

Solemnisation of Marriage Ordinance 2011

Explanatory Report

Reference

1. On 13 October 2010 the Synod passed resolution 15/10 as follows –
 - “This Synod requests the Standing Committee to bring to the first session of the next Synod either –
 - (a) an ordinance which would repeal the Holy Matrimony Canon 1981 and an ordinance or regulations that would then govern the solemnization of holy matrimony in the Diocese of Sydney, or
 - (b) any viable alternative to produce the same result.”
2. On 5 November 2010, the Standing Committee appointed a committee consisting of Bishop Glenn Davies and Mr Justice Peter Young AO, with power to co-opt, to consider this matter.

Background

3. It is useful to consider briefly why our church considers that it is worthwhile to be involved in marrying people. It would seem that in some parts of the Early Church marriage was shunned and the ‘good Christian’ lived in a sort of transitional existence in a community working for the Lord and expecting Christ’s return at any moment. The group that considered sex and childbearing as not in accordance with their ascetic view of Christianity added to this problem.¹
4. However, about AD140, attitudes changed and the Church realised that it needed to provide for the indefinite future and encourage believers to marry and produce children who would carry on the faith. This seems to have been encouraged by promoting elaborate celebrations of marriage as well as in other ways.
5. By the Middle Ages, the Church had been given sole jurisdiction on the validity of marriages. The policy was strictly applied because the whole of English land law estates, which meant in practice the law governing status in the community, was based on the rights of the eldest legitimate son.
6. The rules of the Church required both the persons being married to have been baptised.
7. However, the Church regarded (and still regards) marriage as being founded on consent of the parties. Thus, the Church (though not the State) recognised some ‘Common Law marriages’ where a man and a woman had committed themselves exclusively to each other for life.
8. In the 18th Century, the secular State tightened the laws of marriage and in England required that there be a public ceremony before a Church of England minister. There were partial exemptions for certain religious groups.
9. Today, the State still uses the services of Anglican ministers to ensure that there is a valid marriage. However, this is subsidiary to the Church’s interest in performing marriages.
10. For committed church members, the marriage service is a celebration and a calling down of God’s blessing on the couple.
11. With respect to the marriages of what we might call ‘outsiders’, performing marriage services is part of our ministry encouraging people to commence contact with the Church. We encourage people to use the facilities of the church for marriage, funerals etc as it opens up an otherwise unavailable opportunity for ministry.
12. Thus, it is in the Church’s interest not to dissuade people from making this contact successfully.
13. As part of the review and restatement of the laws of the Church, the General Synod passed the Solemnization of Matrimony Canon 1981.
14. For some reason, which despite speaking to those who sponsored it we cannot discover, the Canon changed the traditional law that both parties must be baptised to a requirement that at least one of them must be baptised. It would seem probable that the change was influenced by the Vaisey Report into English Canon Law² which recommended relaxation of the rule that both parties be baptised to allowing marriages with one baptised party if the bishop was prepared to agree to it. However, the Vaisey Draft Canon XXXVII never came into force.
15. The General Synod 1981 canon was adopted in Sydney by the General Synod—Solemnization of Matrimony Canon 1981 Adopting Ordinance 1982.
16. On the basis that requiring one person to be baptised did not seem to make any sense and that it might inhibit ministry, members of this Diocese sponsored a measure in the General Synod to remove the requirement of baptism.

¹ See the discussion by Ellen Goodman ‘The Origin of Decrees of Nullity—Eschatology exigency and Expediency’ (1985) 8 *University of Tasmania Law Review* 181

² SPCK 1947

17. The requirement for at least one of the persons being baptised in any proposed marriage was the subject of a Doctrine Commission Report in February 2007.³ The Report set out the reasons for removing this requirement: it had no biblical warrant and was an impediment to mission. Weddings are one of the few remaining points of contact between unchurched Australians and the Anglican Church and it is widely considered undesirable to require at least one party to the marriage to be baptised before they can be married in the Anglican Church. Since marriage is God's design and blessing for all humanity, rather than just his covenant people, the Doctrine Commission commended the introduction of the Bill to General Synod.

18. It must not be thought that the reference to 'unbaptised' necessarily means 'non-Christians'. Members of the Salvation Army may well be Christians though not baptised. Conversely it may be remembered that the Rev JH Newman, when still an Anglican, declined to marry a Mr Jubber to a Baptist as she had not been validly baptised in the established church.⁴

19. In 2007 the General Synod passed a provisional canon, namely the Solemnization of Matrimony Amendment Canon 2007 [Provisional Canon P01, 2007]. The effect of the provisional canon was to remove the requirement that at least one of the persons to be married needed to be baptised.

20. The process of enabling a provisional canon to become a canon duly passed is that each diocese has the opportunity to consider its merits and decide either to assent to or dissent from the provisional canon. Unless all dioceses assent to the provisional canon it returns to the next session of General Synod for another vote, requiring a two-thirds majority in each house of General Synod for it to become a canon duly passed.

21. In 2009, the Synod of the Diocese of Sydney passed the General Synod – The Solemnization of Matrimony Amendment Canon 2007 Assenting Ordinance 2009 which effectively gave its assent to the Provisional Canon, as did 75% of those dioceses who considered the legislation (15 of the 20) between 2007 and 2010.

22. In 2010, the General Synod considered whether the Provisional Canon should become a Canon duly passed. By a series of errors and misunderstandings, the provisional canon narrowly failed to gain the required two-thirds majority in each house for adoption. Although the Canon passed in the Houses of Laity and Clergy, it failed in the House of Bishops by two votes, where unfortunately two bishops who had voted against the Canon had done so due to a misunderstanding of how to express their voting intentions, as both were in favour of the Canon passing. Although the vote was recommitted on the floor of the Synod, it subsequently failed in the House of Clergy. The Provisional Canon was thereby rejected by the Synod.

23. Thus, the current 1981 Canon continues to govern the solemnisation of marriage with its requirement that at least one of the parties to a marriage is baptised.

Possible Ways Forward

24. The committee considered four possible pathways to achieve the goal of allowing marriages of two unbaptised persons –

- (a) encourage the Metropolitan to grant a dispensation for non-compliance with the current Canon's requirement that at least one party to the marriage is baptised;
- (b) repeal the 1982 Ordinance that adopted the 1981 Canon and provide regulations for solemnising matrimony;
- (c) repeal the 1982 Ordinance that adopted the 1981 Canon and promote an Ordinance that would regulate marriage; or
- (d) promote a Bill at the next General Synod in 2013 or 2014 which would amend the current Canon accordingly.

Granting Dispensations (option a)

25. As noted before, the current Canon was adopted by the Synod in 1982 (General Synod—Solemnization of Matrimony Canon 1981 Adopting Ordinance 1982), but unlike some General Synod Canons, there was no provision for any regulations in the Canon, other than the power of the bishop to give express permission for a marriage to be solemnised in a place other than a church building (clause 3(c)). The committee therefore took the view that no regulation could be made under the current Canon, whereby the requirement of one person to be baptised could be overturned.

26. Nonetheless, it may be possible for the bishop of a diocese to grant a dispensation for non-compliance with the Canon's requirement that at least one party to the marriage is baptised. The current Canon alludes to the custom of granting a dispensation in relation to marriage banns in clause 4 –

Nothing in this canon shall affect the provisions of any ordinance of a diocese in force or having effect at the time when the diocese adopts this canon relating to the publication of Banns of Marriage and dispensation therewith.

³ A copy of the Doctrine Commission Report was published with the General Synod Papers for both 2007 and 2010 and may be accessed at [http://www.anglican.org.au/Web/Website.nsf/files/Book%202%20-%20Bills/\\$FILE/Fifteenth%20General%20Synod%202010%20-%20Book%202%20-%20Bills%5B1%5D.pdf](http://www.anglican.org.au/Web/Website.nsf/files/Book%202%20-%20Bills/$FILE/Fifteenth%20General%20Synod%202010%20-%20Book%202%20-%20Bills%5B1%5D.pdf)

⁴ Noel Annan, *The Dons*, (University of Chicago Press, Chicago, 1999), p 50.

27. The practice of dispensations has an ancient pedigree and a 'very large proportion of the dispensations recorded in history have been concerned with cases of marriage.'⁵ The classic case was when the monasteries were dissolved, the Archbishop of Canterbury dispensed the monks and nuns from their vows of celibacy so that they could marry.

28. 'Dispense' in ecclesiastical law does not mean 'do away with'. The image is rather that the Archbishop has a cauldron full of laws and he ladles out (or dispenses like a dispensing chemist) those laws according to their spirit and intention rather than their strict form. That is, the laws are applied to individual cases to meet the spirit of the law.

29. A dispensation is generally regarded as an act of jurisdiction which removes a law of obligation in particular circumstances. Thus, it would be possible for a dispensation to be granted which would allow two persons to be married, where neither person was baptised. Although dispensations were authorised by bishops of the ancient church, the practice developed in the Medieval Church whereby only the Pope was authorised to issue dispensations. This is still the law of the Roman Catholic Church today.

30. However, Henry VIII transferred the power of dispensations to the Archbishop of Canterbury (Henry VIII Statute 25 cap 21) at the time of the Reformation. In the Anglican Church of Australia the powers of the Archbishop of Canterbury are inherently the powers of the five Metropolitans (Canon Law Repeal Canon 1989, clause 3(2)). However, the difficulty of pursuing this route is that even if any diocese in NSW might be able to receive a dispensation from their Metropolitan, the Archbishop of Sydney, thereby allowing the marriage of two unbaptised persons, there is little likelihood of dioceses in other Provinces of Australia (e.g., North West Australia) being granted such a dispensation.

Repeal Ordinance and provide Regulations (option b)

31. An economical way forward would be to repeal the 1982 Adopting Ordinance, this would effectively exclude the current Canon and thereby remove the requirement that at least one party to a marriage be a baptised person. Although the current Canon repealed the relevant law of the Canons of 1603, it is worth noting that the repeal of the Adopting Ordinance would not thereby reactivate any relevant law of the 1603 Canons which had been repealed by the enabling legislation.⁶

32. Consideration was given as to what other requirements might also be removed by simply repealing the Adopting Ordinance. The current Canon includes the following requirements –

- (a) the celebrant must be a minister nominated by the Archbishop and registered as an authorised celebrant according to the laws of the Commonwealth of Australia;
- (b) the marriage must be conducted in a licensed church building unless express permission is given by the bishop for some other specific place;
- (c) the persons to be married must not be within the prohibited relationships as declared by the laws of the Anglican Church of Australia in force in the Diocese;
- (d) where either of the persons to be married are minors, there must be compliance with the laws of the Commonwealth of Australia;
- (e) two witnesses are required for the marriage; and
- (f) where either of the persons to be married are divorced, there must be compliance with the laws of the Anglican Church of Australia in force in the Diocese.

33. The committee considered that all these requirements could be codified by way of episcopal regulation, as was the case when the Bishops of the Province promulgated regulations in 1902 and 1922 for the use of clergy solemnising marriages in NSW. Some of the requirements of the current Canon are already covered by Commonwealth law which both regulates marriage and requires that the Diocese nominate those clergy who are to solemnise matrimony in accordance with the rites of the Anglican Church of Australia. This enables the Archbishop to withdraw such nomination, if there were a breach of diocesan regulations.

Repeal Ordinance and pass New Ordinance (option c)

34. Another way forward would be to repeal the existing Adopting Ordinance, which would effectively exclude the current Canon and introduce a new Ordinance to regulate the solemnisation of marriage in the Diocese. Since this new Ordinance would require ministers to solemnise marriages in accordance with the rites and ceremonies of this Church, it could not be construed as making any alteration in the ritual or ceremonial of this Church (Section 71(1) of the Constitution), so it would be competent for the Synod to pass such legislation.

35. However under this option, the committee was divided as to whether it would also be expedient to repeal the General Synod – Matrimony (Prohibited Relationships) Canon 1981 Adopting Ordinance 1982.

36. Bishop Davies recommended this course so that all the legislation pertaining to marriage is located in one ordinance. Moreover, such an Ordinance would not need to cite certain aspects of the Marriage Act 1961, as the current Canon does, but merely reinforce the application of the Marriage Act and legislate for those matters which belong to the doctrine and practice of solemnising marriage in the Diocese. Furthermore, since the current Canon (unwittingly?) omitted four prohibited relationships in the Table of Kindred and Affinity, the new Ordinance would correct this oversight.

⁵ W J Sparrow Simpson, *Dispensations* (London: SPCK, 1935), 39.

⁶ 'The repeal of an ordinance, or part of an ordinance, or the exclusion of a canon of the General Synod by which previous law was repealed shall not have the effect of reviving the previous law without express words to that effect.' Clause 11A of the Interpretation Ordinance 1985.

37. It should be noted that the Marriage Act lists those relationships where marriage is prohibited by law. The Church list is of those relationships which are disallowed between couples seeking an Anglican service for the solemnisation of their matrimony.

38. Justice Young considered that using the Table of Kindred and Affinity as the Church list would not assist for the following reasons, in summary –

- (a) it is desirable that there be one set of ecclesiastical prohibitions for the whole of Australia;
- (b) the terminology has changed from 1563. For instance 'sister' in 1563 in church law meant sibling, sister in law, even a sister of a former spouse. Merely to produce the 1563 list without a new dictionary leads to confusion. This change of meaning led to the Deceased Wife's Sister Act of 1875 (39 Vic No 20) (later also enacted in England in 1907)⁷ later s 18 of the Marriage Act 1899 (NSW) (see also s 18B); and
- (c) Bishop Davies' list adds to the list in the General Synod Canon by including four relationships from the Table of Kindred and Affinity which are not in the Canon. This may open up discussion on the content of the list;
- (d) Justice Young therefore preferred that the Ordinance not repeal the General Synod – Matrimony (Prohibited Relationships) Canon 1981 Adopting Ordinance 1982.

Promote Bill at General Synod (option d)

39. The fourth way forward considered by the committee was to promote a Bill to the next General Synod which would amend the current Canon so as to remove the baptism requirement or to allow for its removal with the permission of the bishop.⁸ However, even if this were successfully passed as a Provisional Canon in 2013 or 2014, unless it was more or less embraced by a large majority in 2013/4, it would still need to be passed at the following General Synod in 2016 or 2017, with no certainty that it would achieve the two-thirds majority.

40. The committee recognised that the Synod may not wish to wait a further five or six years before the baptism requirement is removed. As the explanatory statement accompanying the Synod's assent to the Provisional Canon P01, 2007 in 2009 stated:

In the event that the General Synod does not pass the Canon, it may be possible for our Synod to exclude the Canon and re-enact its provisions by ordinance without the requirement that at least one party be a baptised person.

41. Synod passing its own legislation is, at least, a short term solution. However, it is preferable that there be an Australia-wide approach.

42. It would be appropriate for the Diocesan Bishops to be canvassed to see if they would support a General Synod Canon as per the 2007 Provisional Canon with the proviso that the Bishop must assent to the marriage in church of two unbaptised persons.

Standing Committee's response

43. The Standing Committee requested that a bill be promoted to Synod "by request of the Standing Committee" which repeals the General Synod – Solemnization of Matrimony Canon 1981 Adopting Ordinance 1982 and which regulates the solemnisation of marriage in this Diocese (option c in this report). However the Standing Committee declined to promote the bill in a form which also repeals the General Synod – Matrimony (Prohibited Relationships) Canon 1981 Adopting Ordinance 1982.

44. The Standing Committee also requested the Archbishop to enquire whether a revised General Synod Canon permitting the Bishop to allow a marriage where neither party is baptised would be agreeable to the House of Bishops.

For and on behalf of the Standing Committee

ROBERT WICKS
Diocesan Secretary

21 September 2011

⁷ See Cripps on Church and Clergy 8th ed p539

⁸ At the 2010 General Synod there was a proposal to allow two unbaptised persons to be married with the permission of the bishop. Although this amendment was unsuccessful, it is possible that a future General Synod may pass an amendment Canon which contains this provision.