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Marital Problems: The Law Commission's 'Getting Married' Consultation Paper and Non-Qualifying Wedding Ceremonies

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This article explores the Law Commission's proposals on how and where people can get married in England and Wales as found in their 'Getting Married' Consultation Paper. It examines the extent to which the Commission's proposals will deal with or mitigate concerns expressed about two types of non-qualifying wedding ceremonies: 'unregistered religious marriages' where the couple undergo a religious ceremony that does not comply with the requirements of the Marriage Act 1949, and 'non-religious marriages' where the ceremony is conducted by celebrants representing a belief organisation (such as Humanists UK) or by independent celebrants and so is also outside the Marriage Act 1949 and not currently legally binding. The article largely welcomes the Commission's proposals but expresses concern about the proposed officiant system and how it defines belief organisation; the proposed changes to the law on validity; and the creation of a new criminal offence. The article develops these three points further and contends that, while a transformed weddings law could recognise non-religious marriages and reduce the number of unregistered religious marriages, the introduction of statutory cohabitation rights upon separation is needed to truly deal with concerns over unregistered religious marriages.

Keywords: marriage, weddings, reform, humanism, Islam

INTRODUCTION

When the lockdown restrictions of spring and summer 2020 started to be relaxed, provisions were made to allow attendance at a solemnisation of a marriage and significant event gatherings according to religion or belief. However, in the constantly changing regulations, this exception for significant event gatherings was soon removed, raising the question of whether attendance at non-qualifying wedding ceremonies was now protected.[2] Non-qualifying wedding ceremonies are those marriages celebrations that do not comply with the Marriage Act 1949 and therefore do not result in a legally binding marriage. Such wedding ceremonies include religious ceremonies that do not comply

1 This article is based on a presentation given to the Ecclesiastical Law Society's Day Conference on 20 March 2021. I am grateful to Dr Sharon Thompson and Frank Cranmer for their comments on this in draft.
2 Health Protection (Coronavirus Restrictions (No 2) (England) Regulations 2020, enacted on 24 September 2020.

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with the requirements of the Marriage Act 1949 (often called 'unregistered religious marriages') and ceremonies conducted by belief organisations such as Humanists UK or by independent celebrants (often called 'non-religious marriages'), which also lack legal effect unless a civil ceremony under the Act has also taken place. The removal of the exception for significant event gatherings meant that it appeared that non-qualifying wedding ceremonies were not protected. They did not fall under the solemnisation of marriage since they do not operate under the Marriage Act 1949. This led to a variety of different approaches in the myriad of regulations and guidance that followed in both England and Wales whereby non-qualifying wedding ceremonies – or at least some of them – came to be variously protected under the exception for wedding receptions, under the exception for events and as alternative wedding ceremonies, defined as 'a ceremony based on a person's faith or belief or lack of belief, to mark the union of two people'.[3] This ongoing confusion and the need to protect marriage ceremonies that are extra-legal underscored the social reality that many weddings are now taking place outside the scope of the Marriage Act 1949. The Coronavirus Regulations provided a microcosm example of how English law struggles with the existence of non-qualifying wedding ceremonies.

The rise of unregistered religious marriages and non-religious marriages has galvanised calls for reform of marriage law. Both types of non-qualifying wedding ceremonies have proved controversial in recent years and have led to litigation. In terms of unregistered religious marriages, Rowan Williams' infamous lecture on religious law led to a number of empirical studies into sharia tribunals which identified unregistered religious marriages as an issue.[4] While those who had undergone a marriage under the Marriage Act 1949 had a choice on relationship breakdown between State law remedies and going to a sharia tribunal, those couples who had only had a religious marriage were left on relationship breakdown either to sort out any disputes themselves or to use a sharia tribunal or equivalent.

Unregistered religious marriages were also raised as an issue in a number of official reports, including a scoping report by the Law Commission, the report of the Commission on Religion and Belief in British Public Life (CORAB), an independent review commissioned by the Home Office and even a Resolution

3 Health Protection (Coronavirus Local COVID-19 Alert Level) (Medium) (England) Regulations 2020.

4 R Williams, 'Civil and religious law in England: a religious perspective', (2008) 10 Ecc LJ 262–282. Empirical studies have included S Shah-Kazemi, *Untying the Knot: Muslim women, divorce and the shariah* (London, 2001); S Bano, *Muslim Women and Shari'ah Councils* (Basingstoke, 2012); and G Douglas, N Doe, S Gilliat-Ray, R Sandberg and A Khan, *Social Cohesion and Civil Law: marriage, divorce and religious courts* (Cardiff, 2011). For instance, the Cardiff University research found that over half of the cases dealt with by the Sharia Council in our study involved couples who either had not married under English civil law or had married abroad and whose marital status in English law was unclear.

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passed by the Parliamentary Assembly of the Council of Europe.[5] The Home Office review deemed that the matter could be resolved by creating a new criminal offence 'so that the celebrant of any marriage, including Islamic marriages, would face penalties should they fail to ensure the marriage is also civilly registered', (an approach also followed in a Private Member's Bill put forward by Baroness Cox).[6] By contrast, in *Akhter v Khan*[7] a family court judge favoured a flexible interpretation of the law on validity, but this ultimately did not find favour with the Court of Appeal,[8] meaning that the issue remained unresolved.

In terms of non-religious marriages, following an aborted move to a celebrant system considered under the Blair Government which could have included Humanists,[9] and an unsuccessful Private Members Bill,[10] a number of amendments were considered during the passage of the Marriage (Same Sex Couples) Act 2013 which would have allowed humanist marriage in some form or another. This culminated in section 14 of the Marriage (Same Sex Couples) Act 2013, which mandated a review to be produced and published by 1 January 2015, allowed an order to amend legislation in England and Wales, stipulated that any order 'must provide that no religious service may be used at a marriage which is solemnised in pursuance of the order' and defined 'belief organisation' as 'an organisation whose principal or sole purpose is the advancement of a system of non-religious beliefs which relate to morality or ethics'. The resulting review, however, suggested that the proposed reform raised 'a number of complex issues' and called for the matter to be referred to the Law Commission.[11] The Law Commission, in turn, produced a scoping paper to 'identify the questions that any future reform project would address'.[12] But their call for 'a full Law Commission reform project' went unanswered for a number of years until a two-year project was announced in June 2019.

5 Law Commission, *Getting Married: a scoping paper* (2015), <https://www.lawcom.gov.uk/app/uploads/2015/12/Getting_Married_scoping_paper.pdf>, accessed 15 February 2021; Woolf Institute, *Living with Difference: community, diversity and the common good*, Report of the Commission on Religion and Belief in British Public Life (Cambridge, 2015); Home Office, *The Independent Review into the Application of Sharia Law in England and Wales*, CM 9560 (2018). On the Council of Europe's Resolution, see R Sandberg and F Cranmer, 'The Council of Europe and sharia: an unsatisfactory resolution?', (2019) 21:2 Ecc LJ 203–212.

6 Home Office, *Independent Review*, p 5. For criticism, see R Akhtar, 'Religious-only marriages and cohabitation: deciphering differences', in R Akhtar, P Nash and R Probert (eds), *Cohabitation and Religious Marriage* (Bristol, 2020), pp 69–84 at pp 76–78. Marriage Act 1949 (Amendment) Bill 2020–21.

7 [2018] EWFC 54.

8 *Her Majesty's Attorney General v Akhter* [2020] EWCA Civ 122. See R Sandberg, 'Unregistered marriages are neither valid or void', (2020) 79:2 *Cambridge Law Journal* 237–240.

9 The move stalled because it was thought too important to enact by secondary legislation and there was no suitable Bill before Parliament to include such suggestions: HC Written comment, 1 March 2005, vol 431, col 77WS.

10 Lord Harrison's Marriage (Approved Organisations) Bill 2012–13.

11 Ministry of Justice, *Marriages by Non-Religious Belief Organisations: Summary of Written Responses to the Consultation and Government Response* (2014).

12 Law Commission, *Getting Married: a scoping paper*, para 1.40.

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In the meantime, the All-Party Parliamentary Humanist Group published a report calling for specific law reform, noting that 'wholesale reform is not on the table–and even if it was, it would take years', while Humanists UK supported a number of Private Members' Bills.[13] A few months before the Law Commission was due to publish its consultation paper, Humanists UK supported a judicial review of the current law seeking to establish beyond doubt that the exclusion of non-religious belief marriages was contrary to human rights provisions. The decision, however, amounted to yet another 'almost win' for the Humanists, with the High Court deciding that, although the claim fell within the ambit of Article 9 and there was discrimination, this was justified by the 'legitimate aim not to wish to reform the law in a piecemeal fashion when there are further issues arising in this area of social policy (presently being considered by the Law Commission)' and that the Government and then Parliament should be allowed time to reflect'.[14]

Reform of marriage law has long been mooted.[15] However, these two issues have animated and galvanised the calls for reform in recent years. There are now a number of wedding ceremonies that take place outside the legal framework. There are no reliable figures for unregistered religious marriages but Humanists UK alone conducts around 1,000 ceremonies a year and a recent study estimated that independent celebrants conduct 10,000 ceremonies a year in England and Wales.[16] Many of those couples who have had these non-qualifying wedding ceremonies consider themselves married at the end of it but they are only married in the eyes of the law (and benefit from the legal rights that come with marriage) if and when they undergo a further ceremony in the register office. This means that there are additional costs and hassle because they effectively need to get married twice.

The issues raised by the two types of non-qualifying wedding ceremonies differ slightly. In relation to non-religious marriages, reform is needed in order to fill a gap in the Marriage Act which makes a firm distinction between civil marriage solemnised by State officials and religious marriages. By contrast, there is no such gap for religious marriages. The problem is not

13 All-Party Parliamentary Humanist Group, *'Any Lawful Impediment?' A Report of the All-Party Parliamentary Humanist Group's Inquiry into the Legal Recognition of Humanist Marriage in England and Wales* (2018), p 6, <https://humanism.org.uk/wp-content/uploads/APPHG-report-on-humanist-marriage.pdf>, accessed 15 February 2021. Baroness Meacher's Marriage (Approved Organisations) Bill was introduced in the House of Lords for a First Reading on 9 February 2020; the Marriage (Approved Belief Organisations) Bill, sponsored by Rehman Chishti, received its First Reading on 22 October 2020.

14 *R (On Application of Harrison) v Secretary of State for Justice* [2020] EWHC 2096 (Admin) at para 107.

15 See S Cretney, *Family Law in the Twentieth Century: a history* (Oxford, 2003).

16 All-Party Parliamentary Humanist Group, *'Any Lawful Impediment?'*, p 9. S Pywell, 'The day of their dreams: celebrant-led wedding celebration ceremonies', (2020) 32:2 *Child and Family Law Quarterly* 177–99. The figure for independent celebrants is an estimate based on responses received, which assumes that those who did not respond are as active as those who did.

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that religious marriages cannot be legally recognised under the Act. It is rather that the requirements required for such recognition indirectly discriminate against some religions: the requirements that the wedding must be inside a registered place of worship and that a prescribed choice of words must be used do not fit with some religious traditions. It is this that has led to some religious marriages in those traditions not complying with the requirements of the Marriage Act 1949. Moreover, while several calls for reform have acted on the presumption that unregistered religious marriages are problematic per se, that is not the case.[17] Unregistered religious marriages can lead to discrimination, disadvantage and suffering – and there is a need for legal redress to be provided in such situations. However, this is not true of all unregistered religious marriages. There are various reasons why people enter into unregistered religious marriages. Some do so in order to date: it allows them to be together without being chaperoned.[18] A legally binding marriage would be inappropriate and premature. Unregistered religious marriages are not a problem where they are entered into wittingly and voluntarily. Autonomous and freely informed adults should be free to voluntarily enter into any intimate relationships. There is an argument that legal redress might need to be provided if that relationship changes over time in a way that causes a deterrent to one of the parties: if one gives up work or goes part time to look after children or the other party, for instance. But other than that, if the unregistered religious marriage results from a free choice by both of the parties, then that should be respected.

This article explores the reforms suggested by the Law Commission in their consultation paper and analyses the extent to which the proposed reform would deal with or mitigate the issues raised by unregistered religious marriages and non-religious marriages.[19] On the face of it, it appears that these matters are excluded from the Commission's terms of reference (para 1.14).[20] The consultation paper suggests that it is neither 'considering the recommendation of the Independent Review' nor 'whether non-religious belief organisations, including Humanists, and independent celebrants should be able to conduct legally binding weddings'. However, these exceptions are slight and slightly artificial. Not only does the consultation paper explicitly raise and discuss the issue of unregistered religious marriages, it also makes recommendations in respect of criminal offences, as well as exploring how its other proposals could mitigate

17 This false presumption is true of the Independent Review and the Council of Europe Resolution, for instance.

18 See S Mohee, 'Young British South Asian Muslim women: identities and marriage' (PhD thesis, University College London, 2011), p 211.

19 Law Commission, *Getting Married: a consultation paper on weddings law*, Consultation Paper 247 (2020). Further references to the consultation paper are given in the text.

20 Ibid para 1.14.

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the problem. And, although the paper does not examine the arguments for recognising non-religious marriages, the Commission do 'consider how a new system *could* include weddings conducted by non-religious belief organisations and independent celebrants if it were decided that the law should allow these groups to perform legally binding weddings' and also the necessity of ensuring that the proposed 'scheme is compatible with human rights law in its application to those groups who are permitted to conduct weddings – including any new groups to which it may apply' (para 5.9).

The following discussion falls into five sections. The first section provides a brief overview of the Law Commission's proposals. The next three sections explore in greater depth three of these proposals that have the greatest effect on unregistered religious marriages and non-religious marriages: the move to an officiant system, revisions to the law on validity and the creation of a new criminal offence. It is argued that, although all these proposals are to be broadly welcomed, each one is insufficient and needs to be developed further in ways that are outlined. The concluding section argues that, if the Law Commission's proposals are developed in the ways that this article suggests, then that would solve the issue of non-religious marriage and mitigate the problem of unregistered religious marriage but that a better solution can be provided by also looking at the issue of cohabitation rights on separation.

THE LAW COMMISSION'S PROPOSALS

The Law Commission's consultation paper focuses on what they call 'weddings law', that is, 'the law which governs weddings: how and where couples can get married' (para 1.11). It concludes that the current law is an 'ancient and complex hodgepodge of different rules for different types of ceremonies' (para 1.33) which leads to inefficiencies and unfairness (para 1.34), with there no longer being any 'policy justification for imposing such a patchwork of different rules on communities and couples' (para 7.15). It therefore proposes a new legal framework giving 'couples more freedom and flexibility over their wedding itself' and suggests that this liberalisation could be achieved by 'providing a robust system of preliminaries, to provide ample opportunity for impediments to be discovered, and forced and sham marriages to be identified' (para 1.92).

The proposed system shifts 'much of the focus of regulation onto the preliminaries stage' so 'that, with robust preliminaries to protect the interest of the state, the law could give couples more choice about the wedding ceremony itself' (para 3.7).[21] It is proposed that all weddings would be required to take

21 Each member of the couple would need to give at least 28 days' notice and this would take the form of two steps: '(1) the initial giving of notice, which might take place remotely (for example, by post or online); and (2) an in-person meeting with a registration officer'. These steps could be taken at

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place in the presence of an authorised 'officiant' (para 3.29). The term 'officiant' is used to denote 'the person who is responsible for ensuring that the legal requirements of the ceremony are met' (para 5.2). The officiant need not be the person who conducts or leads the ceremony, often referred to as the celebrant (para 3.31). The two roles may be performed by the same person or by different people. It is noted that 'separating out the roles helps to make it clear what is a matter for the law and what is a matter for religion, custom, practice, or personal choice' (para 5.3). Moreover, there are 'good reasons' why legislation should be 'generally silent on who should conduct the ceremony' given religious diversity: in a number of religious traditions, no third person is required to conduct the ceremony as such (para 5.4). The officiant would be responsible for ensuring that the legal requirements were met, 'along with the responsibility to uphold the dignity and solemnity of marriage' (para 5.6).[22]

The liberalisation of the law on requirements as to ceremony would remove the 'existing requirement for open doors that applies to some types of wedding' (para 1.96). The location would 'be subject to the officiant's consent' with officiants being 'responsible for considering safety and dignity, with guidance on how to do so from the General Register Office' (para 3.66).[23] Similarly, 'all weddings should take place according to the form and ceremony chosen by the parties, and agreed by the officiant'. The main requirement would be that 'the parties should be required to express their consent to be married'. However, even here 'no specific form of words should be required' and 'consent should be able to be conveyed non-orally, for example by participating in a ritual according to religious rites' (para 1.96). The 'one exception' to the permissive rule allowing couples and officiants to determine the content of their own ceremonies rule is that 'although religious content would be permitted during civil ceremonies, the ceremony would be required to be identifiable as a civil ceremony rather than a religious service' (para 3.60). The Law Commission, referring to research that suggests that some registration officers 'are taking a restrictive view as to what they allow couples to include as part of their wedding ceremony' (para 6.16), suggests that 'religious content should be permitted in civil wedding ceremonies, provided that the ceremony remains

the same time or separately: see paras 3.11–3.13. The consultation paper asks whether common preliminaries should apply to Church of England and Church in Wales weddings, which would mean that the current Anglican preliminaries such as the calling of banns would no longer have legal effect (para 3.23).

22 This would include '(1) ensuring that the couple freely consent to the marriage; (2) ensuring that any requirements of the ceremony have been met; and (3) ensuring that the register (or schedule) is signed' (paras 5.51–5.52).

23 The possibility of 'an optional scheme for pre-approval' would also be considered so that 'some venues would already have been determined to be safe and dignified, removing any need for an officiant to make their own assessment' (para 3.66).

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identifiable as a civil ceremony rather than a religious service' (para 6.109).[24] This objective, though laudable, might be difficult to define in practice.

These changes would mitigate the issue of unregistered religious marriages to the extent that the problem is caused by the current restrictions requiring a registered place of worship. The Law Commission's proposals would also go some way to resolve issues concerning non-religious marriages by adopting what they refer to as a scheme 'based on the regulation of officiants, rather than the regulation of the locations where weddings can take place' (para 1.92), which would facilitate non-religious belief weddings on an equal basis to religious ones. However, as the next section will discuss, the Commission's detailed discussion of their officiant-focused system suffers from a number of serious defects.

THE OFFICIANT SYSTEM

The Law Commission's consultation paper proposes that 'officiants would fall into four, or possibly five, categories' (para 3.36).[25] The first category would be registration officers, who would continue to officiate at civil weddings but, under the proposals, only one would need to attend, not two. These would continue to be appointed and employed by local authorities (paras 3.37 and 5.68). However, in order to combat existing confusion, given the anomaly of civil registrars being present at religious weddings, and as a result of the proposal to permit religious weddings to take place in a wider range of locations, registration officers would 'only be able to officiate at civil weddings, not at religious weddings' (para 5.58). This, however, sits oddly with the Commission's proposed relaxation of the rules on religious content. It would mean that 'religious groups would need to ensure that a religious officiant was present instead' (para 5.59).

The second category would be clerks in holy orders within the Church of England and the Church in Wales, who would be 'be authorised by virtue of their ordination, by being in Holy Orders' (para 3.38). This is in line with the Marriage Act 1949, which reflects the position under ecclesiastical law rather than conferring the authority (para 5.76). The paper notes that both the Church of England and the Church in Wales 'have generally accepted duties to conduct the weddings of their parishioners when called upon to do so' (para 5.77) and this merits special treatment. They reason that 'where one church has a special status under the law, this may require specific recognition of its office holders' (para 5.74). The paper points to the formal process of

24 This argument draws on S Pywell and R Probert, 'Neither sacred nor profane: the permitted content of civil marriage ceremonies', (2018) 30:4 *Child and Family Law Quarterly* 415–436.

25 The fifth category is maritime officiants (discussed in paras 3.54–3.56) and that need not concern us here.

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ordination and the internal discipline in those churches and states that in contrast 'within many religious traditions the question of who conducts a wedding is far more fluid' (para 5.84). However, this misses the point slightly: the difference is that, in respect of the Church of England, its processes of appointment and discipline are part of the law of the land. This leaves the Church in Wales in a slightly odd position: its differential treatment is legally justified on the basis that its general processes of appointment and discipline were formerly part of the law of the land but its specific role in relation to marriage has been preserved.

In contrast, all other religious marriages would fall under the third category of 'nominated officiants'. These officiants would be nominated to the General Register Office by the relevant governing authorities of all other religious groups (paras 3.39 and 3.41). The Law Commission's paper leaves open for discussion whether nominating bodies could 'nominate persons by the office that they hold within the organisation' rather than just nominating individuals (para 3.46). The General Register Office would be responsible for keeping a publicly available list of all nominated officiants (para 3.41).

This third category would include non-religious groups if the Government determined that they should be able to solemnise weddings, in which case they would be able to nominate officiants in the same way as religious groups (paras 3.39–3.40). The paper notes that, since in order to be eligible to nominate, 'a religious organisation would have to fall within the description of a religious body given by the Supreme Court in *Hodkin*',[26] then a similar definition should apply to non-religious belief organisations (para 3.42). They therefore propose the following definition of a non-religious belief organisation:

> An organisation that professes a secular belief system that claims to explain humanity's nature and relationship to the universe, and to teach its adherents how they are to live their lives in conformity with the understanding associated with the belief system. (para 3.43)

This parasitical use of the *Hodkin* definition is problematic in that not all non-religious belief systems may be 'secular', either in the common use of the word or in the sense it was used in *Hodkin*, where Lord Toulson said that 'by spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science'. Moreover, the Law Commission's proposed definition tells us very little. It is a functional definition which reveals even less than the human rights and discrimination law

26 *R (on the Application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, on which see R Sandberg, 'Defining the divine', (2014) 16:2 Ecc LJ 198–204; R Sandberg, 'Clarifying the definition of religion under English law: the need for a universal definition?', (2018) 20:2 Ecc LJ 132–157.

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jurisprudence on the definition of belief.[27] The Commission accepts that its proposed definition is not sufficient, noting that it needs to be considered 'whether the definition of a non-religious belief organisation should be limited further, by a list of exclusions of the types of group that would not qualify to nominate officiants, such as political parties, trade unions, or sporting organisations' (para 3.43). The existing definition found in section 14 of the Marriage (Same Sex Couples) Act 2013, which speaks of 'an organisation whose principal or sole purpose is the advancement of a system of non-religious beliefs which relate to morality or ethics', would be preferable to the Commission's suggestion and would go some way to excluding the groups they list. Although the Commission's terms of reference state that they are bound by the definition in *Hodkin*, this does not mean that it should be the basis for defining non-religious beliefs.

The Law Commission proposes that for religious and non-religious organisations alike there should be three further requirements (para 3.44). These requirements do not relate to buildings, on the basis that, given that their proposed scheme envisages moving away from requiring weddings to take place in particular locations, 'it would be would be anomalous to require a religious group to have a registered place of worship in order to appoint an officiant' (paras 5.70–5.71). Instead, the Commission proposes that first there are 'at least 20 members who meet regularly for worship or in furtherance of their beliefs'. This figure of 20 has been suggested because, although it 'might seem like a relatively low threshold … this has been the minimum figure for registering a place of worship for weddings for over 180 years without, as far as we know, causing any problems' (para 5.97). However, this requirement may not be appropriate for religions and belief systems who do not gather communally. The paper circumvents this by suggesting that a relaxed approach should be taken to its interpretation. It notes that this requirement would be met 'by remote meetings amongst celebrants or the executive of the organisation in relation to community outreach and training of celebrants' (para 5.131) and by 'meetings to plan and provide support to one another in how they engage with the community are meetings in furtherance of their religious beliefs' (para 5.98). These examples show the inadequacy of this requirement.

The second requirement proposed by the Law Commission is that the organisation should have 'a wedding service or a sincerely held belief about marriage' (para 3.44) so as to 'help to limit the power to nominate officiants to those groups that would genuinely intend to officiate at weddings' (para 5.99). It is unclear what the words 'genuinely intend' mean here. If they refer to sham

27 *Grainger PLC v Nicholson* [2009] UKEAT 0219/09/ZT, on which see R Sandberg, 'Is the National Health Service a religion?', (2020) 22:3 Ecc LJ 343–354.

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marriages, then it is questionable whether such marriages can be policed in this way, given that the requirement would 'not be seen as any form of check by the state on the content of the ceremony' and would not stipulate that 'the precise terms of that wedding service should have to be used in every case' (para 5.99). This would be an ineffective way of avoiding sham marriages, given that there would invariably be some form of marriage service once officiants were appointed. Focusing on the organisation's beliefs about marriage seems to be an unnecessary and inappropriate imposition which goes against the Law Commission's insistence that the focus is now on officiants not organisations: determining whether an organisation has a belief about marriage could require the General Register Office to get into theological and doctrinal issues.

The third and final requirement would also run this risk. The paper suggests that there could be 'an express exclusion preventing organisations from nominating officiants if the organisation promotes purposes that are unlawful or contrary to public policy or morality' (para 3.44). The Law Commission notes that, 'While there is no specific exclusion of such groups under the current law, we understand that the General Register Office takes the view that it would be able to refuse to register the buildings of such groups for weddings, in the event that any applied' (para 5.100). It is unclear why this would need to be explicitly laid out in the case of bodies nominating individuals rather than bodies registering buildings. Making such an imposition again suggests that the Commission's schema is actually focused on organisations rather than officiants. These requirements show the inadequacy of the Commission's suggested definition of belief, which risks providing a very low threshold of what constitutes a religion or belief. Alternatively, it may be questioned why nominating organisations should be limited to religion or belief. The terms of reference precluded the Commission from engaging with this question: they were tasked to create a system which could include non-religious belief and independent celebrant ceremonies but were prevented from discussing why such ceremonies should be included and where the line ought to be drawn.

This is shown in the fourth category of officiants proposed by the Law Commission, which would include independent celebrants if the Government decided to enable them to solemnise marriages. Individuals would be able to apply to the General Register Office for authorisation and the General Register Office would be responsible for keeping a list of all independent officiants (para 3.50). Like all other officiants, independent officiants would need to prove that they were a 'fit and proper person', to have undertaken relevant training and to undertake ongoing training (paras 3.51–3.52). The difference would be that, while the training for nominated officiants could take place in a number of ways and could be internal to their nominating body (paras 3.47–3.48), for independent officiants training would be either provided by the General Register Office or approved by the Registrar General (paras 3.51–3.52).

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Depending on how strict these requirements were and how they were enforced, they could either place a significant burden on registration officials or open the door to all kinds of celebrants, which would have the effect of making the third category redundant on the basis that, if anyone could apply to be an independent officiant, then there would be no reason to limit nominating organisations to religion or belief organisations.

There is also the question of why independent celebrants cannot be covered by the third category. The Law Commission rules this out simply on the basis that they 'are not aware of any jurisdiction in which celebrants can be nominated by a body that is neither a religious organisation nor a non-religious belief organisation'. The paper goes on to say that 'While there are organisations such as the Wedding Celebrancy Commission that could potentially act as a nominating body, allowing an organisation that was not a religious or belief organisation to nominate officiants would undermine the very point of having definitions of religion or belief and detract from the recognition of those organisations' (para 5.139). This point, however, is questioned by the inadequacy of the definitions of religion or belief discussed above. Given the difficulties of defining religion or belief, it may be preferable to open the definition to all organisations. Recognising independent celebrants without them even being members of an organisation would already cross this line. Individuals would be able to solemnise marriages who were neither State employees nor representatives of religion or belief organisations. Thus the Law Commission's fourth category is a pure example of an officiant-focused approach and it leaves the third category looking quaint by comparison. If independent celebrants can go straight to the General Register Office then it could be asked why religion or belief officiants should be denied that opportunity and be required to operate through their organisation and so be subject to further regulation concerning their organisation rather than themselves. Why should a religious leader of a faith of just 19 members be denied the right to solemnise marriages while an independent celebrant who represents just themselves has that power?

The other reason given by the Law Commission for why a separate category is needed is that 'not all independent celebrants are affiliated to an organization [*sic*], and it might be a contradiction in terms to require an "independent" celebrant to be a part of an organisation' (para 5.139). Stephanie Pywell's empirical research found that only 14 per cent of her respondents were not members of a larger group.[28] However, this is likely to be an underestimate of the number of truly independent celebrants, given that her methodology used the umbrella organisations as the point of contact with one example. It follows that there will be some truly independent celebrants who do not belong to an umbrella

28 Pywell, 'Day of their dreams'; S Pywell, 'Beyond beliefs: a proposal to give couples in England and Wales a real choice of marriage officiants', (2020) 32:3 *Child and Family Law Quarterly* 215–238.

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organisation, who could serve as the nominating body for the purpose of the third type of officiant. However, these are likely to be in the minority and the lack of supervision might give reason not to include them. Even if they were to be included, that would not preclude the majority of independent celebrants being included under the third rather than the fourth type of officiant, which would bolster the role of the umbrella organisation and reduce the burden and discretion placed upon the General Register Office or Registrar General.

The Law Commission's promotion of the officiant-focused system is radical in that it represents a clear move away from a building-based approach and tries to provide a focus that unites the different ways of getting married. However, perhaps what is proposed is too radical for it to be politically possible in that it requires a completely different approach that would affect all religious bodies other than the Church of England and Church in Wales, who in many cases have conducted weddings for hundreds of years. There is a need for a continuity provision whereby those religious groups who already solemnise marriage can continue to do so. The Marriage (Bailiwick of Guernsey) Law 2020 provides a template of how this could be achieved. Article 11 provides for a continuity clause whereby 'a person who, immediately before the commencement of this Law, was an authorised person with reference to a licensed building' under the previous law is 'deemed to be an authorised religious official' for the purpose of the new law.

A preferable approach would be to include such a continuity provision but then to say that officiants would be appointed in the future in one of two ways: by a nominating organisation or by individual application. If individual application is being permitted, then limiting the types of organisation who can nominate does not make sense. It would therefore be preferable if nominating organisations are not limited to religion or belief organisations and could therefore also include the umbrella organisation of independent celebrants and indeed any other organisation that wished to solemnise marriages. This would overcome the problems with the definitions of religion or belief and the question of whether and how independent celebrants can fit within the system.

This could be seen as opening the floodgates to a large number of new organisations with no thresholds in place. Yet the Law Commission's proposals suffer from this same problem, in that the inadequate definition of belief and the low threshold imposed would also open the floodgates. Extending nominating organisations beyond religion or belief organisations would be preferable to the Commission's truly officiant-focused approach for independent celebrants, which could place a significant burden on registration officials. A threshold could be put in place by insisting that nominating organisations do not have the principal or sole purpose of solemnising marriages. This would follow the approach found in section 14 of the Marriage (Same Sex Couples) Act 2013. Moreover, the Irish law on marriage provides a useful template of how

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requirements could be based on organisations and also how certain organisations such as political ones could be excluded.[29] The difference would be that, while the Irish law refers to secular bodies, the rules could be applied to organisations generally, thereby providing equal treatment of religious and non-religious beliefs. The Irish approach could also be usefully applied if organisations were to be restricted to religion and belief organisations. If this approach were taken, then it would be important to have a rigorous definition of religion or belief and a significant threshold.

THE LAW ON VALIDITY

The Law Commission's proposals on how and where marriages can take place would deal with the issue of non-religious marriage and would make significant difference to the unregistered religious. As the consultation paper puts it, the Commission's proposals 'should make it easier to have a religious wedding that is also a legally binding wedding' (para 10.180). However, although the changes could reduce the number of unregistered religious marriages – especially those that occur unwittingly or because of the current legal obstacles – they would not stop unregistered religious marriages from taking place and would not deal with the issue whereby unregistered religious marriages have occurred involuntarily. The consultation paper noted that some mitigation might be achieved through revision of the law of validity and through criminal offences. These, however, are best seen as backstops and are not the most effective protection that could be provided.

With respect to the law on validity, although the Court of Appeal in *Attorney General v Akhter* expressed 'doubt whether it is possible or, indeed, sensible to set out precisely when a marriage would be regarded as falling within the Marriage Act 1949',[30] the Law Commission proposes doing exactly that on the basis that this will provide greater clarity which should reduce 'the scope for accidental non-compliance' (paras 10.106–10.107). This is welcome. Rules on validity need to apply across all purported marriages. Law Commission proposes that a marriage would be valid 'as long as the couple have given notice, and at least one of them believes that the person officiating at the ceremony is authorised to solemnize a legal marriage' (para 10.184). This focuses on 'what was known to the couple, rather than whether as a matter of fact the person officiating was authorised to do so' because 'whether the person officiating has the authority to do so is not necessarily within the couple's knowledge' (para 10.73). However, it is noticeable that, while both parties need to give notice, only one of them needs to believe that there is an authorised officiant (para 10.55). This

29 Civil Registration Act 2004, s 45A.
30 [2020] EWCA Civ 122 at para 66.

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would mean that the marriage is still valid if only one of the parties knows that the officiant is not authorised. The purpose is to protect the party who was unaware by making the marriage valid. It is difficult, however, to see why such a marriage should be valid rather than void.

Under the Law Commission's schema, an opposite-sex marriage would be declared void where notice has not been given by both parties or either party, or if the parties both know that officiant is not authorised (or there is no officiant). This would mean that financial remedies available on divorce could be applied for (para 10.128). There would be a non-qualifying opposite-sex wedding and therefore no legal redress either where one or both parties had not consented or where the couple had not given notice and either they both knew that the officiant was not authorised or there was no officiant at all (paras 10.109 and 10.130). The paper states that 'this would go a long way towards addressing the key problem of religious-only marriages, where some individuals do not realise what is required and are left without any remedy at the end of a lengthy relationship' (para 10.63). There is no doubt, however, that the system put forward by the Law Commission continues to be complex, as shown by the fact that they seek to explain it using both a table and a diagram (para 10.127 and Appendix 6).

An alternative way of conceptualising the Commission's proposals would be to say that the status of the marriage depends on the answers to three questions: (1) Have both parties given notice? (2) Do both or one of the parties believe that the officiant is authorised? (3) Have both parties given consent? Under the Law Commission's schema, the absence of (1) or (2) will render the marriage void; the absence of (3) will make a marriage voidable or non-qualifying; while the absence of (1) and (2) or the absence of all three requirements will render the ceremony non-qualifying. These rules could be clarified further. In particular, contrary to the Commission's proposals, it should be a void rather than a valid marriage where only one of the parties believes that there is an authorised officiant at the wedding. The second question could then be recast as: Do both parties believe that the officiant is authorised?

These provisions would go some way to fulfil the principle that unregistered religious marriages are of concern where there has not been a free and informed choice to opt out of legal protection. Couples misled by the presumed officiant would have a valid marriage under this approach and where one party has misled the other in this regard then the marriage would be void rather than non-qualifying. However, under this proposal, there would still be unregistered religious marriages that were non-qualifying. These proposals would have made no direct difference from the outcome of *Akhter v Khan*, for instance.[31] This

31 [2018] EWFC 54.

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points to the limited effect that changes to the law on validity can have, unless an overly generous approach is taken that effectively makes all purported marriages legally binding, which would cause issues in terms of legal certainty, as well as for those couples who enter into religious marriages with the intention that their union will not be legally binding. The law on validity can only and should only be stretched so far. Some stretching of the law on validity and codifying it in a way that leads to certainty would be advantageous. It is a useful backstop but a limited one.

CRIMINAL OFFENCES

Contrary to the frequent calls for reform that see the enactment of criminal provisions as the solution to the problem of unregistered religious marriages, the criminal law actually provides an even more limited backstop than the law on validity. Criminal law by its nature penalises and punishes behaviour. It does not provide the remedies that are necessary in the case of an unregistered religious marriage: punishing wedding officials or even parties to a marriage does not provide remedies to the disadvantaged purported spouse on relationship breakdown. Recommending the enactment of new criminal offences should therefore be taken lightly since there is a risk that such provisions will be focused upon and erroneously seen as 'the answer'. Moreover, it is often the case that many proposed new criminal offences would penalise behaviour that is already a criminal offence. The desire for a specific offence criminalising a particular thing is often symbolic, given that the thing is often already criminalised under a more general offence.

The Law Commission's consultation paper proposes a new criminal offence to cover a gap in the law. It notes that currently 'it is an offence for any person to solemnize a marriage according to Anglican rites falsely pretending to be in Holy Orders, but it is not an offence to pretend to be an authorised person or superintendent registrar' (para 10.144). The paper therefore proposes that it should be an offence.

(1) for any person to purport to be an officiant and deliberately or recklessly mislead either of the couple about their status or the effect of the ceremony; or
(2) for an officiant deliberately or recklessly to mislead either of the couple about the effect of the ceremony. (para 1.170)

The Commission's creation of the legally responsible role of the officiant provides a relevant person to whom criminal responsibility could apply. This overcomes a significant weakness found in earlier proposed new criminal offences, such as that proposed by the Independent Review which would be 'unlikely to be

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effective' under the current law, given that there is no legal requirement 'for an identified person to conduct a non-Anglican religious wedding – or indeed any person at all' (para 5.35). The Commission contends that their proposed offence would 'reduce the likelihood of either of the couple being misled as to the nature of the ceremony' and is 'intended to deter individuals from purporting to officiate at weddings when they are not authorised to do so' (para 10.188).

These aims are laudable and logical in so far as they removes a possible gap in the law, though it may be questioned whether general criminal offences such as those found in the Fraud Act 2006 already criminalise such behaviour. However, creating and clarifying the legal responsibilities of officiants, as the Law Commission suggests, would help to mitigate the number of unregistered religious marriages and would arguably do enough to bring any rogue celebrants into line without the threat of criminal sanction. When read in the context of the consultation paper as a whole, it is clear that the Commission's criminal offence proposal is a backstop which would simply prohibit officiants and pseudo-officiants from making misrepresentations. However, the risk in making such a recommendation is that the proposed criminal offence could be seen as a 'magic bullet' solution (as the Independent Review and others saw similar offences). That is not what the Commission is proposing but on a glance at their proposals it is possible to erroneously assume this. It is vital that their proposed criminal offence is not seen in that way and not detached from the other proposals which will make much more of a difference.

It follows that, rather than suggesting that a new criminal offence be created, it would be preferable to amend existing criminal offences to make it clear that they apply to the situations that need to be criminalised. This could criminalise the behaviour of the parties rather than the officiant in the situation where there is not a voluntary decision to enter into an unregistered religious marriage. Section 121(1) of the Antisocial Behaviour, Crime and Policing Act 2014 provides for the offence of forced marriage: that is, using violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage.[32] Section 121(4) states that '"marriage" means any religious or civil ceremony of marriage (whether or not legally binding)'. The Law Commission consultation paper notes that this means that 'Forcing someone into a religious-only marriage is potentially a criminal offence' (para 10.199). The offence as drafted clearly criminalises the situation where one party is forced into a civil or religious marriage ceremony. It would not, however, seem to

32 Under this section, where the victim lacks capacity to consent (as defined under the Mental Capacity Act 2005), the offence is 'capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form coercion)'.

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cover the situation where someone is forced not to have a civil wedding ceremony and so an amendment to explicitly state this would be helpful.

The law on coercive control under section 76 of the Serious Crime Act 2015 could provide a similar backstop. This applies where the defendant and the victim are members of the same family if they are, or have been, married to each other; they are, or have been, civil partners of each other; they are relatives; they have agreed to marry one another; they have entered into a civil partnership agreement; they are both parents of the same child; or they have, or have had, parental responsibility for the same child. The provision in section 121(4) of the Antisocial Behaviour, Crime and Policing Act 2014 could be helpfully duplicated here to make it clear that marriage for this purpose includes any marriage ceremony whether or not it is legally binding.

Section 76 of the Serious Crime Act 2015 can complement the law on forced marriage by articulating what constitutes coercive behaviour in intimate adult relationships. It can also be of use in terms of discouraging such behaviour. This offence has already been used in the context of religious marriages. In January 2020 it was reported that a Jewish wife had launched a private prosecution under section 76 against her ex-husband, who denied her a religious divorce (a *get*).[33] The judge accepted an application for the State to fund prosecution costs but the case was discontinued after the ex-husband gave the *get*. The fact that the prosecution did not go ahead means that it is unknown whether this action or one like it would be successful (and whether it would apply to religious-only marriages). However, the wife's solicitor, Gary Lesin-Davis, was quoted as saying that 'Prosecution can provide a powerful remedy to protected vulnerable women whose treatment by recalcitrant husbands strays into criminal offending.'[34]

CONCLUSION

It is difficult to dispute that the law on marriage in England and Wales is 'in desperate need of reform' (para 1.3), being based on rules 'devised at a time when virtually everyone lived, married and died within a single community, and when most people shared the same faith and belief' (para 1.4). The inadequacy of the current law is underlined by two issues that have come to the fore in recent years: those of unregistered religious marriages and of non-religious marriages. In relation to non-religious marriages, there is a need to give marriages conducted by belief organisations and independent celebrants legal effect. However, if ceremonies by independent celebrants are made legally binding

33 S Rocker, 'Landmark case sees woman obtain get after launching private prosecution against husband for coercive control', *JC*, 13 January 2020, <https://www.thejc.com/news/uk-news/landmark-case-sees-woman-obtain-get-after-launching-private-prosecution-against-husband-for-coercive-1.495362>, accessed 16 February 2021.

34 Ibid.

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then there is no reason to restrict the organisations who can conduct weddings to religious or belief organisations. Extending the law to all organisations would have the advantage that the terms 'religion' and 'belief' would not need to be defined; instead safeguards could be put in place following the Irish model.

In relation to unregistered religious marriages, a step forward would be provided by removing the obstacles which currently indirectly discriminate against some religious groups by insisting that such marriages must take place in a place of religious worship and use prescribed words in order to be legally binding in their own right. This would be likely to reduce the numbers of unregistered religious marriages. However, unregistered religious marriages are not always problematic. Where they result from a free and deliberate choice then the decision not to comply with legal formalities should be respected. Banning such marriages, requiring that they always follow a legal ceremony or penalising those who conduct such ceremonies would therefore be inappropriate and counterproductive, forcing such unions further into the shadows. This means that legal redress should only be provided to those in unregistered religious marriages where the failure to comply with registration requirements is unwitting or is not truly voluntary on the part of one of the parties. Education and awareness-raising have an important part to play here but this would be aided considerably if the legal framework was accessible and principled. Ultimately there is a role for law here in terms of providing backstops whereby some redress can be given to those who unwittingly or involuntarily enter into unregistered religious marriages. Reform of the law of validity to make some unregistered religious marriages void and therefore opening the door to financial remedies could provide such a backstop and there is a limited role for some criminal offences.

However, the Law Commission's proposed reforms in *Getting Married* will not be sufficient in relation to unregistered religious marriages. As the consultation paper concedes, there would remain 'cases where a legal remedy would be appropriate' but that 'the need for a remedy in these cases derives from what has happened during the relationship rather than the ceremony itself, and so falls outside the scope of what can be achieved by reform to weddings law' (para 10.190). The most important backstop that could be provided is by offering some limited cohabitation rights on relationship breakdown of the type that exist in neighbouring jurisdictions and have previously been recommended by the Law Commission.[35] Other than where there are children as a result of the relationship or where the couple have been renting, if a cohabiting relationship

35 Family Law (Scotland) Act 2006; Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ireland); Law Commission, *Cohabitation: the financial consequences of relationship breakdown*, Law Com no 307 (2007), available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc307_Cohabitation.pdf>, accessed 16 February 2021. The matter has also been the subject of two Private Members' Bills: Lord Lester's Cohabitation

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breaks down then any financial and property disputes are currently dealt with through the law of property. This means that 'the simple question is "who owns what?" and the court is only concerned to answer that question, not to consider who *should* get what, applying any sort of "fairness" consideration of the sort that applies on divorce'.[36] A preferable approach would be through what the Law Commission referred to as 'a statutory scheme for the adjustment of property rights or financial provision between cohabiting couples on separation'.[37] Although there are some differences between the approaches of neighbouring jurisdictions and the proposals by the Law Commission and Private Members' Bills, they all provide a statutory scheme which will apply to cohabitants on separation provided that there is no opt-out. The schemes allow a cohabitant to seek a financial order in certain circumstances.[38] Most approaches provide for an opt-out either implicitly or explicitly. All of the approaches allow for the relationship between cohabitants to be assessed over time.[39] This is crucial since the relationship and the degree of reliance is likely to change over time.[40] Recognising this would go a long way to ensure that fairness applies where there has been no witting or truly voluntary decision to enter into a marriage without complying with the requirements of the Marriage Act 1949 or the *Akhter v Khan* situation, where there is a promise to register the marriage later but that never happens. A way forward can be provided by bringing the law on adult intimate relationships into the twenty-first century through opt-out cohabitation rights and an updated law on marriage which includes non-religious belief and removes provisions that indirectly discriminate against some religions. It is to be hoped that the Law Commission's final report reflects this and that it is implemented to bring England and Wales in line with our neighbouring jurisdictions.

Bill in 2009 and Lord Marks's Cohabitation Rights Bill, which was first introduced in 2013 and most recently re-introduced in February 2020. See also the speech by Baroness Hale in *Gow v Grant* [2012] UKSC 29, discussing the Scottish model and the Law Commission proposals. Reform has also been championed by academic research such as A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: social change and legal reform in the 21st century* (Oxford, 2005); and A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform', (2010) 22:3 *Child and Family Law Quarterly* 328–350.

36 J Miles, '"Cohabitants" in the law of England and Wales: a brief introduction' in Akhtar, Nash and Probert, *Cohabitation and Religious Marriage*, pp 27–38, at pp 27, 35.

37 Law Commission, *Cohabitation*, para 1.5.

38 Some systems provide more details as to the definition of the term 'cohabitants' than others but the definition tends to be satisfied if the couple have had a child together or have lived together for a certain amount of time. Most approaches require evidence of an advantage or disadvantage, with a range of slightly different factors then given for the court to consider in determining this.

39 Any opt-out agreement would also need to be looked at in the same way.

40 This is a concern that Sharon Thompson has raised in relation to prenuptial agreements. She has put forward a new approach, which she terms 'feminist relational contract theory', which explicitly factors in how the relationship has changed over time, with particular focus on the gendered dimensions. See S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: issues of power in theory and practice* (Oxford, 2015); and S Thompson, 'Feminist relational contract theory: a new model for family property agreements', (2018) 45:4 *Journal of Law and Society* 617–645.

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