

FURTHER COMMENTARY ON GS MISC 1339

Introduction

The purpose of this further commentary¹ on GS Misc 1339 is:

- To reflect on the nature of the advice given by the Legal Office to General Synod in GS Misc 1339 (**section 1**);²
- To explain the relationship between Holy Matrimony and civil marriage, to draw attention to the deficiencies in the characterisation of that relationship in the Legal Advice and to identify some of the consequences of that deficient characterisation (**section 2**); and
- To consider the most appropriate procedural route for introducing the proposed *Prayers of Love and Faith* ('Prayers') (**section 3**).

In so doing, the commentary serves to indicate some of the limits of what can lawfully be done without departing from the Church's current doctrine of marriage and makes recommendations to the Bishops as they develop proposals for a new version of the *Prayers*.

1. The Nature of the Legal Advice

1.1 The legal advice was drawn up for the College and House of Bishops, but the instructions given to the Legal Office have not been disclosed.

Paragraph 1 of GS Misc 1339 tells us that it 'sets out legal advice for General Synod which is to the same effect as the advice which was given to the College and House of Bishops'.

It is unclear what one should infer from the phrase, 'to the same effect' but it introduces the possibility that while GS Misc 1339 reports the main conclusions of the Legal Office's advice to the Bishops, some details, nuances or provisos might not have been reported to General Synod. In particular, it is possible that the legal advice considered and evaluated alternative procedural routes which the Bishops have decided to reject, and if so, such advice would have been helpful to see.

More significant is the fact the Legal Office first gave its advice to the Bishops, and the nature and scope of its advice will have been shaped by the questions posed by the Bishops. In legal parlance, what were the instructions given to the Legal Office by the Bishops? General Synod has not seen those instructions and it is possible that some of the Bishops may also not have seen them.

¹ This "further" commentary elaborates the brief comments (set out in *Comment on Legal Note GS Misc 1339 dd 4 February 2023*) made shortly before the debate in General Synod in February 2023. Like its predecessor, it neither purports to, nor does, offer legal advice.

² The text of GS Misc 1339 is set out in Appendix A to this commentary.

The Legal Advice explicitly acknowledges that its advice rests on an understanding of the relationship between ‘civil marriage’ and ‘Holy Matrimony’ which is not settled law and which is therefore open to possible challenge (see further below). However, curiously, the Legal Advice does not address those uncertainties, the risks that arise from those uncertainties, or the ways in which those risks could be avoided, mitigated or managed. One would have expected this.

In this respect, and in other ways, the Legal Advice sometimes appears to reflect an intention to find the best available legal justification for a single proposed course of action which the Bishops are already minded to pursue. It might be considered more appropriate for the Legal Office to weigh up, and advise on the pros and cons of, a number of different possible courses of action (as it did in November 2016 in Annex 1 to GS2055) and to indicate how the Bishops might proceed with minimum legal risk.

Furthermore, it is possible that the Houses of Clergy and Laity (and therefore General Synod as a whole) might have interests that are not fully aligned with those of the Bishops. For example, if the effect of commending prayers under Canon B 5 creates risks for clergy which a process of authorising prayers under Canon B 2 would not, the House of Clergy might want guidance, or reassurance, on legal questions on which the Bishops did not seek advice from the Legal Office.³ Indeed, since we know that the Bishops are themselves divided over *Living in Love and Faith*, it is possible that different groups from among the Bishops would wish to ask the Legal Office different questions, if they were able to do so.

1.2 The Legal Advice builds on, but differs from, advice given by the Legal Office in recent years. However, changes in its advice are neither highlighted nor explained.

Paragraph 2 notes that: “In 2017 the Legal Office set out the relevant legal considerations against which any proposals arising from Living in Loving and Faith would need to be assessed”; a footnote refers the reader to Annex 1 to GS 2055.⁴

Annex 1 is “an extract from a note from a Legal Advice which was provided for the Reflection Group on Sexuality & the House of Bishops” (see Annex 1, p.16). This is reassuring since Annex 1 was not a comprehensive overview of the relevant legal considerations; furthermore, with respect to some of the ground covered by Annex 1, it is by no means clear that it was an altogether accurate representation of the relevant legal considerations. In a similar way, as will become apparent at various points in this commentary, GS Misc 1339 is neither comprehensive nor accurate.

³ Furthermore, if a mechanism were established by which the House of Clergy and/or House of Laity could seek advice from the Legal Office, it is not self-evident that the Legal Office could provide advice on specific issues to, say, the House of Bishops and the House of Clergy if their interests were not fully aligned. In private practice issues such as this are managed by strict conflict of interest rules which govern the conduct of solicitors and may limit the persons for whom a solicitor may act.

⁴ The text of Annex 1 to GS 2055 is set out in Appendix B to this commentary.

Nevertheless, Annex 1 to GS 2055 did discuss three possible ways in which the approval of services for same sex couples might proceed: (i) amend Canon B 5, (ii) amend Canon B 30, or (iii) proceed on the following basis:⁵

“c. Make no legislative change and

- i. Make it clear to the clergy that it is not lawful for them to use a form of service which either explicitly or implicitly treats or recognises the civil marriage of two persons of the same sex as equivalent to holy matrimony, but*
- ii. explain that it would be lawful for the clergy to use a form of service which celebrated the relationship between two persons of the same sex provided that the form of service did not explicitly or implicitly treat or recognise their relationship as equivalent to holy matrimony.”*

Plainly, GS Misc 1339 is designed to provide legal support for the view that the *Prayers* satisfy the requirements set out in (c) (ii) above. However, paragraph 9 of Annex 1 of GS 2055 went on to say:

“So far as limb ii of option c is concerned, the House might need also to explain that the form of service used should not implicitly or explicitly convey the idea that the Church was sanctioning or condoning a sexual relationship between the two persons. Whether or not it would need to do that would depend on whether or not the House maintained the position set out in the 2005 pastoral statement on civil partnerships that–

“the Church of England teaches that “sexual intercourse, as an expression of faithful intimacy, properly belongs within marriage exclusively” (Marriage: a teaching document of the House of Bishops, 1999). Sexual relationships outside marriage, whether heterosexual or between people of the same sex, are regarded as falling short of God’s purposes for human beings”.

If that remained the Church of England’s teaching, then a service which sanctioned or condoned such a sexual relationship would not meet the requirement that a service must “edify the people” and would probably also be contrary to, or indicative of a departure from, the doctrine of the Church of England in an essential matter.”

By contrast, GS Misc 1339 adopts a different approach and appears to suggest that it is sufficient that the *Prayers* “are simply silent on the point” (paragraph 9). No attention is drawn to the fact that this represents a departure from its earlier advice and no explanation is given for the change of approach.

Furthermore, GS Misc 1339 advances, and proceeds on the basis of, a particular view of the relationship between ‘civil marriage’ and ‘Holy Matrimony’ which was only

⁵ Annex 1 to GS 2055 did not discuss the possibility of seeking to draw up authorised liturgy under Canon B 2 but it is possible that the longer note, from which Annex 1 is extracted, did consider Canon B 2.

considered to be one possibility in Annex 1 to GS2055. Paragraph 13 of Annex 1 sets out a number of options available to the Bishops by which Canon C 26 and questions of clergy conduct could be addressed. Paragraphs 13(c) and 13(d) each contemplated two possible views of the relationship between ‘civil marriage’ and ‘Holy Matrimony’. Thus in paragraph 13(d) it was stated the Bishops could,

issue a teaching document which explains that [civil marriage is no longer the same institution as holy matrimony] [civil marriage **with a person of the same sex** is a different institution from holy matrimony (*emphasis added*)]

Meanwhile, a still wider range of ways of understanding the relationship between ‘civil marriage’ and ‘Holy Matrimony’ was compatible with the possible options available to the Bishops set out in paragraphs 13(a) and (b). These were considered to be dependent on the Bishops clarifying their teaching on the relationship between Holy Matrimony and civil marriage. However, in GS Misc 1339 only one possibility is presented as the single correct interpretation.

There have therefore been material changes in the advice given by the Legal Office since November 2016, even though neither the law of marriage nor the Canons have changed in any relevant respect. This requires explanation.

1.3 The legal advice oscillates between prudent caution and bold creativity.

There is a telling phrase in paragraph 5 where the implications of the Marriage (Same Sex Couples) Act 2013 begin to be explored. Paragraph 5 says: “... **there is a good case for saying** that the institution of Holy Matrimony and the institution of civil marriage are now distinct, even though the legal incidents are generally the same for both” (*emphasis added*).

To a lawyer, this is an instantly recognisable admission that the view which is being advanced is not settled law but merely an arguable case. The expression – “there is a good case for saying” – can take on a range of different meanings in different circumstances. By way of example, it could, in some cases, even mean: “This is the only argument we have available, but it is a defensible argument”; or, again, it could mean: “This is a respectable view held by some lawyers, but not all, and this question has not yet been tested in court”.

Elsewhere the Legal Advice makes novel, experimental claims. For example, unless the claim that the definitions of civil marriage and Holy Matrimony are “mutually exclusive” is a rhetorical flourish with little or no meaning, it is an extravagant claim that is patently wrong (see 2.1 below). Similarly, the idea that the (alleged) silence in the text of any *Prayers* with respect to sexual intimacy in a relationship is sufficient to ensure that the *Prayers* cannot – in any circumstances – be indicative of a departure from doctrine so far as sexual relationships are concerned is an astonishingly bold and problematic claim to make (see also 2.2 below).

1.4 The Legal Advice is provisional.

Paragraph 10 says: “In reaching a final view on the legal position the Legal Office will need to see both the final draft of the Prayers and the replacement pastoral guidance.” To this one might add, the Legal Office will need to consider and address the many concerns and questions about GS Misc 1339 which have been raised by a number of observers and commentators.

In short, the Legal Advice from the Legal Office is not definitive advice and does not purport to be definitive advice. In response to an undisclosed request it states a novel and contestable view of the law. On that basis, and in the absence of any contextual material, it gives provisional approval to draft *Prayers*. Before proceeding further, the Bishops should seek and publish fuller and clearer legal advice, which fairly sets out the range of possible courses of action, with their attendant legal advantages and disadvantages.

2. The relationship between ‘civil marriage’ and ‘Holy Matrimony’

The relationship between ‘civil marriage’ and ‘Holy Matrimony’ lies at the heart of the Legal Advice. Paragraph 5 correctly states that ‘Holy Matrimony’ is another name for ‘marriage for the purposes of ecclesiastical law’. By contrast ‘civil marriage’ is ‘marriage for the purposes of the general law’.

The Legal Advice claims that the introduction of same-sex marriage has brought about such a fundamental change in the legal understanding of marriage that a ‘good case’ can be made for saying that the institutions are ‘distinct’. The understandable caution implied in the term ‘good case’ has already been noted. This caution is abandoned in paragraph 6 which talks more confidently in terms of ‘mutually exclusive’ definitions and ‘concepts’ of a ‘different nature’. Paragraph 7 concludes from this that a same-sex couple who enter into a civil marriage are simply ‘obtaining a civil status’ which is not Holy Matrimony and does not purport to be Holy Matrimony and therefore does not conflict with the Church’s understanding of marriage. Paragraph 8 states that so long as the proposed Prayers do not treat civil marriage as if it were Holy Matrimony, there is no conflict with the doctrine of the Church.

This argument is problematic in at least five respects:

- it adopts an implausible interpretation of English law;
- it fails to specify fully the legal tests to be applied to any proposed liturgy;
- it imposes unrealistic requirements on clergy;
- it fails to answer a central question: whether it is part of the doctrine of the Church of England that Holy Matrimony is the only proper context for sexual intimacy;
- it mistakes the role of civil law in relation to intimate relationships.

2.1 The Legal Advice adopts an implausible interpretation of English law

The Legal Advice offers three different ways of characterising the relationship between civil marriage and Holy Matrimony: (i) 'mutually exclusive', (ii) 'concepts' of a 'different nature' and (iii) 'distinct institutions'.

'Singleness' and 'marriage' are mutually exclusive statuses. It is impossible for anyone to be both single and married. If the definitions of civil marriage and Holy Matrimony were 'mutually exclusive' it would mean that parties who were in a civil marriage could not also be in a relationship of Holy Matrimony and parties joined in Holy Matrimony could not also be in a state of civil marriage. That is palpably nonsense and simply inconsistent with the claim in the preceding paragraph that '[c]ivil marriage and Holy Matrimony both continue to be recognised by the state as conferring the same civil status'.

Perhaps by 'mutually exclusive', the Legal Advice means 'completely unrelated'. If the two institutions were wholly distinct in this sense, we would expect the fact of having entered a civil marriage to be irrelevant to the question of whether one is in a relationship of Holy Matrimony and *vice versa*. This would be like the relationship between being in a civil marriage and being joint owners of a house. Many married couples are joint owners of the family home. It may even be true that most joint owners are married. But if two people buy a house together, they may or may not be married. And if they are married, they may or may not buy a house together. Joint ownership of real property is wholly distinct from being married; any typical overlap is accidental.

The relationship of civil marriage to Holy Matrimony is not like this either. The fact of having entered into a civil marriage is highly relevant to the question of whether one is joined in Holy Matrimony, and the fact of having been joined in Holy Matrimony is highly relevant to (indeed, conclusive of) the question of whether one is married for the purposes of civil law. An opposite-sex couple who get married in church thereby simultaneously acquire the civil status of 'married'. Furthermore, the Church of England has always treated the civil marriage of an opposite-sex couple as a valid marriage for the purposes of Christian theology and ecclesiastical law. The existing service of blessing after a civil ceremony of marriage is based on this assumption. Civil marriage is still entered into by the exchange of vows before witnesses, the older form of which runs as follows:

I do solemnly declare, that I know not of any lawful impediment why I (your name) may not be joined in matrimony to (your partner's full name).

And,

I call upon these persons, here present, to witness that I (your full name) do take thee (your partner's full name) to be my lawful wedded wife/husband.

The Legal Advice is silent on the status of opposite-sex civil marriages after 2014, but it would be a novel development indeed to argue that such relationships are not still marriages for the purposes of ecclesiastical law.⁶ Moreover, the religious celebration

⁶ In her speech to General Synod, the Bishop of London also stated, 'Opposite sex couples who have been civilly married are understood as being married in the sight of God and of the

of marriages is subject to civil legal regulation, meaning, among other things, that it is unlawful for a legally-effective religious wedding to take place between a couple who are not qualified to marry according to civil law.

In short, all marriages for the purposes of ecclesiastical law are also marriages for the purposes of civil law, most marriages for the purposes of civil law are also marriages for the purposes of ecclesiastical law, and the celebration of marriages is regulated by civil and ecclesiastical law together.

The Marriage (Same Sex Couples) Act 2013 contains several safeguards to ensure that the Church of England and other religious denominations are under no legal obligation to celebrate marriages between same-sex couples. It states that ‘marriage between same sex couples is lawful’ (section 1) but then immediately restricts the ways in which such marriages may take place (section 2), excluding Part II Marriage Act 1949 which regulates ‘marriage according to rites of the Church of England’. This exclusion is reinforced by stating that no canon of the Church of England is contrary to the Submission of the Clergy Act 1533 by virtue of its making provision ‘about marriage being the union of one man with one woman’ (section 3). And in case that is not enough, the Act also states that ‘any duty of a member of the clergy to solemnize marriages ... is not extended by this Act to marriages of same sex couples’ (section 4). In other words, from 2014 onwards, English law has adopted a broader definition of marriage but recognises and accommodates the fact that the Church of England and other religious denominations still maintain a narrower traditional definition.

In these circumstances it is positively misleading to talk of ‘concepts of a different nature’ let alone ‘mutually exclusive’ ones. Rather, the two views of marriage are related but inconsistent with each other. That is why the Church went to such lengths to protect its liberty. **From a legal perspective, there is one institution (marriage) with broader and narrower views as to who is entitled to enter that single legal state. This is the view of Parliament, the Government and the Supreme Court,⁷ and there is no reason for ecclesiastical law, which is part of English law, to take a different view.**

2.2 The Legal Advice fails to specify the applicable legal tests completely

In Paragraph 3, the Legal Advice states:

‘The effect of Canon B 5.3, in the light of the doctrine described in Canon B 30, is that it would not be lawful for a minister to use a form of service which either

Church. There is no question of reneging on the validity of that understanding.’ (Press Release, 6 February 2023)

⁷ Marriage (Same Sex Couples) Act 2013, s. 1, is headed ‘Extension of marriage to same sex couples’. The Government’s *Short Guide to the Act* uses the same term, and the *Factsheet* states, ‘Extending marriage to same sex couples has not changed the fundamental nature of marriage, or how it affects opposite sex married couples’. See <https://www.gov.uk/government/publications/equal-marriage-documents-explaining-our-policy>. In *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, Baroness Hale of Richmond PSC also describes the Marriage (Same Sex Couples) Act 2013 as ‘extending’ the institution of marriage.

explicitly or implicitly treated or recognised the civil marriage of two persons of the same sex as corresponding to Holy Matrimony.’

In paragraph 4, the Legal Advice applies two tests to the draft *Prayers*. In paragraph 9 a further test is adopted. It would have been more helpful if the Legal Advice had set out the tests it considers relevant clearly before applying them. They would appear to be as follows:

- The *Prayers* must not treat the civil marriage of two persons of the same sex, either expressly or implicitly, as amounting to Holy Matrimony;
- The *Prayers* must be framed so that they do not bless civil marriages (or civil partnerships); any blessing must be of the couple and the good in their relationship, not of the civil status they may have acquired;
- (Possibly) The *Prayers* must contain no implication that what is being celebrated or blessed is a sexual relationship.

In Paragraph 9, the Legal Advice concludes,

...a sexual relationship is not inherent in a same sex marriage, any more than it is in a civil partnership. The draft *Prayers* contain no implication that what is being celebrated or blessed is a sexual relationship. The argument that the *Prayers* are therefore indicative of a departure from doctrine so far as sexual relationships are concerned cannot be sustained; they are simply silent on that point.

This suggests that the correct tests are limited to assessing the text of the *Prayers* in the abstract. However, a departure from doctrine may also be indicated by the context in which a form of service is applied. For example, it would indicate a departure from the Church’s doctrine of baptism to use the service of baptism for a person who has already been baptised. The same could be said of using the marriage service for a couple one of whom was already married. The service may well be impeccable; the context is everything. This affects both the rubrics to accompany the *Prayers* and the pastoral guidance as to the occasions of their appropriate use.

Assessing the *text* of the *Prayers* for conformity with the doctrine of the Church is therefore necessary but not sufficient. **It is not lawful for a minister to use a form of service which either explicitly or implicitly indicates a departure from the Church’s doctrine of marriage, or to use a form of service in a context which establishes that implication. Once one takes context into account, the Legal Advice becomes unrealistic and it becomes apparent that more attention must be paid to distinguishing between contexts which may be compatible with the Church of England’s doctrine of marriage and those which are not.**⁸

⁸ The development of rubrics to accompany the *Prayers* and the preparation of the pastoral guidance can and should include giving attention to this question. It is possible that the working groups which have recently been established appreciate that this is one of the tasks before them but, as has been made clear, this issue is a legal one as well as a pastoral one.

2.3 The Legal Advice imposes unrealistic requirements on clergy.

The *Prayers* are designed, amongst other things, to be used as a service of blessing immediately after a civil marriage between two people of the same sex. Yet the first two requirements set out above (not treating a civil marriage as Holy Matrimony, and not blessing the civil marriage as such) are unrealistically demanding of the minister.

It is easy enough to avoid referring to a civil marriage as ‘Holy Matrimony’ because that term is not used very often in common speech. But ‘Holy Matrimony’ is simply another name for ‘marriage for ecclesiastical purposes’ or ‘marriage as understood by Christians’. In the view of the Church of England, that is what Christians ought to think ‘marriage’ really is. It is therefore not appropriate, at least in formal ecclesiastical contexts, to refer to a civil marriage between two people of the same sex as a ‘marriage’ without carefully qualifying that claim. One wonders quite how a minister would negotiate the verbal gymnastics involved in blessing a couple who had just entered into a civil marriage while sedulously avoiding any suggestion that their civil marriage was *actually* a marriage.

On top of this, the minister is required to bless ‘the couple and the good in their relationship’ but not the ‘civil status’ (paragraph 4). Yet the civil status is a relational one (‘marriage’). If the occasion for seeking God’s blessing is precisely the acquisition of this civil relational status, the distinction seems impossible to draw. It is not drawn in the draft *Prayers*, and in public statements various bishops have made claims which do not reflect it. This is hardly surprising.

In short, the legal conditions proposed by the Legal Advice effectively require the minister to explain to the congregation that they are gathered to seek God’s blessing on the couple on the occasion of their entering into a civil marriage, which is however, in spite of appearances, not really a marriage and nor is the marital dimension of their relationship being blessed. The Bishops should consider carefully whether this is helpful or indeed feasible.

2.4 The Legal Advice fails to state the doctrine of the Church of England in relation to sexual intimacy.

In the light of the evident controversy around sexual relations outside marriage within the Church, paragraph 9 of the Legal Advice is curiously worded. It reports a possible objection (‘some people have raised concerns’) and rejects it on the grounds that the question does not arise, since the draft *Prayers* are ‘simply silent’ on the point.

This assessment of the draft *Prayers* is actually contestable. It is questionable whether they are really ‘silent’ when (a) the readings available include texts drawn from Song of Songs and (b) there is scope for the blessing of a couple’s rings which are redolent not merely of commitment but romance and exclusive sexual relationship.

However, even if the prayers were revised to make them silent, what is more worrying is the failure of the Legal Advice to address head-on the question of whether it is part of the doctrine of the Church of England that sexual intimacy is inappropriate outside of Holy Matrimony. As will be shown below, Canon B 5 makes this a legal question,

since we need to be clear whether it is indicative of a departure from doctrine to bless a relationship outside of marriage which is known to be sexually active. That sexual intimacy is inappropriate outside of Holy Matrimony is certainly the historic position of the Church. It also seems to have been the position of the Legal Office in November 2016.⁹ It was reaffirmed as recently as General Synod in November 2022. Mr Sam Margrave (Coventry) asked the Chair of the House of Bishops:

Q36 In answer to a previous question from Mrs Andrea Minichiello-Williams (Q49 in February 2019) the then Bishop of Newcastle, on behalf of the Chair of the House of Bishops, confirmed that the House of Bishops' position on marriage is that set out in Canon B 30 – *'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'*. Is the position of the House of Bishops that this represents the doctrine of the Church and, if so, that any sexual relations outside of this definition of marriage is a sin?

The Bishop of London to reply on behalf of the Chair of the House of Bishops:
A Canon B 30 does indeed continue to articulate the doctrine of the Church, including asserting that holy matrimony is the proper context for sexual intimacy.

Clarity on the doctrine of the Church in relation to sexual intimacy is vital if the legal limits of Canon B 5 are to be observed. The same clarity is vital for the purposes of Canon C 26 (Of the manner of life of clerks in Holy Orders).

2.5 The Legal Advice mistakes the role of civil law in relation to intimate relationships

The Legal Advice is marred by a deep-rooted failure to understand the nature of the legal and theological questions facing the Church in relation to same sex partnerships. This is a result of failing to recognise that marriage is a social institution.

To claim that marriage is a social institution is to claim that it represents a stable and typical form of collective human life constituted by a network of inter-related social, ethical and legal norms. No social institution is fully constituted by the formal legal rules which undergird it. This is as true of marriages, as it is of churches, political parties, football clubs and schools. There is a complex interaction between the formal legal rules and the broader, looser, social expectations and values which, as it were, put flesh on the bones of the institution. For example, strictly speaking, English law does not require *any* marriage (either opposite- or same-sex) to be an active sexual relationship, so long as the parties agree on the degree of intimacy, or lack of it, between themselves.¹⁰ As a matter of law, they could even agree on sustaining an

⁹ Paragraphs 8(c)(ii) and 9 of Annex 1 to GS 2055 read together imply that until such time as the Church's teaching changes, to 'sanction or condone' a sexual relationship between two people of the same sex would be to 'explicitly or implicitly treat or recognise their relationship as equivalent to Holy Matrimony'.

¹⁰ Refusal to consummate has to be 'wilful' (i.e. a matter of deliberate choice) and only makes a marriage 'voidable' at the suit of the other party. Until such time, the marriage is valid. Since the

'open' relationship, tolerating or approving each other's affairs. Yet the social meaning of marriage undoubtedly typically includes the idea that sexual intimacy is normal, legitimate and should be exclusive. The legal framework is only one part of the entire social institution. Whereas the law is relatively clear and settled, the broader social expectations are more contested and fluid.

The Church has theologically-grounded views on the nature of at least some social institutions and the legal forms which best support those institutions. These include the view – at least for the present – that marriage (properly understood) and same-sex partnerships are different in substance. Unlike English law, which increasingly only focuses on the contractual dimension of marriage, and thus has now glossed over the difference between opposite-sex and same-sex relationships, the Christian Church has historically treated the marriage contract as unique by reference to its relation to the natural order and its spiritual resonance, reflected in requirements of sexual differentiation, procreativity, exclusivity and fidelity. This is the position summarised in Canon B 30. A same-sex partnership may have some, but it cannot have all, of these features.

Once it is recognised that 'Holy Matrimony' is a theologically-grounded understanding of an important social institution, the contrast which is drawn in the Legal Advice between Holy Matrimony and civil marriage is shown to be false. 'Civil marriage' is a legal term referring only to the legal rules which constitute a particular legal status. 'Holy Matrimony' is a social institution which can take the form of civil marriage. Before one can address the question of the appropriate civil legal form for same-sex relationships, one needs a clear and theologically-grounded view of what, in substance, they are. Clearly they are not instances of Holy Matrimony. Only when their nature as a new form of social institution distinct from marriage has been clarified can one consider what civil legal form, if any, can be commended as suitable.

If Holy Matrimony is, in its substance, different from a same-sex partnership, the question to address is whether it is appropriate for both social institutions to have the same civil legal form and name. One can imagine a legal context in which there is no choice; in 2004 the Government could simply have introduced same sex marriage. But the Civil Partnerships Act 2004 was introduced on the understanding that although the civil legal consequences should be similar – they could not be entirely identical – it was important to find a different term for same-sex relationships. This was undoubtedly a compromise between those who sought legal recognition and the advantages of civil marriage, and those who thought that marriage and same-sex partnerships were different in substance. Notwithstanding the introduction of same-sex marriage, English law still offers to couples the legal form of civil partnership.¹¹ More recently, that legal form has been opened up to opposite sex couples as well. Although 'marriage' and

recent reform of divorce law, adultery is no longer a specified fact demonstrating irretrievable breakdown.

¹¹ While it is possible for a same-sex couple to convert their civil partnership into marriage without taking vows, this is not available to opposite-sex civil partners. The law was clearly designed to allow same-sex couples who entered into a civil partnership before the availability of same-sex marriage to get married without having to dissolve the partnership and marry by a new ceremony.

'civil partnership' now have virtually identical legal consequences in contemporary English law, there is still the difference that civil marriage is entered into using vows which refer to 'marriage', 'matrimony', 'husband' and 'wife'. By contrast, civil partnership is entered into by declaration:

I declare that I know of no legal reason why we may not register as each other's civil partner. I understand that on signing this document we will be forming a civil partnership with each other.

The contrast in English law between civil partnership and civil marriage reflects the Church's doctrine of Holy Matrimony: that same-sex partnerships necessarily have a distinctive nature by comparison with marriage as understood by the Christian church. **Just as it would be contrary to the Church's doctrine of marriage for an opposite-sex couple to choose civil partnership over civil marriage, so also, in our current context, it would be contrary for a same-sex couple to choose civil marriage over civil partnership. Blessing a couple who have chosen the less suitable legal form for their relationship indicates a departure from the Church's doctrine of marriage, and choosing a same-sex civil marriage over a civil partnership would similarly imply a failure by a clergyman to comply with Canon C 26.**

There are thus two principal ways in which *Prayers of Love and Faith* may indicate a departure from the doctrine of the Church of England: (a) if they are offered in blessing a sexually-intimate relationship outside of Holy Matrimony; (b) if they are offered in blessing a couple who have entered a civil marriage which is not also Holy Matrimony.

3. The Procedural Route: Is Canon B 5 suitable?

Annex 1 of GS 2055 and GS Misc 1339 both assume that the use of Canon B 5 to adopt new liturgical resources for the blessing of same-sex relationships is unproblematic, so long as those resources do not effectively treat civil marriage as equivalent to Holy Matrimony. However, this is not at all straightforward.

3.1 Canon B 5: General Considerations

Canon B 1.1 (Of conformity of worship) lists the forms of service authorised for use in the Church of England. Canon B 1.2 provides: "Every minister shall use only the forms of service authorized by this Canon, except so far as he may exercise the discretion permitted by Canon B 5."

Canon B 5.1 empowers a minister in her or his discretion to make and use variations to services authorized under Canon B 1 which are "not of substantial importance". Canon B 5.2 empowers a minister to use forms of service considered suitable by her or him for occasions for which no provision is made in the Book of Common Prayer or under Canons B 2 (forms of service approved by General Synod) or B 4 (forms of

service approved by the Convocations, Archbishops or Ordinary). In either case, Canon B 5.3 sets out two conditions. Variations and new forms of service must be:

- (i) “*reverent and seemly*”; and
- (ii) “*neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter*”.

In the past, a number of forms of service and variations have been commended by the House of Bishops as suitable for use by ministers in the exercise of their discretion and these are detailed [here](#). There is no form of service or variation in the list anywhere near as controversial or novel as the draft *Prayers*.

The House of Bishops’ response to *Living in Love and Faith* (GS 2289) describes the prayers as ‘a suite of resources’ (6) offering clergy ‘a variety of flexible ways to affirm and celebrate same-sex couples in church’ (3). This suggests that the *Prayers* are viewed by the Bishops as a set of commended variations on existing forms of service. If this is correct, Canon B 5.1 requires that the variations must be “not of substantial importance”.

Alternatively, the Bishops could consider developing a complete form of service for a specified occasion, such as the blessing of a same-sex couple after entering a civil partnership, to be used under Canon B 5.2.¹² The closest parallel would be the *Order for Prayer and Dedication after a Civil Marriage*. However, any new complete form of service would be a liturgical development of substantial importance.¹³

The fact that a form of service or variation has been commended by the House of Bishops is not decisive of the question whether its adoption by clergy is compliant with Canon B 5, a question which can be made the subject of proceedings under the Ecclesiastical Jurisdiction Measure 1963.¹⁴ A particular problem with relying on Canon B 5.1 is that the proposed *Prayers* may be used in a such a way as would amount to a variation of substantial importance. Clergy using the *Prayers* in this way would be acting unlawfully.

The more appropriate process for the approval of controversial forms of service (including substantial variations such as the proposed *Prayers*) is the Canon B 2 process. This process would make General Synod (rather than the courts) the final arbiter as to whether the *Prayers* are compliant with the doctrine of the Church of England and would protect clergy from exposure to proceedings alleging that the use

¹² Any such form of service would need to navigate the challenges identified at 2.3 and 2.4 above.

¹³ A new form of service for the blessing of a same sex couple after entering into a civil partnership would also, *a fortiori*, be a substantial development and one which would (at least) be indicative of a departure from the Church of England’s doctrine of marriage, as explained above.

¹⁴ This is borne out by the fact that Canon B 5.4 indicates that a question over whether a form of service complies with the requirements of Canon B 5 may be referred to a bishop and he may give pastoral guidance, advice or directions. However Canon B 5.4 goes on to say: “such reference shall be without prejudice to the matter in question being made the subject matter of proceedings under the Ecclesiastical Jurisdiction Measure 1963.”

of the *Prayers* is unlawful.¹⁵ It would also provide a better opportunity for ensuring that failure to use the *Prayers* is not unlawfully discriminatory.

3.2 The requirement that the *Prayers* must be “neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter”

Found in Canon B 5.3, the requirement that the *Prayers* must be neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter is a twofold requirement, not a single requirement expressed in two different ways. In other words, the *Prayers*:

- must not be “contrary to the doctrine of the Church of England in any essential matter” (the ‘not contrary’ test); and
- must not be “indicative of any departure from the doctrine of the Church of England in any essential matter” (the ‘not indicative’ test).

A form of service which does not contradict the doctrine of the Church of England may nonetheless be ‘indicative of a departure from [such] doctrine’.

In the previous section, on ‘Civil Marriage and Holy Matrimony’, we suggested that GS Misc 1339 supplies an incomplete specification of the legal tests which must be applied to determine whether a form of service is ‘indicative of a departure from the doctrine of the Church of England in any essential matter’. The possibility that a departure may be non-essential has not figured in the debates, and the successful amendment (g) to the Motion passed in General Synod in February 2023 does not include this qualifying clause. Given the existence of Canon B 30, we may assume that questions of marriage and same-sex relationships are ‘essential’.

Here, however, we focus on an important implication of the word ‘indicative’: it demands consideration of the question ‘indicative to whom?’. To the House of Bishops, to General Synod, to canon lawyers, to clergy, to members of a congregation, to parishioners, to the general public? Canon B5 does not say expressly, but Canon B 5.3 does offer a substantial clue: the doctrinal requirements follow immediately after the requirement that the variations be ‘reverent and seemly’. The ‘reverent and seemly’ tests arise from the fact that forms of service are, by definition, liturgical in character and so public in nature. For this reason, it is proper to infer that the question of whether a form of service is ‘indicative’ of a departure from doctrine should be assessed by reference to ‘public perception’, and that public perception is inevitably one of the entire liturgical act, not simply the words adopted.

Philip Jones has expressed this point as follows: “It is *not* sufficient that [prayers] are merely not contrary to doctrine. Prayers may still confuse or mislead the public about the Church’s doctrine, even without contradicting that doctrine. Canon B 5.3 is worded to prevent this. Like justice, sound doctrine must not only be done, it must be *seen* to

¹⁵ See also GS 2055 at paras. 40 and 42.

be done – by Anglican lay worshippers and by persons of any religion and none. *Not* just by the Legal Office.”¹⁶

If the Prayers were to be approved for use under Canon B4, by the archbishops for their provinces or by individual diocesan bishops for their dioceses, they would need to meet the same two tests of being “neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter”.

In the light of the question of whether the variations introduced by any commended *Prayers* will be of substantial importance or not, as well as uncertainty as to what is or is not indicative of a departure from doctrine, and the risk to individual clergy which flows from these doubts, the Bishops should invite General Synod to adopt the proposed *Prayers of Love and Faith* under the Canon B 2 route.

Sunday, 14 May 2023

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In preparing this commentary we have received significant assistance and advice from Professor Julian Rivers.

¹⁶ Philp Jones, ‘Canon B 5 and the Prayers of Love and Faith’ (January 2023) (<https://ecclesiasticallaw.wordpress.com/2023/02/03/canon-b5-and-the-prayers-of-love-and-faith/>)

APPENDIX A
TEXT OF GS MISC 1339

GENERAL SYNOD

Prayers of Love and Faith: a note from the Legal Office

1. This note summarises the legal background to the decision of the House of Bishops that it should, following discussion in the General Synod, commend Prayers of Love and Faith, a draft of which is contained in Annex B to GS 2289. It sets out legal advice for the General Synod which is to the same effect as the advice which was given to the College and House of Bishops.
2. In 2017 the Legal Office set out the relevant legal considerations against which any proposals arising from Living in Love and Faith would need to be assessed. Before the House of Bishops can commend public prayers for use by ministers, it must be satisfied that the use of those prayers by the minister would meet the requirements of Canon B 5 (Of the discretion of ministers in the conduct of public prayer). Paragraph 3 of Canon B 5 provides, "... all forms of service used under this Canon shall be reverent and seemly and shall be neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter."
3. The Church's doctrine of Holy Matrimony as being between one man and one woman is set out in Canon B 30. The effect of Canon B 5.3, in the light of the doctrine described in Canon B 30, is that it would not be lawful for a minister to use a form of service which either explicitly or implicitly treated or recognised the civil marriage of two persons of the same sex as corresponding to Holy Matrimony. But it would in principle be lawful for a minister to use a form of service for two persons of the same sex who wished to mark a stage in their relationship provided that it did not explicitly or implicitly treat or recognise the civil marriage of two persons of the same sex as corresponding to Holy Matrimony.
4. The Legal Office has carefully examined the draft Prayers. It considers that none of the text contained in the draft Prayers of Love and Faith treats the civil marriage of two persons of the same sex, either expressly or impliedly, as amounting to Holy Matrimony. The Prayers are careful to avoid any such implication. Moreover, the Prayers are framed so that they do not bless civil marriages (or civil partnerships); any blessing is of the couple and the good in their relationship, not of the civil status they may have acquired (bearing in mind that not all will have a civil status – those in covenanted friendships in particular). Note 5 in Notes to the Service specifically states, "Any adaptation or new texts added by the minister here or elsewhere in the service must not involve the incorporation of the blessings contained in the Marriage Service. These were set out in Annex 1 to GS 2055. 2 Ibid. paragraphs 7 and 8. 2 from the Book of Common Prayer or Common Worship." Accordingly, nothing contained in the draft prayers would amount to, or be indicative of, a departure from the doctrine contained in Canon B 30. The Legal Note at the end of the Notes to the Service

makes it clear that any variations to the sample services or to the prayers must be in conformity with paragraph 3 of the Canon B 5.

5. In *Living in Love and Faith: A response from the Bishops of the Church of England about identity, sexuality, relationships and marriage*³, the box on page 7 headed “Marriage, the State and the Church of England” refers to a distinction that has, since the coming into force of the Marriage (Same Sex Couples) Act 2013, arisen between civil marriage and Holy Matrimony. Civil marriage and Holy Matrimony both continue to be recognised by the state as conferring the same civil status and there remains a substantial overlap in the legal rules as to preliminaries, annulment and dissolution and they are treated in the same way by other areas of the law, such as immigration law, taxation and so on. However, because what is capable of constituting a marriage for the purposes of ecclesiastical law (the union of one man and one woman) now differs fundamentally from what is capable of constituting a marriage for the purposes of the general law (the union of two persons without regard to their sex), there is a good case for saying that the institution of Holy Matrimony and the institution of civil marriage are now distinct, even though the legal incidents are generally the same for both.
6. This follows from the terms of the Marriage (Same Sex Couples) Act 2013, which explicitly provides for a definition of marriage in ecclesiastical law (one man and one woman) which is different from the definition in the general law. The two definitions are mutually exclusive and this can be seen as having resulted in there now being two different institutions by the name of “marriage”. Since the coming into force of the 2013 Act, civil marriage in England has taken no notice of the respective sexes of the parties to a marriage; it has become in effect a ‘gender-neutral’ institution. But Holy Matrimony continues to be defined by ecclesiastical law – not by the changed position in the general law brought about by the 2013 Act – and remains “in its nature a union ... of one man with one woman”. The 2013 Act explicitly preserves the position in the Canons of the Church of England. Because the sexes of the parties are irrelevant so far as the general law concept of marriage is concerned, the concept of civil marriage is now of a different nature from the concept of marriage set out in Canon B 30 (Holy Matrimony).
7. The civil marriage of a same sex couple confers a civil status on the couple: they are married so far as the general law is concerned but that status is not – and by definition does not purport to be – Holy Matrimony. On that basis, they do not need to be treated as doing more than obtaining a civil status, and in particular they do not need to be considered simply by obtaining that civil status as rejecting or challenging the definition of Holy Matrimony in Canon B 30.
8. The proposed prayers and other forms of service which may be used for a same sex couple who have entered a civil marriage, do not indicate or imply that the couple are considered to be in a state of Holy Matrimony; they recognise that the couple’s relationship has been marked by their entering into a particular civil status (albeit

regarded by the State as “marriage”). Provided that the prayers meet the requirements described in the preceding paragraphs, the fact that they are for use – among other occasions – for a couple who have entered into a civil marriage is not indicative of a departure from the doctrine of Holy Matrimony as set out in Canon B 30, just as that would not be the case for prayers for use with a couple who have entered into a civil partnership or a covenanted friendship.

9. Some people have raised concerns that the draft Prayers of Love and Faith are contrary to, or indicative of a departure from, the doctrine of the Church of England in an essential matter, on the basis that they are for use in connection with relationships that involve sexual relations between persons of the same sex. But a sexual relationship is not inherent in a same sex marriage, any more than it is in a civil partnership. The draft Prayers contain no implication that what is being celebrated or blessed is a sexual relationship. The argument that the Prayers are therefore indicative of a departure from doctrine so far as sexual relationships are concerned cannot be sustained; they are simply silent on that point.

10. The bishops have indicated that “Issues in Human Sexuality” is to be replaced. But nothing in the draft Prayers pre-empts what the replacement might say on the subject of sexual relationships. In reaching a final view on the legal position the Legal Office will need to see both the final draft of the Prayers and the replacement pastoral guidance.

**The Legal Office
Church House
Westminster
January 2023**

APPENDIX B

TEXT OF GS 2055 ANNEX 1

ANNEX 1

SEXUALITY ISSUES: WHAT IS AND IS NOT POSSIBLE UNDER THE RELEVANT LEGAL PROVISIONS

This is an extract from a note from the Legal Office which was provided for the Bishops' Reflection Group on Sexuality & the House of Bishops; and is made available as background resource for the General Synod.

Services

1. The starting point is Canon B 1.2:

“Every minister shall use only the forms of service authorized by this Canon, except so far as he may exercise the discretion permitted by Canon B 5. It is the minister’s responsibility to have a good understanding of the forms of service used and he shall endeavour to ensure that the worship offered glorifies God and edifies the people.”

2. The forms of service authorized by Canon B 1 are basically the forms contained in the Book of Common Prayer and forms of service that have been formally approved by the General Synod. The Convocations, the Archbishops and diocesan bishops can approve services for use on occasions for which no provision is made in the BCP or by the General Synod and if they do so, these services are authorized. We are not aware that any such services have been approved. The Accession Service and some other services are also authorized.

3. Canon B 5.2 provides:

“The minister having the cure of souls may on occasions for which no provision is made in the Book of Common Prayer or by the General Synod under Canon B 2 or by the Convocations, archbishops, or Ordinary under Canon B 4 use forms of service considered suitable by him for those occasions and may permit another minister to use the said forms of service.”

4. Canon B 5.3 provides (so far as relevant here):

“... all forms of service used under this Canon shall be reverent and seemly and shall be neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter.”

5. Canon B 5.2 and 5.3 together provide incumbents and priests in charge with a limited authority to compose or adopt services that have not been authorized. It is by virtue

of this provision that they are able to adopt services which, although unauthorised, have been “commended by the House of Bishops of the General Synod for use by the minister in exercise of his or her discretion under Canon B 5 of the Canons of the Church of England”. A great deal of the material published as *Common Worship* is in this category.¹⁷

6. The effect of Canon B 5.3 is that the authority conferred on the minister to compose or adopt forms of service is subject to the overriding condition that a form of service must not be contrary to, or indicative of any departure from, the doctrine of the Church of England in any essential matter.
7. Canon B 30 summarises the doctrine of the Church of England in relation to marriage. **The effect of Canon B 5.3, in the light of the doctrine described in Canon B 30, is that it would not be lawful for a minister to use a form of service which either explicitly or implicitly treated or recognised the civil marriage of two persons of the same sex as equivalent to holy matrimony.**
8. The applicable canonical provisions accordingly limit the possibility for providing services for same sex couples in a way that leaves the following options:

a. Amend Canon B 5 to remove the requirement that forms of service “shall be neither contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter”. This would additionally need an amendment to the Church of England (Worship and Doctrine) Measure 1974 which requires Canon B 5 to contain that requirement.

OR

b. Amend Canon B 30 so that the Church of England no longer “affirms, according to Our Lord’s teaching, that marriage is in its nature a union ... of one man with one woman”.

OR

c. Make no legislative change and

- i. Make it clear to the clergy that it is not lawful for them to use a form of service which either explicitly or implicitly treats or recognises the civil marriage of two persons of the same sex as equivalent to holy matrimony, but**

¹⁷ See <https://www.Churchofengland.org/prayer/worship/worship/texts/pastoral/psauthorizationdetails.aspx>

<https://www.Churchofengland.org/prayer>

- ii. **explain that it would be lawful for the clergy to use a form of service which celebrated the relationship between two persons of the same sex provided that the form of service did not explicitly or implicitly treat or recognise their relationship as equivalent to holy matrimony.**

OR

- d. **Make no legislative change and maintain the position set out in the 2014 pastoral guidance on same sex marriage.**

9. So far as limb ii of option c is concerned, the House might need also to explain that the form of service used should not implicitly or explicitly convey the idea that the Church was sanctioning or condoning a sexual relationship between the two persons. Whether or not it would need to do that would depend on whether or not the House maintained the position set out in the 2005 pastoral statement on civil partnerships that–

“the Church of England teaches that “sexual intercourse, as an expression of faithful intimacy, properly belongs within marriage exclusively” (Marriage: a teaching document of the House of Bishops, 1999). Sexual relationships outside marriage, whether heterosexual or between people of the same sex, are regarded as falling short of God’s purposes for human beings”.

If that remained the Church of England’s teaching, then a service which sanctioned or condoned such a sexual relationship would not meet the requirement that a service must “edify the people” and would probably also be contrary to, or indicative of a departure from, the doctrine of the Church of England in an essential matter.

Clergy conduct

10. Canon C 26.2 provides (so far as relevant):

“Every clerk in Holy Orders ... shall be diligent to frame and fashion his life and that of his family according to the doctrine of the Christ, and to make himself and them, as much as in him lies, wholesome examples and patterns to the flock of Christ.”

11. This provision is regularly cited by Bishops’ Disciplinary Tribunals in misconduct cases as a basis for finding that conduct complained of is “unbecoming or inappropriate to the office and work of a clerk in Holy Orders”. It is a fundamental provision so far as the manner of life of the clergy is concerned.
12. It is prima facie a breach of Canon C 26, read in the light of Canon B 30 (Of holy matrimony) (see above), for a clerk in Holy Orders to enter into a marriage with a person of the same sex. That is on the basis that by doing so, he or she is fashioning his life in a way that is inconsistent with the doctrine of Christ as expounded by Canon B 30 and making him or herself a bad example to the flock of Christ.

13. The applicable canonical provisions accordingly limit the possibility for tolerating the contracting of marriages by members of the clergy with a person of the same sex. The options are as follows:

a. Amend, or provide an exception to, Canon C26 so that being married to a person of the same sex is not of itself a breach of Canon C 26.2

OR

b. Amend Canon B 30 so that the Church of England no longer “affirms, according to Our Lord’s teaching, that marriage is in its nature a union ... of one man with one woman”.

OR

c. Amend Canon B30 to state that [civil marriage][marriage to a person of the same sex] is a different institution from holy matrimony and that entering into a civil marriage with a person of the same sex does not of itself amount to an act contrary to the doctrine set out in the Canon.

OR

d. Leave Canon B 30 as it is but issue a teaching document which explains that [civil marriage is no longer the same institution as holy matrimony] [civil marriage with a person of the same sex is a different institution from holy matrimony] and that a person who enters into such a civil marriage should not, merely by doing so, be considered as acting in a way contrary to the doctrine set out in Canon B 30.

OR

e. Make no change and maintain the position set out in the 2014 pastoral guidance.

The Legal Office
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November 2016