

Chapter 2 update: September 2021

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2.5.3: The Law Commission's consultation proposals on weddings

As we noted on pages 65-6 of the main text, the Law Commission has begun a new project examining marriage law. The terms of reference for the project, consultation paper (published in Sept 2020) and all other project documents are / will be available at [the Law Commission's website](#).

The Commission's project is considering the following issues:

- The legal preliminaries required before a wedding.
- The locations where weddings should be able to take place.
- Who should be legally capable of solemnizing a marriage. This includes considering how a scheme could encompass weddings conducted by non-religious belief organisations and independent celebrants. But the Commission will make no recommendations on whether new groups should be allowed to conduct legally binding weddings – that is considered to be a policy decision for Government / Parliament.
- Whether specific vows should be required in a wedding ceremony.
- How marriages should be registered.
- What should be the consequences for couples who do not comply with any formal requirements.

The Government will be considering separately:

- Interim reform to permit a relaxation of the rules regarding where civil ceremonies may be held, with a view to permitting outdoor locations to be used “whilst maintaining the requirement that venues be seemly and dignified”, and
- Some limited reform relating to marriage and religious weddings, in light of recommendations made by the [Independent Sharia Review](#).

The Covid-19 pandemic has given some of these issues heightened importance, given that, by law, wedding ceremonies for the vast majority of couples¹ have to be held indoors, where risk of virus transmission is higher than in the fresh air. Indeed, literally as I type this (on 22 Sept 2020), the government has announced that wedding ceremonies and receptions will be reduced to just 15 participants (down from the previous, already very limiting, Covid rule of 30). Whilst not specifically aimed at addressing the issues arising from the pandemic, the Commission is mindful that the present situation requires that we have a marriage law that is resilient to this sort of widespread disruption / emergency situations.

Under the Commission's proposed scheme:

- Civil preliminaries – applicable to all bar Anglican weddings, unless the Churches of England and Wales amend their rules to adopt the civil preliminaries – would be made simpler.

¹ Cf the far more flexible position of Jewish and Quaker communities.

- Couples would be able to give notice of their intention to marry online and to choose in which registration district to complete the preliminaries in person (so it would no longer be necessary for the couple to give notice in the place(s) where they had resided for the past seven days).
- The resulting notices of intention to marry would then be published online, rather than in the form of hardcopy notices, thereby far better fulfilling the publicity function that preliminaries are supposed to perform.
- The couple would have 12 months following the issuance of the ‘schedule’ – the document allowing the marriage to go ahead – to hold the ceremony.
- If Parliament were minded to take this route (see above – a policy decision for them), non-religious belief organisations such as Humanists² and/or individual (unaffiliated) celebrants would be able to officiate at and/or conduct marriage ceremonies.
- Couples would have a free choice about *where* to marry (provided it were deemed by the officiant to be safe and dignified), including in their own homes or outdoors – not just in a specifically approved wedding venue or register office.
- Since the location of the wedding would no longer be regulated, the critical factor determining a ceremony’s validity would be the presence of an appropriate officiant, who need not conduct the actual ceremony, but who would be under a duty to ensure both parties’ consent to marry, compliance with other legal requirements and signing of the marriage schedule, which the couple would then have a duty to lodge promptly at the register office.
- The requirement to include prescribed wording in the marriage ceremony would be removed, giving couples complete flexibility regarding their vows etc – though there would have to be some clear expression of consent to marry, whether oral, by conduct or simply by signing the schedule.
- Current restrictions on the inclusion of religious texts, songs etc in civil ceremonies would be removed, thereby allowing their use, provided the ceremony remained essentially civil, rather than religious, in nature. This would, for example, allow inter-faith couples to tailor a civil ceremony in a way that reflected their two families’ faith traditions.
- Importantly, the incidence of non-marriages (particularly in case of religious-only weddings, such as that in *Akhter v Khan* – see second update to 2.6.1 below) would reduce, thanks to revised rules about the impact of failure to observe the newly-reduced range of formal requirements.

The issue of religious-only marriages and the risk of a finding of that their wedding ceremony was ‘non-qualifying’ and so of no legal effect at all (what used to be referred to as a ‘non-

² Cf *R (ota Harrison) v Secretary of State for Justice* [2020] EWHC 2096 (Admin): Art 9/14 ECHR fully engaged by their current inability to celebrate marriages, but no breach found – *for the time being* – in view of this wide-ranging review of marriage law.

marriage’) is explored extensively in chapter 10 of the Consultation Paper (from para 10.171). In its summary document, the Commission said this:

Law Commission, *Getting Married: A Summary of the Weddings Law Consultation Paper*
(London: 2020), 34-5

Our provisional proposals will make it easier for religious weddings to comply with the legal requirements.

- A religious wedding will not need to take place in a place of worship that is registered for weddings, enabling couples to have a legally binding wedding at a venue that is meaningful to them and their faith.
- There will be no prescribed words that have to be included in a ceremony, enabling couples to have a legally binding ceremony which reflects the traditions in their faith.

Our provisional proposals also seek to reduce the circumstances in which couples find themselves in a marriage which has no legal effect.

- A marriage will be valid if the couple give notice and consent to be married in the presence of an officiant, or a person whom at least one of them believes to be an officiant.
- A marriage will be void (rather than non-qualifying) if the couple do not give notice but still consent to be married in the presence of an officiant, or a person whom at least one of them believes to be an officiant.

...

However, we do not think that our project is able to solve this issue entirely. Our project is limited to considering the law governing weddings. Hardship can arise in a religious-only marriage when the couple has celebrated their relationship according to religious rites, even when both knew that the ceremony would not be legally recognised. But ultimately the unfairness and hardship does not result from the ceremony. It arises from the couple’s ensuing relationship (and the fact that the couple did not enter into a legally recognised marriage at a later date). We agree that a legal remedy would be appropriate in these cases. However, the need for a remedy derives from what has happened during the relationship, rather than from the ceremony itself, and so falls outside the scope of what can be achieved by reform to weddings law.

Religious-only weddings are a specific instance of a wider difficulty that arises at the end of a relationship between a couple who were never married in the eyes of the law. Ultimately, we do not think that couples who have had a religious ceremony can be treated differently at the end of their relationship from couples who have had a non-religious, non-legally recognised ceremony, or who have had no ceremony at all. We consider that the correct approach to such cases is to focus on the consequences of the relationship coming to an end, rather than on the ceremony.

Reform of the law relating to cohabitation would be able to ensure protection of those whose religious ceremonies have no legal consequences, as well as those who have had a non-religious ceremony with no legal consequences or have not had any ceremony at all. We draw attention to our earlier proposals for such reform.

Those are the recommendations that we discuss in chapter 7 of the main text, at 7.6, which successive governments have shown no inclination to implement.

2.6.1: The advent of mixed-sex civil partnership, and the question of conversion to (and from) civil partnership

On pages 66-67 of the main text, we noted the passage of the [Civil Partnerships, Marriages and Deaths \(Registration etc\) Act 2019](#), a Private Member's Bill that passed with Government support. The Act achieves mixed-sex civil partnership effectively but indirectly – section 2 imposes an obligation on Government to implement mixed-sex civil partnership by way of statutory instrument amending the Civil Partnership Act 2004, to take effect no later than 31 December 2019. The [required regulations](#)³ were passed in November 2019, and the first mixed-sex civil partnership registrations duly took place on New Year's Eve, amongst them [Steinfeld and Keidan themselves](#). Much like the advent of same-sex marriage, the key legal change was effected by very simple statutory drafting:

- deleting “of the same sex” from s 1(1) of the Civil Partnership Act 2004; and
- deleting “(a) they are not of the same sex,” in the grounds for eligibility (and so of grounds making a purported CP void) set out in s 3.

In line with earlier [Government proposals](#):

- the adultery ‘fact’ is not available for mixed-sex civil partnership dissolution, thus adopting the position of civil partnership law, rather than mixed-sex marriage law; though, of course, from autumn 2021 it will be all change when the new divorce law comes into force (see update to chapter 3)
- similarly, the voidable grounds relating to lack of consummation and the respondent's venereal disease will not be available between mixed-sex civil partners
- where one party to a same-sex civil partnership acquires a gender recognition certificate rendering the relationship mixed-sex, the couple will be able (with the other party's consent) to remain in that civil partnership. It is therefore no longer the case (as it was before – see pp 67 and 95 of the main text), that both parties to a (same-sex) civil partnership would need to change gender at the same time in order to remain in their civil partnership, or that a civil partnership must be annulled before a full gender recognition certificate can be issued.⁴

The regulations also deal with religious organizations' involvement in the creation of mixed-sex civil partnership; implications for the law of parentage; implications for various financial entitlements (such as state and other pensions); and recognition of overseas unions as civil partnerships.

The [Government's paper](#) also set out its thinking about the issue of conversion, a topic on which the Act allows – but does not compel – the making of regulations. As at September 2020, over a year since the consultation closed, the Government has not published any response to the consultation on this issue. It is currently possible for same-sex civil partners

³ The Civil Partnership (Opposite-sex Couples) Regulations 2019, SI 2019/1458.

⁴ See reg 23 et seq, *ibid*, for the relevant changes here.

to convert their relationship to marriage, and that position has been preserved for the time being by amendment to s 9 of the Marriage (Same Sex Couples) Act 2013, which makes clear now that only same-sex civil partners can convert a civil partnership to a marriage.⁵ This conversion facility, which has no time-limit on it, was created when same-sex marriage was introduced in order to allow couples who had been denied access to marriage the opportunity simply to ‘upgrade’ their existing relationship to marriage at minimal (administrative) cost. The question now arises whether mixed-sex couples already married should be permitted to change their relationship to one of civil partnership, on the basis that they too have been denied access to a relationship form that they would have preferred to adopt.

The Government stated in its consultation paper that it was (then) minded to introduce this, but on a time-limited basis: i.e. *all* couples (mixed- or same-sex) would have a particular window of time in which to effect further conversions, and then the conversion route would be closed (no particular period of time is suggested, but presumably it would be little more than a couple of years or so). The Government justified this position on the basis of the rationale set out above: i.e. to give couples previously denied something a chance to get it with minimal fuss, all as yet non-formalized couples henceforth being able to take their pick between marriage and civil partnership from the outset.

The Government gave the following reasons for rejecting a longer-term/indefinite conversion right:

- that an indefinite scheme would entail ‘long-term administrative complexity, uncertainty and confusion about the status of a couple’s relationship and their rights’
- that indefinite conversion rights would ‘risk blurring the distinction between marriage and civil partnership’
- that it does not want to ‘encourage concepts of “trading up” or swapping one relationship for another’
- and that it would ‘undermin[e] the seriousness of the decision taken to enter a particular form of relationship’, in the new circumstances where all couples will have a choice about which type of relationship to formalize, to permit a later conversion.

It is not clear that these are strong arguments in themselves, or that they outweigh the disadvantages that a lack of indefinite conversion rights would impose on some couples. For example, consider the following cases:

- a mixed-sex marriage couple in which one party obtains a gender recognition certificate such that their relationship is now same-sex. Suppose that the couple wish to stay together, but for religious reasons no longer wish to be married and would rather now have a civil partnership
- a couple in a civil partnership undergo a religious conversion or have some other personal reason for now wishing to be married to one another

⁵ See reg 37, *ibid*.

- a couple in a civil partnership are moving overseas to a jurisdiction that will not recognize the partnership but would recognize a marriage.

Only the last of these examples is considered in the Government's paper, dismissed quickly on the basis that the 'principal concern is to address an inequality in this country, rather than account for the treatment of those relationships in other countries'. That seems unnecessarily unhelpful to citizens of this country who need or wish to move overseas. As to the first two examples, it is not clear how the seriousness of the parties' original, carefully considered commitment is in any sense undermined by the law responding to their changed circumstances – whether those circumstances be ones of legal status or simply personal development. The idea that this would encourage 'trading up' interestingly implies some sense of one relationship form being superior over the other. But as the *Steinfeld and Keidan* litigation made clear, any such sense of 'superiority' cuts both ways, depending on one's perspective – whether religious individuals continue to view marriage as the gold standard, or those ideologically opposed to marriage as patriarchal consider civil partnership to be the more modern, equal relationship form. Since we are accommodating the latter view by extending civil partnership to mixed-sex couples, just as we accommodated the view that same-sex couples should be permitted to marry, and since one's ideological views – or the condition of one's relationships – are not static over the life-course, why not accommodate this in law by permitting an ongoing right to convert in either direction? Indeed, that would surely sustain, rather than blur, the distinction between the two institutions.

The Government's response to consultation is awaited.

2.6.1: Non-marriages: ‘non-qualifying ceremonies’ – order restored to the law by *HM Attorney-General v Akhter, Khan and ors* [2020] EWCA Civ 122; but reform still needed

On pages 79-80 of the main text, we discuss the case of *Akhter v Khan*. The first instance judge had, rather surprisingly, found a void marriage between a couple who had gone through a purely religious marriage ceremony that, as they both knew, was legally ineffective to create a valid marriage in English law where the ‘husband’ had reneged on the agreement to have a later civil marriage. The decision caused consternation in many legal circles, appearing to depart from consistent case law that would clearly have classed this as a non-marriage. Indeed, given the parties’ full legal awareness of what they were (and were not) doing, this was not one of those very ‘hard’ cases in which one might feel compelled to rescue a party or parties who, in good faith, had honestly believed that they were validly married. The decision was appealed by the Attorney-General and duly overturned by the Court of Appeal, restoring orthodoxy to this area of law. The Court rejected both the judge’s interpretation of the key statutes (the Marriage Act 1949, to which the MCA 1973, s 11(a) refers) and the human rights arguments⁶ that the judge had prayed in aid of his position. And dismissed the novel arguments presented before it, in particular by intervenors in the case (neither Akhter nor Khan themselves taking any part in the appeal).

HM Attorney-General v Akhter, Khan and ors [2020] EWCA Civ 122

JUDGMENT OF THE COURT:

9. A person’s marital status is important for them and for the state. The status of marriage creates a variety of rights and obligations. It is that status alone, derived from a valid ceremony of marriage, which creates these specific rights and obligations and not any other form of relationship.⁷ It is, therefore, of considerable importance that when parties decide to marry in England and Wales ... they, and the state, know whether what they have done creates a marriage which is recognised as legally valid. If they might not have done so, they risk being unable to participate in and benefit from the rights given to a married person.

10. The answer to the question of whether a person is recognised by the state as being validly married should be capable of being easily ascertained. Certainty as to the existence of a marriage is in the interests of the parties to a ceremony and of the state. Indeed, it could be said that the main purpose of the regulatory framework ..., since it was first established over 250 years ago, has been to make this easily ascertainable and, thereby to provide certainty. ...

The Court analysed the relevant legislation and the case law concerning ‘non-marriage’, and concluded:

60. It would not, [given the authorities], appear to be open to us to decide ... that the concept of non-marriage should be confined to situations where there was “clearly no intention for any form of marital relationship to be created”.

⁶ See [2020] EWCA Civ 122, from [67].

⁷ Save in so far as civil partnership does so.

61. Even if this was open to us, however, it seems to us that to accept this submission would be to open up a path which would create very considerable difficulties, similar to those which the regulatory system first introduced in 1753 has been designed to prevent.

62. The present case concerns a religious ceremony and [the submission of counsel for an intervening NGO, Southall Black Sisters] would seem to require that all religious ceremonies, whenever and however performed, should be brought within the scope of the 1949 Act. That would clearly not be an acceptable dividing line especially as a marriage solemnized in approved premises can take any form (other than a religious service) the parties choose. It would then, equally, be questioned by why such [non-religious] ceremony wherever performed should not also be included within the scope of the 1949 Act. It would clearly not be acceptable to exclude such ceremonies and to give them a different legal effect to a religious ceremony for that reason alone. The current legal position has been neatly summarised [by the Law Commission], namely that: "Faced with the prospect of effectively deregulating marriage ... the courts developed the concept of the 'non-marriage'".

63. We would, therefore, have concluded that, to prevent the regulatory system being fundamentally undermined and in a manner which would be contrary to the need for certainty in the interests of the parties and in the public interest, we would have decided that there are some ceremonies of marriage which do not create even void marriages. In summary, in some cases the extent of non-compliance with the formal requirements stipulated under the 1949 Act means that the manner in which the marriage has been "solemnized" (to use the word from the 1949 Act...), is such that the parties have not intermarried *under* the provisions of Part II or, when relevant, *according* to the rites of the Church of England.

64.... [H]owever, we agree with observations that have been made about the unsatisfactory nature of the expression "non-marriage". We consider that the focus should be on the ceremony and would propose that they should be called a "non-qualifying ceremony" to signify that they are outside the scope of both the 1949 and 1973 Acts.

However, whilst it was clear that the *purely* religious ceremony that Nasreen Akhter and Mohammad Shabaz Khan underwent was non-qualifying,⁸ the Court did not feel able to say what deficiencies would and would not yield that outcome:

66. ... [W]e doubt whether it is possible or, indeed, sensible, to seek to delineate when the cumulative effect of the failure to comply with the required formalities will result in a non-qualifying ceremony and when it will result in a void marriage. Rather, we would suggest that the focus of the parties who want to marry and of those officiating at a ceremony of marriage, should be on complying with the required formalities so that they can be confident that they have contracted a valid marriage. ... [A]lthough there may be ceremonies ... where the cumulative effect of compliance with the required formalities is to create a valid or, alternatively, a void marriage, we would not want to encourage parties who want to marry to rely on such partially compliant ceremonies because the outcome will, inevitably, be uncertain.

There is clearly a strong case for reform of marriage law, the case for which is set out at page 65 of the main text and [in the Law Commission's weddings project documentation](#). But for now, the onus is now very much on community and religious leaders of non-Anglican couples wishing to contract a marriage that is both compliant with their faith *and* legally valid in English law to take the steps currently provided by the Marriage Act 1949 to secure that outcome.

⁸ See [2020] EWCA Civ 122, from [122].

2.8.2: The persistence of the common law marriage myth and the problem of ‘choice’ in relationship formation

On page 112 of the main text, we noted the existence of the ‘common law marriage myth’, i.e. the erroneous notion that simply living together as a couple confers marriage-like status and rights, at least over time. The existence of this myth in the minds of a majority of the British public, was uncovered in the British Social Attitudes survey 2000. The latest survey, conducted in 2018, shows that the myth is very much alive, with almost half of the public believing the myth. Worryingly, the view is more prevalent amongst members of households that have children – 55% of those individuals believe in the myth, compared with 41% of those without children. For the data on this and other issues relating to relationships and gender, see [British Social Attitudes 36](#).

The persistence of this myth is concerning, particular for those whose relationships end in separation, given the lack of financial remedies for such cases – as discussed in chapter 7. It is also important to remember that many cohabitants will not have ‘chosen’ that status, whether because they are subject to the myth or because they are in an ‘uneven’ relationship (see Barlow and Smithson, 2010), unable to persuade their partner to formalize the relationship but also unable to leave the relationship. It seems that the Government has yet to understand this reality. Consider the Ministerial foreword to the recent civil partnership implementation report discussed above: ‘We know there are over three million opposite-sex couples that cohabit but *choose not to marry for personal reasons*.’ That language could be taken to imply that all cohabitants are in the Steinfeld and Keidan camp, or something like it – deliberately rejecting marriage. In reality, for many, probably most, cohabitants, no meaningful ‘choice’ may be being made at all.

For more discussion of the justification (or lack of it) for extending civil partnership to all, rather than closing it to all new entrants, and of the possible impact of that development on the prospects of law reform for cohabitants, see articles by Hayward and by Miles & Probert in (2019) 31 *Child and Family Law Quarterly* at pages 283 and 303.