Law Commission
Reforming the law

Getting Married
A Scoping Paper

Executive Summary

17 December 2015

INTRODUCTION

1.1 A couple's wedding day is one of the most important days of their lives. It is a day of celebration, as well as a day of legal significance. This project is about how to balance these two elements and design a modern law of marriage fit for the 21st century.

1.2 When we started this scoping phase of the project, we considered that the question for us to ask was whether the current law provides a fair and coherent framework for enabling people to marry. In other words, does the law allow people to marry in a way which meets their needs and wishes and so is meaningful for them, while recognising the interests of society and the state in protecting the status of marriage?

1.3 Our conclusion at the end of the scoping phase is that there are many people whose needs and wishes are not met by the current law and that society's interest in regulating how marriages are solemnized can be better protected. We have also concluded that the current law does not provide a coherent framework for enabling people to marry. The level of regulation differs between religions, and between religious and civil marriages. There is also a feeling among many groups and individuals that the law is unfair and overly-restrictive.

1.4 While the law permits both civil and religious marriages, the legal hurdles mean that there are tight controls on where couples can marry. Nor is there any provision for marriages to be conducted according to any non-religious system of belief, such as humanism. Individuals in interfaith relationships (where the couple each hold different religious convictions) may also not be able to marry in a form that reflects both beliefs because explicitly religious material cannot be included in a civil ceremony and not all religious groups are open to recognising the rites of other faiths.

1.5 At the same time, how people want to marry cannot be the only criterion. Regulation is needed to ensure that the interests of society and the state are protected. The law should ensure that those getting married are eligible to do so. It should prevent people being forced into marriage, and ensure that marriages are not entered into solely to gain an immigration advantage ("sham marriages"). There is also a need to keep a proper record of all marriages that take place.

1.6 As a result, we think that reform is needed to achieve greater choice within a simpler legal system. The current system of marriage law, designed as it was in the nineteenth century, is not meeting the needs and wishes of today's more diverse society. The law is incoherent and unnecessarily complex, and it could better protect the legitimate interests of the state and society.

THE CATALYST FOR THE PROJECT

1.7 In 2014, the Government conducted a public consultation on the question of whether non-religious belief organisations such as the British Humanist Association should be able to solemnize marriages.

1.8 Responses to the Government consultation showed considerable support for a change in the law to allow marriages to be solemnized by non-religious belief organisations. They highlighted, however, difficult questions as to how such reform could be implemented and a number of those who responded to the consultation suggested that any change should take place only as part of a more fundamental review. As a result, the Government asked the Law Commission to conduct a broad review of the law governing how people get married.

1.9 As we discuss below, the law is out of date, complex and uncertain. As a result, the question of whether non-religious belief organisations should be able to solemnize marriages, although important, is only one of the many questions that would need to be considered by a full review of the law governing how and where people marry.

THE SCOPING PHASE

1.10 Given the range of complex legal, social and religious issues underpinning the law of marriage, it was felt appropriate for the initial phase of work carried out by the Law Commission to be a scoping study. This work would identify the issues that would need to be considered before proceeding to any public consultation on options for reform.

1.11 The scoping phase has enabled us to gain an understanding of all the issues and to consider the shape of any future work. This phase has also allowed us to identify those social policy questions on which it would not be appropriate for the Law Commission, as a law reform body, to make recommendations.

1.12 During the scoping phase we have undertaken an in-depth analysis of the problems in the current law, informed by meeting with a number of groups and individuals with particular expertise or interest in the issues under consideration. The object of this work was not to consult on, or develop, specific proposals for reform but rather to attempt to ascertain the nature and range of concerns about current law and practice.

1.13 We have looked at the law in other jurisdictions to identify a range of international models to consider when designing a simpler, fairer and more modern law of marriage. We have particularly focused on those jurisdictions close to home and note that both Scotland and the Republic of Ireland allow marriages to be conducted by certain non-religious belief organisations. We also carried out preliminary research into the laws of the USA, Canada, Australia, New Zealand and South Africa, as well as undertaking an overview of the different approaches across Europe.

THE CURRENT LAW

1.14 Our law of marriage was designed in and for another age. The current Marriage Act, passed in 1949, was merely a consolidating measure and the structure of the current law remains essentially that of the Marriage Act 1836.

1.15 The law governing how people marry can be described in three stages. First, there are rules governing what people must do before they marry, often referred to as the marriage "preliminaries". Second, there are rules as to how and where the marriage ceremony may take place. Third, there are rules as to how the marriage must be registered with the state.

1.16 Exactly what is required at each of these different stages depends on whether the marriage is civil or religious; if the latter, the legal requirements also differ between religions.

1.17 The options for a religious ceremony are more limited for same-sex couples. A same-sex couple may not marry in an Anglican ceremony and may only marry according to the rites of another religion if that religion permits. The scoping paper and any further work done by the Law Commission does not and will not re-consider this position, which has only recently been established.

Preliminaries

1.18 Before the ceremony, the couple getting married must give notice of their intention to marry. They have to provide certain information and documentation about themselves and details of when and where their marriage is to take place. These requirements differ depending on whether the couple are marrying following civil or Anglican preliminaries.

1.19 All couples marrying in a non-Anglican ceremony must give notice to a superintendent registrar at the register office in the district where they live. The superintendent registrar, if satisfied that the parties are eligible to marry, will publish the details of the intended marriage for 28 days, during which time any person may object to the marriage. After that "waiting period" has elapsed the registrar will issue the couple with certificates authorising their marriage to take place. Where one of the parties may gain an immigration advantage as a result of the marriage there may be a longer waiting period to facilitate checks on whether the intended marriage is genuine. There are also different rules for giving notice where one or both of the couple is detained in a prison or hospital, housebound or terminally ill.

1.20 Couples who marry in an Anglican ceremony do not need to give notice to a superintendent registrar (although that is possible). Instead they can ask for banns of matrimony to be called in church or obtain a common or special licence. Banns are the most common form of authority for couples marrying in an Anglican ceremony; they are, in effect, a notice of the marriage read out during three consecutive Sunday services before the marriage takes place. Where one of the couple may obtain an immigration advantage as a result of the marriage they may not marry on the authority of banns or a common licence; they will either need to give notice to the registrar or obtain a special licence.

Ceremony

1.21 There are restrictions on where a ceremony may take place. A civil ceremony must take place in a register office or on approved premises, such as a hotel or a museum.

1.22 Anglican ceremonies may take place in any church or chapel where banns may be called, or in any location permitted by a special licence, which is often used to authorise marriages in private chapels such as in Oxbridge colleges or Inns of Court. The Anglican church has its own additional rules as to where any particular couple may marry, based on place of residence, usual place of worship or qualifying connection. There are no statutory restrictions as to where Jewish and Quaker marriages may take place; the only restrictions are those found within the religions themselves.

1.23 All other religious ceremonies, including those of Christian denominations outside the Anglican church, must take place in a building which has been certified as a place of religious worship and registered for the solemnization of marriages. Religion is broadly defined for these purposes, but the belief must claim to "explain mankind's place in the universe" and go beyond "that which can be perceived by the senses or ascertained by the application of science". As a general rule, a religious ceremony in a registered building can only take place in the district where one of the parties lives, though there are exceptions in certain circumstances.

1.24 This "buildings-based" system differs from many other jurisdictions that focus on authorising the persons who may conduct legally valid marriages, often referred to as "celebrant" systems.

1.25 Like the rules on location, the rules governing what must and must not form part of the marriage ceremony differ depending on the type of ceremony. These rules are complex and we have therefore summarised them in an infographic "Routes to Marriage", which appears at the end of this summary.

1.26 Where the infographic indicates that the ceremony requires a prescribed form of words this means that the Marriage Act 1949 requires the couple to use certain words to show that they are free to marry and that they take each other as spouses. The infographic also indicates that the solemnization of marriages by religions other than Anglicans, Quakers and Jews must occur in the presence of a civil registrar or an authorised person. Religious organisations which have buildings registered for the solemnization of marriage must for the first twelve months have a registrar present at every wedding to register the marriage. After that time they may appoint a person, known as the authorised person, to be responsible for registration. However, the responsibility the role entails deters some organisations from taking that option and they continue to require a registrar to attend.

Registration

1.27 All marriages, no matter how they are celebrated, must be registered with the state. In each type of ceremony a particular person is responsible for ensuring that the marriage is registered and that a copy of the entry in the marriage book is sent to the local register office. This process centres around the responsible person making quarterly returns to the register office, a system originating in 1837. In turn, the register office passes the information to the General Register Office. The process is widely considered to be administratively cumbersome and inefficient.

OUT OF DATE, COMPLEX AND UNCERTAIN

1.28 Having briefly described the current law we now consider why we think that it is in need of reform.

Out of date

1.29 The current law of marriage has a long history; much of it precedes the 1836 Act, and the granting of common and special licences dates back to legislation from 1533. Old law is not necessarily bad law but the changes in society over the last two hundred years mean that the law governing marriage no longer meets the needs of our time. For example, the rules for Anglican preliminaries, which rely on local publication of an intended marriage to ensure any objections can be made, no longer look robust in a modern society with a bigger, urban population, and dwindling church attendance.

1.30 The decline in adherence to formal religion, and the feeling that a civil ceremony does not allow sufficient scope for personalisation, has led to people seeking other alternatives to the current civil and religious options that are meaningful to them.

1.31 This growing demand for a meaningful alternative is evidenced by the choice of many couples to have non-legally binding ceremonies in addition to, or instead of, a legally binding ceremony of marriage. The reasons for this vary greatly. Some couples want to marry in a location that would not be permitted for a legal marriage ceremony. Others want to have a ceremony according to particular beliefs – such as humanism – that are not currently recognised for the purposes of solemnizing a legal marriage. For an increasing number of interfaith couples it is a wish to have a ceremony that can reflect their different beliefs. In all of these cases, couples may seek out organisations or individuals who are willing to conduct non-binding ceremonies in accordance with their wishes usually either preceded or followed by a legally effective (often register office) wedding. This can add to the cost of getting married and means that for many couples what they regard as their "real" wedding is not the ceremony at which they become legally married.

1.32 Further, the current law does not evenly cater for the needs of different religious groups. The legislation passed in 1836 was not designed with a multi-faith society in mind. Our "buildings-based" system presupposes that people with religious belief would always wish to marry in their place of worship, but that does not hold true for all religions, including Islam, Buddhism and Jainism.

Complex

1.33 The law in this area is complex: there are different rules for different groups at every stage of getting married. The twin tracks of civil and Anglican preliminaries, the differences in location and content for different ceremonies, and the different requirements as to registration combine to create a difficult legal landscape. The primary legislation is underpinned by numerous regulations dealing with, for example, the approval of premises for civil ceremonies, the obligations of authorised persons in registered buildings, and the marriage of same-sex couples in buildings shared by different religious groups. The law should be as clear and accessible as possible, and the current system is, we suggest, in some aspects needlessly over-regulated.

Uncertain

1.34 Even though there is a great deal of law governing the solemnization of marriage, there is a lack of certainty around some central aspects. For example, the law does not specifically state that the couple must be present in the same room, that the ceremony needs to be in a language that they understand, or at what point in any given ceremony a couple are married. Further, the legislation does not even provide what the minimum requirements are for a marriage to be valid.

1.35 The law outlines certain circumstances where a marriage will be void, meaning invalid from the start, due to an intentional failure to comply with certain required formalities. There are other circumstances where a failure to comply will not affect the validity of the marriage. However, there are gaps in the law where the consequences of an intentional or innocent failure to comply are not clear.

1.36 The parties to a void marriage can make financial claims against each other in the event that their relationship breaks down, in the same way as if they were validly married. But some couples have failed to comply with the rules to such an extent that the courts have held their marriage to be a "non-marriage". The result is that their marriage has no status in law and the parties have no legal claims against each other in the event of the breakdown of the marriage. This can happen after many years of the couple living together with one or both of them believing that they are husband and wife. This is particularly likely to occur where the couple follow the requirements of their religion and wrongly assume that the resulting ceremony will be recognised by the law.

1.37 Recent case law has highlighted the uncertainties in the law and the unpredictable nature of the outcome in such cases. For example, in one case a couple who had neither given notice nor registered their marriage were found to be validly married as their ceremony happened to take place in a building that was registered for the solemnization of marriages at a time when an authorised person was, by coincidence, present. The law should not leave to chance such an important issue as marital status.

THE OBJECTIVES OF REFORM

1.38 In considering how any new system of law might be devised, we have identified a number of guiding principles which we suggest should underpin any reform in this area. These principles have led us to conclude that the objective of reform should be to legislate for greater choice within a simpler legal framework.

1.39 The guiding principles are:

(1) certainty and simplicity;

(2) fairness and equality;

(3) protecting the state's interest; and

(4) respecting individuals' wishes and beliefs.

Certainty and simplicity

1.40 Greater certainty and simplicity would benefit both the couple and the state. At the most basic level, providing certainty as to whether and when a couple are married is crucial both for the parties involved and the state in determining their status and legal entitlements. A simpler system could assist here too: in such a system there would likely be fewer mistakes and less risk of a marriage being invalid as a result. A simpler system would also remove unnecessary hurdles and costs to getting married and be easier and cheaper to administer.

Fairness and equality

1.41 Any system needs to be fair to those from different beliefs and cultures, and comply with legislation relating to human rights and equality. This does not mean that the system should not recognise and acknowledge diversity among different religions or beliefs. Rather, it means that the level of regulation should be the same for all groups that can solemnize marriages, unless there is a good reason to depart from that.

Protecting the state's interest

1.42 The state's interest in marriage needs to be protected. As a result, one basic assumption of our work has been that there is a need for some legal regulation of the process of getting married. There are a number of very strong reasons for such an assumption. At the very least, the state has a role to play in checking the parties' eligibility and capacity to marry and whether they consent to do so, and in preventing sham and forced marriages. It is vital that any new system does not undermine the state's role in these areas. The state also has an interest in maintaining a record of marriages taking place since marriage affects the status of an individual and gives rise to legal rights and obligations.

Respecting individual's wishes and beliefs

1.43 It is right that, in taking a step with profound legal and personal implications for their lives together, a couple can do so in the way that is most meaningful for them, whether that meaning be derived from religion, other beliefs or personal convictions. A balance will need to be struck so that as much respect as possible is accorded to the couple's wishes and beliefs without any adverse effect on the protection of the state's interest in marriage.

THE OPTIONS FOR REFORM

1.44 During the scoping phase, we have considered different models for reform. We have concluded that two, which may appear attractive at first sight, would not be the right models to take forward into any future work in this area: legislating solely for marriages to be solemnized by non-religious belief organisations, and legislating for universal civil marriage. Our preferred option, which would form the basis of any future work that the Law Commission undertakes in this area is reform that creates a new system that provides for greater choice within a simpler legal structure.

Legislating solely for non-religious belief organisations

1.45 One option for reform would be legislating solely for non-religious belief organisations to be able to solemnize marriages. Indeed, the Marriage (Same Sex Couples) Act 2013 empowers the Secretary of State to make provision for marriages by non-religious belief organisations. However, the Government concluded in its response to the 2014 consultation that there was no option that could be immediately implemented "which would provide for complete equality of treatment between those who have religious beliefs, those with humanist or other non-religious beliefs, and couples more generally". The work that we have done during the scoping phase has led us to agree with that conclusion.

1.46 Non-religious belief organisations tend not to have buildings that could be registered for the solemnization of marriages. This means they could not fit easily into the current buildings-based system. They are not analogous to Jews and Quakers, whose current position in marriage law arose from their historically distinctive practices, tight self-regulation and small numbers. Non-religious belief organisations would have to be treated as a new exception, which would create further anomalies and potentially an increased perception of unfairness depending on how they were regulated. What is needed is a new system that seeks to minimise, rather than multiply, differences in the legal treatment of those authorised to conduct weddings.

1.47 Further, legislating solely to allow non-religious belief organisations to solemnize marriages would not solve any of the other problems in the current law. In terms of according with the principles outlined above, we suggest that this option would not achieve certainty and simplicity, nor fairness and equality.

Legislating for universal civil marriage

1.48 Requiring all couples wishing to marry to go through a civil ceremony of marriage would be a fundamental change to the law of marriage in England and Wales. While providing certainty and simplicity, fairness and equality and protecting the state's interests, universal civil marriage would unnecessarily offend against the idea of respecting individual's wishes and beliefs.

1.49 The genesis of the project was to consider the law with a view to extending the right to solemnize marriages, not taking it away. Universal civil marriage would potentially increase the cost for couples getting married as many would want an additional ceremony to reflect their beliefs and understanding of marriage that could not be incorporated in a civil ceremony.

Legislating for greater choice within a simpler legal framework

1.50 We are of the view that the project should address all of the ways in which people can marry rather than seeking to impose universal civil marriage, or proceeding with the sole aim of enabling non-religious belief organisations to conduct marriages within the current framework.

1.51 The project would consider reforms underpinned by the guiding principles identified above, aiming to provide greater choice within a simpler legal framework.

WHAT WOULD BE INCLUDED IN A LAW COMMISSION REFORM PROJECT

1.52 Any future reform work by the Commission will need to answer questions about what should happen at each of the stages of getting married. The questions raised could include the following.

1.53 *Preliminaries*: What does the state need to know before people can legally marry? Who should receive that information and how and where should it be provided? Should there be universal civil preliminaries, so that all couples intending to marry give notice to the state?

1.54 *Ceremony*: If the ability to solemnize marriages is extended beyond religious groups and the state, how could this be done? Can the rules be made more coherent? Is there scope to expand the range of locations in which a marriage ceremony can take place? For example, should marriages be able to take place outdoors?

1.55 *Registration*: What should be the process of registration? Who should be responsible for ensuring that a marriage is registered?

1.56 *Generally*: What should be the minimum requirements for a valid marriage? What offences or sanctions are needed to uphold a reformed law of marriage? Should aspects of the law governing the formation of civil partnerships be aligned with the law governing the solemnization of marriages?

1.57 In Chapter 4 of the scoping paper we set out all of the issues that would need to be considered in a full review.

1.58 When considering how to answer these questions we would work on the basis that reform should be cast within pre-established policy parameters. We do not consider there should be a change to the law determining what amounts to a religion for the purposes of the solemnization of marriage. This has been recently considered and determined by the Supreme Court and involves value judgements which have implications that go beyond marriage law. Nor should the project re-examine the changes to marriage law made by the Immigration Act 2014, which were intended to minimise the risk of sham marriages.

1.59 As well as enabling us to decide what should be within the scope of future reform work by the Commission the scoping phase has also allowed us to reach a conclusion on what should be out of scope. We have identified three such issues; these are the Church of England's and Church in Wales's duty to marry their parishioners, how English law deals with marriages that have taken place overseas and whether or not non-religious belief groups should be obliged to solemnize marriages of same-sex couples.

1.60 We have also identified two key policy areas which would feature in the reform of marriage law but are questions for the Government rather than the Law Commission.

1.61 The question of whether or not the current categories of those able to solemnize marriages should be expanded, and if so to which other groups or individuals. The Law Commission would consider how any expansion of the current categories the Government decided to make could be incorporated in a new system.

1.62 How far any changes made to the law governing the solemnization of marriage should be reflected in changes to the law governing the formation of civil partnerships. We would consider how certain reforms could operate for both marriage and civil partnership but whether any such alignment should be undertaken is a social policy issue solely for the Government.

CONCLUSION

1.63 The current law governing the solemnization of marriages is outdated, uncertain and needlessly complex. It does not cater adequately for the many faiths and non-religious beliefs that make up 21st century society and is perceived to be unfair. We take the view that the solution lies in full-scale reform and we have identified both the guiding principles that should underpin a reformed marriage law and the objective at which, we believe, reform should aim: greater choice for marrying couples within a simpler legal framework.

1.64 A reformed law should, while taking account of the history of marriage, strike the right balance between freedom for couples to get married in the way and in a location that they want and that is meaningful to them, while protecting against the abuses involved in sham and forced marriages. Within the parameters that we have set out above we believe that the Law Commission is well placed to develop a coherent and modern law of marriage.

ROUTES TO MARRIAGE

Solemnization of marriages under the Marriage Act 1949

Civil marriages

In a register office

- No religious service
- Open doors
- Two witnesses
- Prescribed form of words
- Presence of Superintendent Registrar and Registrar

On approved premises

- No religious service
- Open doors
- Two witnesses
- Prescribed form of words
- Presence of Superintendent Registrar and Registrar

Religious marriages

Other religions

- Such form and ceremony as the parties wish
- Open doors
- Two witnesses
- Prescribed form of words
- Presence of Registrar or Authorised Person
- In a registered place of worship

Jewish

- Between persons professing the Jewish religion
- According to the usages of the Jews
- No restriction as to place

Society of Friends

- Between members of the Society of Friends or other persons authorised by the Society
- According to the usages of the Society of Friends
- No restriction as to place

Church of England or Church in Wales

- According to the rites and ceremonies of the Church
- Two witnesses
- Conducted by a person in Holy Orders
- In a church or chapel or other authorised place

◆ Under Part III of the Marriage Act 1949: Marriages under Superintendent Registrar's Certificate

◆ Under Part II of the Marriage Act 1949: Marriage according to the rites of the Church of England