (b) where either party has been divorced and their former spouse is still living, to the conscientious right of objection conferred on the relevant cleric by section 8 of the Matrimonial Causes Act 1965. They unanimously agreed that the effect of the 1965 Act is to leave the decision as to whether or not to exercise that right in a particular case to the relevant cleric alone: it is their conscience that is protected. The Church cannot therefore require him or her to act in a particular way, whether in an individual case (e.g. by requiring the decision to be taken by a tribunal or giving a right of appeal to the bishop from the cleric's decision) or by requiring the cleric to apply certain criteria or to follow certain procedures.

This analysis - which was derived from normal administrative law principles relating to the exercise of statutory powers - would be equally applicable whether the criteria or procedure were laid down by Act of Synod or Canon. It also raised doubts about the validity of the existing Act of Convocation, in so far as it purported to prohibit further marriage by precluding the use of the marriage service wherever one of the parties had been divorced and their former spouse was still living.

(Nor did section 8 allow a cleric to have regard to matters other than those relevant to the exercise of the right of conscientious objection it conferred. That provision was not intended to provide a basis for a discriminatory approach as between couples generally, with the cleric allowing further marriage for some couples but not others. Its effect was to protect a cleric's freedom of conscience (and it was not just available to those who held an 'indissolubilist' position<sup>23</sup>). It

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<sup>23</sup> There is nothing in the terms of section 8 to limit it in this way; and the argument that it should be given a generous interpretation, protecting the full range of understandings of what the Church of England's doctrine requires, has probably been strengthened by the Human Rights Act. (Section 3(1) of the Act requires primary legislation to be read and given effect in a way which is compatible with the rights conferred by the European Convention on Human Rights; and Article 9 of the Convention of course confers the right to freedom to manifest one's religion.)

followed that in deciding whether to take advantage of the right by refusing to conduct a service of further marriage, a cleric should only have regard to factors which were relevant to whether the further marriage would be consistent with their understanding of the Church of England's doctrine of marriage.)

There was a difference of view between the Legal Officers, however, as to the extent to which the Church could properly, as a matter of law, provide any *guidance* for a cleric as to whether or not to conduct a service of further marriage in a particular case.

One of the Legal Officers took the view that the Church was not entitled to seek to influence the cleric's decision in any way. Even non-legally binding guidance from the Church would be open to challenge on the basis that it would constitute a fetter on the clerics' judgement. And, in so far as a cleric took it into account, there was a danger that it would provide a basis for the argument that they had taken into consideration matters which the statutory provision did not allow.

The other three Legal Officers took a different view. They considered that there was no objection to the Church offering guidance to clergy to help inform their decision. That guidance could both address the Church of England's view of marriage and further marriage generally and identify particular factors which might be relevant to the question of whether further marriage in a particular case would be consistent with that view. But any such guidance must not seek to interfere with the

exercise of a cleric's personal judgement, recognising instead that the decision was theirs alone. Nor must it encourage them to take into account considerations which were irrelevant to the exercise of the conscientious right of objection. It should accordingly be focused on enabling the cleric to satisfy him or herself that conducting a service of further marriage in a particular case would be consistent with the doctrine of the Church of which he or she was a minister. Factors relating to the conduct of the parties could only be taken into account if and in so far as they were relevant to that question.

The majority therefore considered that, whilst it would not be consistent with the civil law for the Church to make provision for further marriage to take place only if certain nationally agreed pastoral criteria were met, there was in principle scope for the Church to issue guidance to clergy to enable them to exercise their own judgement as to whether or not to conduct a further marriage.

As to the process by which any guidance might be offered, the Legal Officers unanimously agreed that if it was proper for the Church to offer guidance of this kind, any statement by the General Synod which impacted upon the exercise of the clergy's right of conscientious objection under section 8 of the 1965 Act should be made under the authority of an ordinary resolution rather than an Act of Synod. This was because, whilst an Act of Synod did not have prescriptive legal effect, it would impact upon the conscience of the clergy: it possessed *"great moral force as the considered judgement of the*



*highest and ancient Synod of the Province*"<sup>24</sup>. It might therefore be seen as representing a fetter on the exercise of the conscientious right of objection and accordingly as being open to legal challenge on the basis of the principles explained above.

### **(b) The Human Rights Act itself**

The Legal Officers proceeded on the assumption that, in whatever form the General Synod made new provision for further marriage, in doing so it would be a 'public authority' for the purposes of the Human Rights Act 1998, and was therefore required to act in a way which was compatible with the rights conferred by the European Convention on Human Rights.

The Legal Officers also agreed that it was strongly arguable that a cleric was also a public authority in his or her own right in relation to the conduct of marriages, because of the legal consequences of marriage in civil law.

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<sup>24</sup> This was the description attached to the effect of an Act of Convocation in *Bland v Archdeacon of Cheltenham* [1972] 1 All ER 1012, 1018. The effect of an Act of Synod corresponds to that of an Act of Convocation, but in relation to the Church of England as a whole: under section 1 of the Synodical Government Measure 1969 the powers enjoyed by the Convocations of Canterbury and York have of course been conferred upon the Synod, but so that they may be exercised for the Church of England as a whole.

The Legal Officers identified two of the Convention rights as relevant in these circumstances: the right to marry (conferred by Article 12) and the right to be free from discrimination on any ground (conferred by Article 14).

It was unanimously agreed that Article 12 as such did not present a problem because it did not confer a right to marry in any particular place or form. It was also unanimously agreed, however, that Article 14 could potentially apply in conjunction with Article 12. Thus, granted that further marriage was possible, those seeking it were entitled in principle to be free from discrimination. That meant, amongst other things, that similar cases had to be treated in a similar way. It was recognised, however, that discrimination in this area would be justifiable if it was undertaken to pursue a legitimate aim and involved a reasonable relationship of proportionality between the means employed and the aims sought to be realised.

The majority view amongst the Legal Officers was that implementing and acting upon guidance of the kind they considered to be compatible with the 1965 Act was not at serious risk of challenge on these grounds. That was because any discrimination would be undertaken in order to pursue the legitimate aim of protecting the freedom of religion of the cleric in question (which was itself protected under Article 9) and, within the framework of the present law, involved a reasonable relationship of proportionality between the means employed and the

aims sought to be realised. The discrimination would not, in particular, be undertaken with a view to achieving some other end.

Similar arguments would be applicable in the event that the cleric was indeed a public authority in his or her own right in relation to the conduct of marriages.

One of the Legal Officers took a different view, considering that arrangements of the kind envisaged by the majority could be seen as being undertaken not solely to protect the cleric's right of conscientious objection but at least partly to achieve other ends, including the promotion of consistency, and could therefore possibly be open to legal challenge.



**MARRIAGE IN CHURCH AFTER DIVORCE:  
ANALYSIS OF DIOCESAN RESPONSES**

1. The Report from the House of Bishops' Working Party chaired by the Bishop of Winchester on *Marriage in Church after Divorce* [GS 1361] was published in January 2000 with an invitation for Diocesan Synods to debate it. Dioceses were then asked to report back by the end of March 2001 with a record of Diocesan Synod votes on the following propositions:
  - 1) *Do you accept the principle that there are circumstances in which a divorced person may be married in church during the lifetime of a former spouse?*
  - 2) a. *Do you support the recommendations of the Working Party summarised in Chapter 9 of the report as being the right way to proceed?*  
b. *If not, what do you consider to be the shortcomings of the recommendations?*
2. All 44 dioceses duly reported back on this matter. An analysis of the diocesan voting is attached. As can be seen from this, there was strong support for **the principle** set out in the first question above (with no diocese opposed); there was, however, less of a consensus on **the practical application** in terms of support for the Winchester proposals although they

did receive majority support in 26 dioceses (62% of those who have responded). It is clear from the diocesan responses that the consultation process has involved a very extensive airing of this sensitive issue extending, in many cases, well beyond formal voting in Diocesan Synods; many PCCs and Deaneries have also discussed the matter, and both FLAME and the Mothers' Union have facilitated discussions and made comments of their own.

3. Many of the points that have arisen in the course of the consultation largely mirror those considered by the House's Working Party, but, at the risk of oversimplifying literally hundreds of comments, many of which were to some extent mutually contradictory, the following stand out:

- ❖ concern at the judgmental role placed upon the incumbent, and the consequential administrative burden;
- ❖ calls for clergy to be supported in any decision-making role by a more formal process than that envisaged, through reference to a panel / tribunal;
- ❖ the feeling that the proposed criteria should be tightened up in a number of respects to reduce the subjectivity to a minimum, and further enhance good practice;
- ❖ the perception that discrimination in this area might be open to challenge, possibly under the Human Rights Act;

- ❖ the feeling that the reference to the Diocesan Bishop was an unnecessary additional bureaucratic layer;
- ❖ the realisation - acknowledged in the Working's Party's recommendation 9.7 - that proper resourcing would be needed to provide training to those making decisions;
- ❖ a feeling that there should be some differentiation in the marriage service in respect of further marriage;
- ❖ a desire to see clarification of the circumstances in which the Service of Prayer & Dedication should be used, in the event of further marriage being available;
- ❖ the question of making proper provision for such couples whose parish priest refuses on conscience ground to solemnise further marriages (possibly linking in with what may emerge from the Working Party on marriage law under the chairmanship of the Bishop of St Edmundsbury & Ipswich).





### Marriage in Church after Divorce: Diocesan Responses

Diocese	Date of Vote	Vote 1	Vote 2	Comments
Bath & Wells	March –by post (due to Foot & Mouth)	<i>B: 2/0 C: 71/7 (2) L: 57/7 (1)</i>	<i>B: 2/0 C: 47/22 (11) L: 41/15 (9)</i>	
Birmingham	24.3.01	<i>B: 2/0 C: 52/2 L: 49/7</i>	<i>B: 2/0 C: 39/15 L: 47/9</i>	
Blackburn	1.3.01	96/24 (10)	9.3: 98/9 (23) 9.4: Agreed by majority 9.5: 80/19 (23) 9.6: Noted – no vote 9.7: Accepted nem con 9.8: Noted 9.9: Rejected	Synod also voted by 88/19 (15) that it was ‘inappropriate to have different words of service for marriage and marriage after divorce’
Bradford	March 01	<i>B: 2/0 C:30/0 (4) L: 49/2</i>	<i>B: 2/0 C: 24/7 (3) L: 36/9 (6)</i>	Synod welcomed <u>Marriage</u> but called for the HoB to initiate research and informed Christian reflection on heterosexual relationships and marriage with a view to further pastoral advice on marriage. Also calls for specific ministry to people at the time of a legal divorce.
Bristol	11.11.00	<i>B: 2/0 C: 29/0 L: 35/0 (1)</i>	<i>B: 1/0 C: 27/0 L: 36/1</i>	9.3, 9.6 & 9.7 amended; 9.5 deleted (ie. omission of reference to the bishop, whose role would be advisory only) Also called for handling of first marriages to be reviewed.
Canterbury	10.3.01	<i>B: 1/0 C: 45/4 L: 55/2 (2)</i>	<i>B: 1/0 C: 57/6 (2) L: 57/3 (7)</i>	

Carlisle	11.11.00	67/15 (1)	9.3-7: 52/26 (7) 9.8: 77/6 (2) 9.9: 55/12 (18)	Anxiety at the pastoral consequences of the decision resting with the Incumbent.[PMM passed to this effect by 47/25(10)] Support for alternative wording for a further marriage to reiterate commitment to lifelong marriage. [PMM passed 40/35(11)]
Chelmsford	10.3.01	124/20 (7)	69/74 (12)	
Chester	3.3.01	132/5 (2)	101/33 (8)	Following motion passed calling for consistency across CofE [132/9] Further motion commending the Archdeacon of London's proposals passed narrowly [63/55(12)]
Chichester	13.1.01	B:3/0 C:34/30 (1) L:53/35	B: 0/3 C:10/53 (1) L: 17/61(8)	
Coventry	Nov. 00	92/0 (1)	64/8 (20)	
Derby	10.2.01	111/15 (3)	81/44 (7)	
Durham	4.11.00	124/7 (7)	85/40 (13)	
Ely	10.3.01	98/15 (5)	72/25 (17)	Further motion passed as follows: <ul style="list-style-type: none"> <li>• Parish Church should be available unless incumbent applies to the bishop to prevent such a marriage</li> <li>• Decision should be up to the incumbent alone, but in consultation with bishop or his nominated officer</li> <li>• Should be a form of service for the ending of a marriage</li> <li>• Should be national application forms</li> <li>• Should be an appeal process</li> </ul>

Europe	June 00	<i>B:</i> 2/0 <i>C:</i> 19/1 (1) <i>L:</i> 24/0 (1)	<i>B:</i> 1/1 <i>C:</i> 0/19 (3) <i>L:</i> 1/21 (3)	
Exeter	24.2.01	<i>B:</i> 2/0 <i>C:</i> 43/15 <i>L:</i> 51/14 (2)	<i>B:</i> 0/2 <i>C:</i> 0/57 (1) <i>L:</i> 3/63 (5)	
Gloucester	24.3.01	72/11 (4)	60/22 (7)	
Guildford	3.3.01	99/10 (2)	90/9 (9)	Motion called for an overhaul of teaching on marriage; developing models of good practice in marriage preparation (involving the laity); greater clarity in the discernment process offered to clergy; and that couples should not be disadvantaged by residency.
Hereford	10.3.01	99/1 (2)	96/7 (3)	
Leicester	17.6.00	85/11 (5)		One composite motion.
Lichfield	28.4.01	<i>B:</i> 3/0 <i>C:</i> 33/4 <i>L:</i> 39/10 (3)	<i>B:</i> 1/2 <i>C:</i> 19/14 (2) <i>L:</i> 27/21 (4)	
Lincoln	March 01	<i>B:</i> 3/0 <i>C:</i> 43/5 (3) <i>L:</i> 56/7 (2)	<i>B:</i> 2/1 <i>C:</i> 18/22 (8) <i>L:</i> 24/32 (7)	
Liverpool	March 01	103/3	90/19 (2)	Amendments to the 2 <sup>nd</sup> motion: ❖ That Canon B30 should not be amended (53/44 (15)); ❖ That National Pastoral Criteria should explain that some clergy cannot in conscience conduct further marriages but may be able to offer pastoral support (83/9 (13)).
London	26.02.01	<i>B:</i> 3/0 <i>C:</i> 47/8 <i>L:</i> 52/15	<i>B:</i> 0/3 <i>C:</i> 9/41 <i>L:</i> 5/45	Diocesan Synod Motion passed by 98/14 as follows: 1. “That this Synod accepts that there are exceptional circumstances in which a divorced person may be married in church during the lifetime of a former spouse.

				<ol style="list-style-type: none"> <li>2. That this Synod believes that the recommendations of the working party summarised in chapter 9 of the Report ...will lead to remarriage in church becoming normative, and on a par with first time marriage, rather than an exceptional provision, and therefore reject those recommendations;</li> <li>3. That this Synod reaffirms its commitment to Canon B30;</li> <li>4. That the HoB be requested to bring forward proposals for the establishment of diocesan, regional or provincial panels, along the lines of those established by the Anglican Church of Canada, to review all applications for remarriage;</li> <li>5. That the HoB be requested to draw up pastoral guidelines for the diocesan, regional or provincial panels to reflect the understanding that the Church regards remarriage as an exceptional provision and to take into account all known circumstances of the breakdown of the applicants' previous marriage(s);</li> <li>6. That this Synod request the ABC to permit the grant of special licences to make provision for those suitably recommended to be married, if not in their parish church, to be married in a church within their deanery, by the clergy using their right under civil law to act as registrars;</li> <li>7. That this Synod request the Standing Committee of the Convocation of Canterbury to bring forward proposals to amend the 1957 Act of Convocation in line with (6) above."</li> </ol>
Manchester	24.2.01	<i>B:</i> 3/0 <i>C:</i> 59/8 (1) <i>L:</i> 67/5 (1)	<i>B:</i> 1/1 (1) <i>C:</i> 11/51 (6) <i>L:</i> 16/54 (7)	Further motion passed by 92/23 (35) expressing concern at the Bishop's role in the process as being potentially time-consuming and bureaucratic; and asking for further work on the pastoral guidelines (esp e, g & h) to make them of greater practical help to parish clergy.
Newcastle	17.3.01	62/24 (2)	55/28 (5)	
Norwich	14.10.00	78/17 (3)	59/39 (5)	
Oxford	March 01	<i>B:</i> 3/1 (0) <i>C:</i> 55/8 (2) <i>L:</i> 77/12	<i>B:</i> 2+1/2 <i>C:</i> 35/28 (2) <i>L:</i> 51/32 (6)	

Peterborough	3.3.01	<i>C</i> :49/11 <i>L</i> :57/11	<i>C</i> : 33/28 <i>L</i> : 46/18	
Portsmouth	11.11.00	100/7 (3)	66/21 (23)	
Ripon & Leeds	23.6.01 (post F&M)	<i>B</i> : 2/0 <i>C</i> : 43/7(1) <i>L</i> : 30/2(1)	<i>B</i> : 1/1 <i>C</i> : 6/24 (1) <i>L</i> : 2/41 (6)	
Rochester	17.2.01	<i>B</i> : 1/0 <i>C</i> : 53/6 (4) <i>L</i> : 45/14 (3)	<i>B</i> : 1/0 <i>C</i> : 25/24 (1) <i>L</i> : 25/31 (4)	Following motion asked Archbishops' Council to discuss the pros and cons of universal civil marriage. ❖ Concern at incumbent's role: need for training. ❖ Concerns about continued inconsistencies.
St Albans	10.3.01	<i>B</i> : 2/0 <i>C</i> : 43/12 <i>L</i> : 69/9	<i>B</i> : 0/2 <i>C</i> : 24/33 <i>L</i> : 41/30	
St E & I	Planned Synod vote in March 01 cancelled due to the Foot & Mouth epidemic	11/14 responses to Bps' Council support principle	Majority support from deaneries	
Salisbury	Nov 00	<i>B</i> : 2/0 <i>C</i> : 43/6 (1) <i>L</i> : 59/12 (1)	<i>B</i> : 2/0 <i>C</i> : 34/12 (5) <i>L</i> : 41/22 (9)	
Sheffield	10.3.01	<i>B</i> : 2/0 <i>C</i> : 26/8 <i>L</i> : 45/3	<i>B</i> : 2/0 <i>C</i> : 10/26 <i>L</i> : 9/36	
Sodor & Man	PCC vote	N/A	41%/59%	In 1987 clergy in convocation agreed that no remarriage should take place without the Bishop's permission: this is still in place.

Southwark	10.3.01	87/20 (7)	4/109 (3)	2 <sup>nd</sup> motion considered recourse to Diocesan Bishop in each case to be unnecessary and impractical, and called for arrangements for pastoral referral in each deanery for couples where the incumbent did not remarry on conscience grounds
Southwell	April 2000	Agreed	Abstain	
Truro	12.5.01	<i>B: 2/0 C: 27/13 L: 52/8</i>	<i>B: 0/2 C: 1/37 (2) L: 0/60</i>	
Wakefield	10.3.01	<i>B: 1/0 C: 44/9 L: 36/14</i>	<i>B: 1/0 C: 21/26 (6) L: 24/20 (7)</i>	
Winchester	28.4.01	<i>B: 3/0 C: 44/15 (2) L: 58/16 (3)</i>	Agreed except for 9.5	Rejection of recommendation that incumbent should decide each case. Motion on universal civil marriage heavily lost.
Worcester	3.3.01	<i>C: 38/0 L: 41/1 (1)</i>	<i>C: 2/37 (1) L: 1/37 (4)</i>	
York	28.4.01	109/4 (2)	8/92 (10)	Following motion passed - 66/36 (12) : “That this Synod requests the Convocations of Canterbury and York to revoke the regulations concerning marriage and divorced persons and recommends that the ecclesiastical preliminaries for marriage, namely banns, common licence and special licence, should be made available without distinction being made between divorced persons wishing to remarry during the lifetime of a former spouse and persons who have not previously been married.”
<i>Armed Forces</i>	Jan 01	<i>B: 1/0 C: 17/1 (1) L: 11/0</i>	<i>B: 1/0 C: 16/0 (3) L: 9/1 (1)</i>	
<b>Summary</b>				
44		43/0 (1)	26/17(1)	

## ANNEX 4

### **Canterbury Convocation**

The following Regulations were passed in the Upper and Lower Houses of the Canterbury Convocation in May 1957 and declared an Act of Convocation on 1 October 1957.

#### Regulations concerning Marriage and Divorce

1. That this House reaffirms the following four Resolutions of 1938.....
  - (1) That this House reaffirms that according to God's will, declared by Our Lord, marriage is in its true principle a personal union, for better or for worse, of one man with one woman, exclusive of all others on either side, and indissoluble save by death.
  - (2) That this House also affirms as a consequence that remarriage after divorce during the lifetime of a former partner always involves a departure from the true principle of marriage as declared by Our Lord.

- (3) That in order to maintain the principle of lifelong obligation which is inherent in every legally contracted marriage and is expressed in the plainest terms in the Marriage Service, the Church should not allow the use of that service in the case of anyone who has a former partner still living.
- (4) That while affirming its adherence to Our Lord's principle and standard of marriage as stated in the first and second of the above resolutions, this House recognises that the actual discipline of particular Christian Communion in this matter has varied from time to time and place to place, and holds that the Church of England is competent to enact such discipline of its own in regard to marriage as may from time to time appear most salutary and efficacious.

[2(A) Recognising that the Church's pastoral care for all people includes those who during the lifetime of a former partner contract a second union, this House approves the following pastoral regulations as



being the most salutary in present circumstances:

(a) When two persons have contracted a marriage in civil law during the lifetime of a former partner of either of them, and either or both desire to be baptised or confirmed or to partake of the Holy Communion, the incumbent or other priest having the cure of their souls shall refer the case to the Bishop of the diocese, with such information as he has and such recommendations as he may desire to make.

(b) The Bishop in considering the case shall give due weight to the preservation of the Church's witness of Our Lord's standard of marriage and to the pastoral care of those who have departed from it.

(c) The Bishop is satisfied that the parties concerned are in good faith and that their receiving of the Sacraments would be for the good of their souls and ought not to be a cause of offence to the Church, he shall signify his approval thereof both to the priest and to the party or parties concerned : this approval shall be given in writing and shall be accepted as authoritative in both

the particular diocese and in all other diocese of the province]<sup>25</sup>

[2(B) No public Service shall be held for those who have contracted a civil marriage after divorce. It is not held within the competence of the Convocations to lay down what private prayers the curate in the exercise of his pastoral Ministry may say with the persons concerned, or to issue regulations as to where or when these prayers shall be said]<sup>26</sup>.

2(C) Recognising that pastoral care may well avert the danger if it comes into play before legal proceedings have started, this House urges all clergy in their preparation of couple for marriage, to tell them, both for their own sakes and for that of their friends, that the good offices of the clergy are always available.

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<sup>25</sup> This Section was revoked by the General Synod in November 1982.

<sup>26</sup> This Section was revoked by the General Synod in July 1985.

## **York Convocation**

The following is a relevant extract from Marriage Resolutions of the York Convocation adopted in June 1938:

1. That this House affirms that according to God's will, declared by Our Lord, marriage is in its true principle a personal union, for better or for worse, of one man with one woman, exclusive of all others on either side, and indissoluble save by death.
2. That this House also affirms as a consequence that both divorce itself and re-marriage after divorce during the lifetime of a former partner always involve(s) a departure from the true principle of marriage as declared by Our Lord.
3. That in order to maintain the principle of lifelong obligation which is inherent in every marriage contract between Christians (however solemnized) and is expressed in the plainest terms in the Marriage Service, the Church

should not allow the use of that Service in the case of anyone who has a former partner still living.

4. That while affirming its adherence to Our Lord's principle and standard of marriage as stated in the first and second of the above resolutions, this House recognises that the actual discipline of particular Christian Communion in this matter has varied from time to time and place to place, and holds that the Church of England is competent to enact such discipline of its own in regard to marriage as may from time to time appear most salutary and efficacious.

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