

Law Commission report - Part one

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The Law Commission will today publish its much awaited report on Matrimonial Property, Needs and Agreements. In its press release entitled 'Making it easier for separating couples to manage their finances and property', the Commission sets out its three main aims: first, to introduce a draft bill which will make qualifying nuptial agreements legally binding, so long as certain conditions are met; second, to recommend that the Family Justice Council produces authoritative guidance on 'financial needs' so as to equip separating couples with the legal knowledge to reach agreement about finances and property without having to go to court; and third, to recommend that the Government commissions a long-term study to assess whether a non-statutory formula for spousal maintenance (such as the sort used in Canada) would work in England and Wales. Prenuptial agreements are already recognised by the family courts in England and Wales and are capable of being enforced, if freely entered into by each party with a full appreciation of their implications and if certain safeguards have been met. What is newly proposed by the Commission is that prenuptial agreements should become legally *binding* once the financial needs of the parties and any children involved have been met, so long as both parties have received independent legal advice and both have exchanged material details of their respective finances. The statutory criteria set out in s25 Matrimonial Causes Act 1973 cannot be ousted without an Act of Parliament. So, whilst provisions for binding prenuptial agreements are to be set out in a draft bill, the other two tenets of the Report – the guidance on financial needs and the study on formulaic spousal maintenance – will remain defined, to a degree, by the principles set down in the statute as interpreted by the family courts. There is evidently a desire for independence and autonomy amongst separating couples who wish to resolve their differences without contested court hearings. We already have established forms of dispute resolution in the family law arena: mediation; collaborative law; and, more recently, family arbitration. However, now that the Law Commission has provided its recommendations, the chance to enter into a binding prenuptial agreement will become a real and attractive prospect for many couples. The press release gives us a taste of the contents of the Report and its recommendations are very much welcomed. However, many questions are raised by the proposals: 1. Will the guidance on financial needs be commissioned and delivered quickly; given the apparent requirement that needs must be met before a qualifying nuptial agreement is capable of being binding? 2. Could the expressed aim to enable separating couples to achieve financial independence mean an end to lifetime maintenance orders? 3. Does the direct reference to the Canadian formula for spousal maintenance mean that is the model the Law Commission favours? The latter determines child support (based on a federal formula) and gives a guidance bracket for the amount and duration of spousal support to be paid which is not fixed but which narrows the scope for disagreement between separating couples. 4. What sort of information will constitute 'material' information, for a qualifying agreement to be potentially binding? 5. Can a Bill introducing binding prenuptial agreements be implemented in the absence of clear guidance on financial needs, which seems to be the centre-piece of the Law Commission's recommendations?