



# Summary: Analysis & Evidence

# Policy Option 1

**Description:** (i) Remove from the legal process the requirement to evidence one of five facts to demonstrate a marriage or civil partnership has irretrievably broken down and replace with a statement of irretrievable breakdown. (ii) Introduce a minimum timeframe of 26 weeks for the divorce process. The option considers the impacts of 13, 26, 39 and 52 weeks. (iii) Remove the ability to contest a divorce. (iv) Provide an option for jointly initiating proceedings.

## FULL ECONOMIC ASSESSMENT

Price Base Year n/a	PV Base Year n/a	Time Period Years n/a	Net Benefit (Present Value (PV)) (£m)		
			Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	n/a	n/a	n/a
High	n/a	n/a	n/a
Best Estimate	n/a	n/a	n/a

Description and scale of key monetised costs by 'main affected groups' - None				
<b>Other key non-monetised costs by 'main affected groups'</b>				
Spouses who wish to bring their marriage or civil partnership to a legal end, or who wish to obtain a legal separation will find that the introduction of a minimum time period is likely to extend the time taken to complete the divorce process for most cases, measured from the petition to decree absolute. HM Courts and Tribunals Service (HMCTS) and the family court judiciary will incur implementation costs and work is ongoing to assess these. HMCTS may also experience a temporary spike in volumes from couples who would be in the process of waiting two or five years to cite separation at the point of implementation. Legal services providers will need to familiarise themselves with the new rules. This option is also expected to reduce the workload for family lawyers as they will be dealing with cases with reduced conflict and without the need to evidence one of the five facts.				
BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low	n/a	n/a	n/a	
High	n/a	n/a	n/a	
Best Estimate	n/a	n/a	n/a	
Description and scale of key monetised benefits by 'main affected groups' - None				
<b>Other key non-monetised benefits by 'main affected groups'</b>				
Spouses who wish to bring their marriage or civil partnership to a legal end, or who wish to obtain a legal separation should experience reduced conflict within the divorce, dissolution or legal separation process. They should also find the simplified process easier to navigate. They will also need to make less use of legal services. The children of divorcing couples should experience reduced conflict between their parents which should also facilitate better cooperation and co-parenting after separation. HMCTS and the family court judiciary will experience a small reduction in their administrative costs. Legal services providers will benefit from reduced levels of acrimony among their clients which is expected to make their job easier and to facilitate agreements. The public and voluntary sector, where they assist adults and families before, during and after separation will be able to focus on assisting couples to move forward than on explaining the system to them.				
<b>Key assumptions/sensitivities/risks</b>			<b>Discount rate (%)</b>	n/a
We assume no impact on related financial settlements, the long-term divorce rate or on the likelihood of reconciliation. HMCTS face the risk of an unexpectedly large spike in cases from the removal of the separation period, post implementation.				

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m
Costs: n/a	Benefits: n/a	Net: n/a	n/a

# Summary: Analysis & Evidence

# Policy Option 2

Description: Add a new 'statement' fact alongside the current facts, introduction of a new minimum timeframe, removal of the ability to contest, and provision of the option of joint application

## FULL ECONOMIC ASSESSMENT

Price Base Year n/a	PV Base Year n/a	Time Period Years n/a	Net Benefit (Present Value (PV)) (£m)		
			Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	n/a	n/a	n/a
High	n/a	n/a	n/a
Best Estimate	n/a	n/a	n/a

### Description and scale of key monetised costs by 'main affected groups'

None

### Other key non-monetised costs by 'main affected groups'

The costs of this policy are the same as Option 1

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	n/a	n/a	n/a
High	n/a	n/a	n/a
Best Estimate	n/a	n/a	n/a

### Description and scale of key monetised benefits by 'main affected groups'

None

### Other key non-monetised benefits by 'main affected groups'

The benefits of this option are the same as Option 1 except:

- The potential for the system to be abused by those spouses wishing to cause harm would remain;
- Where one party wished to allege the other party's conduct as the basis for seeking a divorce, they would still be able to do so.

In these cases, the risk of harm is reduced relative to the baseline, but not to the same extent as Option 1

### Key assumptions/sensitivities/risks

Discount rate

It is assumed that there will be no impact on related financial settlements, the long-term divorce rate and reconciliations. There is a risk that the retention of facts would fail to reduce conflict in some cases, in particular where abuse exists. There is a risk of unexpectedly large spike in cases from the addition of a new "statement" fact adding a new route for divorce without alleging conduct and without having to wait for a separation period to apply, post implementation.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

# Summary: Analysis & Evidence

# Policy Option 3

Description: Shorten the separation periods to one year (with consent) and two years (without consent). Similar to the system currently in place in Scotland.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: n/a	High: n/a	Best Estimate: n/a
<b>COSTS (£m)</b>					
		<b>Total Transition (Constant Price) Years</b>	<b>Average Annual (excl. Transition) (Constant Price)</b>	<b>Total Cost (Present Value)</b>	
<b>Low</b>		n/a	n/a	n/a	
<b>High</b>		n/a	n/a	n/a	
<b>Best Estimate</b>		n/a	n/a	n/a	
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
None					
<b>Other key non-monetised costs by 'main affected groups'</b>					
There would be familiarisation and transition costs to legal service providers and the public and voluntary sectors similar to those associated with Option 1					
<b>BENEFITS (£m)</b>					
		<b>Total Transition (Constant Price) Years</b>	<b>Average Annual (excl. Transition) (Constant Price)</b>	<b>Total Benefit (Present Value)</b>	
<b>Low</b>		n/a	n/a	n/a	
<b>High</b>		n/a	n/a	n/a	
<b>Best Estimate</b>		n/a	n/a	n/a	
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
None					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
<ul style="list-style-type: none"> <li>a. Reduced use of conduct-based facts as the incentives to speed up divorce are reduced</li> <li>b. Reduced conflict due to the above benefit</li> <li>c. Improved fairness as fewer couples will need to cite conduct-based facts for financial reasons. However, this option would not completely eliminate the problem as Option 1 does</li> </ul>					
<b>Key assumptions/sensitivities/risks</b>				<b>Discount rate (%)</b>	
It is assumed that there will be no impact on related financial settlements, the long-term divorce rate and reconciliations					
There is a risk of unexpectedly large spike in cases from the reduction of the separation period. As the periods would be reduced under this option (rather than removed), this risk is smaller than in the other options.					

## BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

# Evidence Base (for summary sheets)

## A. Background

1. The current law requires a party to a marriage or civil partnership who seeks a divorce or dissolution<sup>1</sup> to provide one or more of five<sup>2</sup> facts to demonstrate that the sole ground for divorce or dissolution, irretrievable breakdown, is met. Three of these facts are based on the conduct of the other spouse (adultery, behaviour and desertion), and two are based instead on a period of prior separation (two years if both spouses consent, five years otherwise). Approximately 61%<sup>3</sup> of cases between January 2011 and June 2018 involved the use of conduct-based facts.
2. Divorce and dissolution applications can be initiated by one spouse (“the petitioner”), and must be acknowledged by the other spouse (“the respondent”) who has the option to contest (“defend”) the proceedings. Only 2% of divorce cases are contested,<sup>4</sup> and this can be a result of dispute over the choice of fact relied upon by the petitioning spouse or other disputes (88% of sampled defended cases), rather than disagreeing that their relationship is over (12% of sampled defended cases).<sup>5</sup>
3. The current legal process makes no provision for the court to investigate disputed facts except in the few cases that are formally defended. As we discuss further below, the current legal process is often misunderstood.<sup>6</sup> The law does not require the fact relied upon by the petitioner to be the real reason for the breakdown of the legal relationship: it requires the relationship to have broken down irretrievably, and for at least one of the five facts to be proved, but as confirmed by the Supreme Court, “the Act does not require that there be a causal connection between them.”<sup>7</sup> This creates a divergence between the law, practice, and public expectations (see paragraphs 124-126).
4. Making allegations about a spouse’s conduct within matrimonial proceedings to legally dissolve a marriage or civil partnership or where a decree of judicial separation or separation order is sought, has been shown to create or exacerbate conflict during an already difficult time.<sup>8</sup> However, this option is incentivised if a couple is unwilling or unable to wait for a separation period of minimum two years to elapse, often for practical or financial reasons. This can have a detrimental impact on making arrangements for the future, including financial arrangements and, for parents, child arrangements for which they need to continue to communicate and cooperate for their children.<sup>9</sup>
5. The options considered in this Impact Assessment (IA) build on a long case for reform. As the Law Commission argued in 1988: “Attaining the aims [within good divorce law] of maximum fairness and minimum bitterness has been rendered impossible by the retention of the fault element. The incentive to make allegations in the petition “draws the battle-lines” at the outset. The ensuing hostility makes the divorce more painful, not only for the parties but also for the children, and destroys any chance of reconciliation and may be detrimental to post-divorce relationships. Underlying all these defects is the fact that whether or not the marriage can be dissolved depends

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<sup>1</sup> The same facts are used where a legal separation is sought as an alternative to divorce or dissolution.

<sup>2</sup> Four facts are available for dissolution cases: behaviour, desertion, two-year separation, five-year separation

<sup>3</sup> FamilyMan Divorce data January 2011-June 2018

<sup>4</sup> Unpublished data from HMCTS reported in *Owens v Owens* [2017] EWCA Civ 182 para 98. This sets out that in the year to January 2017, notice of an intention to defend was given in 2,600 of the 113,996 petitions in England and Wales (about 2.28%), and of these only 760 had an Answer filed (0.67%).

<sup>5</sup> Trinder and Sefton (2018) *No Contest: Defended Divorce in England and Wales*, London: Nuffield Foundation, p.40.

<sup>6</sup> Liz Trinder et al. (2017), *Finding Fault?: Divorce Law and Practice in England and Wales*, London: Nuffield Foundation, pp.110 and 145.

<sup>7</sup> *Owens (Appellant) v Owens (Respondent)* [2018] UKSC 41, para 49.

<sup>8</sup> Anne Barlow et al. (2014) *Mapping paths to family justice*, ESCR: “We saw the capacity for this [fault-based] legal requirement to upset and antagonise parties and to disturb the equilibrium of the dispute resolution process”.

<sup>9</sup> Resolution (2018) survey of family justice professionals found that 90% say current law makes it harder to reduce conflict between ex-partners, and 67% say the current law makes it harder for separated parents to reach agreements [http://www.resolution.org.uk/news-list.asp?page\\_id=228&page=1&n\\_id=373](http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=373)

principally upon what the parties have done in the past. In petitions relying on fault-based facts, the petitioner is encouraged to “dwell on the past” and to recriminate.”<sup>10</sup>

6. This is further indicated by the Government’s White Paper in 1995, *Looking to the Future*.<sup>11</sup> This preceded Part 2 of the Family Law Act 1996 (later repealed for other reasons) which would have introduced a wholly new process for divorce without the ability to make allegations about conduct because the body of evidence was clear about the harmful effects of the current system.
7. The Government argued in its consultation paper *Reducing family conflict: reform of the legal requirements for divorce* (Published September 2018) that the requirement to prove one or more ‘facts’ to establish the irretrievable breakdown of the marriage or civil partnership was unnecessary and should be removed. We said that this would reduce conflict during the legal process and promote a more amicable basis for agreeing arrangements for the future (see sections ‘Benefits for spouses’ and ‘Benefits for children’). We consulted on the detail and other proposals for reforming the legal requirements for divorce. This IA sets out the relevant identified impacts of the updated policy proposals contained within the Government’s response to the consultation in late 2018.

## B. Rationale and policy objectives

8. The conventional economic approach to Government intervention is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (for example, monopolies overcharging consumers) or there are strong enough failures in existing Government interventions (for example, waste generated by misdirected rules). The proposed new interventions should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and re-distributional reasons (for example, to reallocate goods and services to the needier groups in society).
9. In this case, however, the rationale for intervention for the options assessed in this IA is to reduce conflict within the legal process of divorce. We intend to remove elements of the current law which create or exacerbate conflict, and which have been shown not to contribute positively either to reconciliation or to helping people reach agreement about arrangements for the future.<sup>12</sup> We have also heard from groups representing victims of domestic abuse of difficulties caused by the current law, including by the fact requirement – feeling that they must choose between risk of further harm by citing conduct or remaining in a legal relationship with their abuser for a lengthy separation period – and by the ability to contest a divorce, which can be used as a malicious controlling tactic to perpetrate abuse.<sup>13</sup>
10. Whilst not the primary motive for intervention, simplifying the law has the additional benefit of making the process easier to understand for those involved. This may reduce the need for individuals to seek legal support to have the necessary information to participate in the legal system.

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<sup>10</sup> Law Commission (1988) *Facing the Future: A Discussion Paper on the Ground for Divorce*, Law Com. No.170, Command Paper HC 479 (London: HMSO), p.28.

<sup>11</sup> Lord Chancellor’s Department, *Looking to the Future: Mediation and the Ground for Divorce*, Command Paper Cm 2799 (London: HMSO, 1995), p.6: “It was clear from the responses to the consultation that there is considerable discontent with the current system. Many consultees considered that the divorce law encourages hostility and bitterness by creating an incentive for petitioners to make allegations of fault, regardless of whether these are relevant to the reasons for the breakdown of the marriage.”

<sup>12</sup> *Ibid.*

<sup>13</sup> Rights of Women (2018), *Briefing on divorce law reform*, <http://rightsofwomen.org.uk/wp-content/uploads/2018/07/Briefing-on-divorce-law-reform-260718.pdf>; Jenny Birchall & Shazia Choudhry (2018) “What about my right not to be abused?” Domestic abuse, human rights and the family courts, Women’s Aid and QMUL; Trinder and Sefton (2018) *No Contest: Defended Divorce in England and Wales*, London: Nuffield Foundation; Corbett, N.E. and Summerfield, A. (2017) Alleged perpetrators of abuse as litigants in person in private family law: the cross-examination of vulnerable and intimidated witnesses.

11. More detail on the rationale for intervention to address the problems caused by the current law are set out in “Reducing Family Conflict – Government response to the consultation on reform of the legal requirements for divorce” and Appendix 1 of this document.

### *Policy objectives*

12. The policy objectives are in line with the Ministry of Justice’s wider strategic objectives to deliver a modern courts and justice system, including to provide a fair and effective justice system which supports better outcomes for children and families. The main policy objectives are:
  - 1) To ensure that the decision to divorce is a considered one
  - 2) To minimise the adversarial nature of the legal process, to reduce conflict and to support better outcomes by maximising the opportunity for the parties to agree arrangements for the future
  - 3) To make the legal process fairer, more transparent, and easier to navigate
  - 4) To reduce the opportunities for an abuser to misuse the legal process for divorce as a way to perpetrate further abuse

## **C. Affected Stakeholder Groups, Organisations and Sectors**

13. The main groups affected by the options considered in this IA are:
  - Spouses who wish to bring their marriage or civil partnership to a legal end, or who wish to remain in a legal relationship, but live apart separately.
  - Children of divorcing couples
  - HM Courts and Tribunals Service (HMCTS) and the family court judiciary
  - The legal services sector
  - The public and voluntary sector, where they assist adults and families before, during and after separation

## **D. Options under Consideration**

14. To meet the policy objectives, the following options have been considered:
  - Option 0: Baseline/Business As Usual – Make no changes to existing legislation in this area.
  - Option 1: (i) Remove from the legal process the requirement to evidence one of five facts to demonstrate a marriage or civil partnership has irretrievably broken down and replace with a statement of irretrievable breakdown. (ii) Introduce a minimum timeframe of 26 weeks for the divorce process. The option considers the impacts of 13, 26, 39 and 52 weeks. (iii) Remove the ability to contest a divorce. (iv) Provide an option for jointly initiating proceedings.
  - Option 2: Add a new ‘statement’ option alongside the current facts
  - Option 3: Retain the existing facts and shorten the separation periods to one year with consent and two years without (similar to Scotland’s divorce law)
15. Option 1 is the preferred options as it is considered to best meet the policy objectives.

## **Option 0: Baseline/Business As Usual**

16. The main features of the baseline option are as follows:
- i. The law would remain as it currently stands. In this scenario the five facts would continue to be used.
  - ii. This baseline also includes the impacts from the ongoing digitisation of the legal process. These reforms are expected to be fully operational prior to the implementation of any of the options discussed in this IA. It is expected to be available by the end of 2019, and is forecast to be used for around 80% of applications.
17. Option 0 meets policy objective 1 to the extent that the facts theoretically demonstrate that the marriage has irretrievably broken down or that a legal separation should be granted. However, their use runs counter to the other objectives for the reasons set out in section B of this IA, also summarised below.
18. Under this option, the legal process would continue to incentivise the use of conduct-based facts. This continued use is at best unnecessary, and at worst creates or exacerbates conflict that harms wellbeing and is detrimental to agreeing arrangements for the future. There would continue to be a mismatch between the law and practice on the one hand, and public perceptions about the legal process on the other. There would continue to be the potential for an abuser to use the ability to defend the legal proceedings to exercise coercive control.

## **Option 1: Removal of the five facts, introduction of a new minimum timeframe, removal of the ability to contest, and provision of the option of joint applications**

19. Option 1 will involve the following legislative changes:
- i. Replacing the requirement to evidence one of five facts in order to demonstrate that a marriage or civil partnership has irretrievably broken down (or to obtain a legal separation) with the provision of a statement of irretrievable breakdown (or statement that a legal separation is sought).
  - ii. Introducing a minimum timeframe of 26 weeks for the divorce or dissolution process. This will consist of a minimum of 20 weeks from the petition stage to the decree nisi stage (or petition stage to legal separation) and 6 weeks from the decree nisi to the decree absolute. Section E also considers the impacts of alternative minimum time frames of 13, 39 and 52 weeks.<sup>14</sup>
  - iii. Removing the ability to contest a divorce, dissolution or legal separation.
  - iv. Providing an option for jointly initiating proceedings.
20. This option is expected to meet all four policy objectives.

## **Option 2: Add a new 'statement' option alongside the current facts**

21. Option 2 would involve the following legislative changes:
- i. This option would be the same as Option 1, with the exception that the five facts would be retained alongside the 'statement' system.

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<sup>14</sup> Each of these would consist of a minimum of 6 weeks from Decree Nisi to Decree Absolute, the remainder being made up of a minimum time from Petition to Decree Nisi (7, 33 and 46 weeks respectively)

22. This option meets policy objective 1 and partially meets all the other policy objectives. However, the retention of the five facts means spouses who seek to create pain or conflict through the divorce process would still have an opportunity to do this through use of conduct-based facts. This could cause unnecessarily harm without any legal or societal benefit. Where couples choose not to place blame or describe specific reasons for marital breakdown, the Government would expect the statement of irretrievable breakdown option to be used.

**Option 3: Shorten the separation periods to one year (with consent) and two years (without consent). Similar to the system currently in place in Scotland.**

23. Option 3 would involve the following legislative changes:
- i. As stated this option would retain the current system, as set out in Option 0 and Section B, with the exception of shortening the separation periods to one year (with consent) and two years (without consent).
24. As with Option 0, this option would only meet policy objective 1 as it would retain the incentive to use potentially harmful conduct-based facts for financial or practical reasons.

**Other Options Considered**

25. Two further options were considered in order to meet the policy objectives but, for the reasons explained below, have not been appraised in this IA.

**Option 4: Remove conduct-based facts, but retain the requirement to provide separation-based facts.**

26. Option 4 would have involved the following legislative changes:
- i. This option would be identical to Option 0, with the exception that the conduct-based facts would have been removed.
  - ii. This would have implied that the minimum period for divorce would be two years plus the period from petition to decree absolute.
  - iii. Within this option would have been the possibility of shortening the separation periods.
27. This option would have achieved policy objective 1, and elements of policy objective 2, but would have failed to make the legal process fairer (policy objective 3). While the removal of conduct-based facts would have removed the issue of allocating blame, the long time period required for a divorce of separation would prevent people from moving on with their lives. Furthermore, the separation requirement would not be fair for couples who cannot afford to separate without agreeing finances upon divorce. The alternative option available to them to live 'separately' within the same house requires difficult and artificial living conditions. Whilst this could be reduced by shortening the required periods, this option would still not achieve the policy objectives as well as Option 1.
28. The option would not have achieved policy objective 4 as individuals suffering abuse would be required to remain in a legal relationship with their abuser for a long separation period. It is also possible that an abuser could misuse the system by withholding consent and thereby extend the separation period. For this reason, this option was not considered beyond the long-list stage.

**Option 5: Make the legal system for divorce, dissolution or legal separation an administrative process which is removed from the court system**

29. Option 5 would have involved the following legislative changes:

- i. Divorce, dissolution or legal separation in this case would be a solely administrative process.
30. A divorce or dissolution is a fundamental change of legal status that will alter people's rights and responsibilities. We believe that it is important to have the continued involvement of the family court in order to protect individual and public policy interests, which include guarding against fraudulent or coerced applications, or applications by those without litigation capacity or a litigation friend.
31. For this reason, this option was not considered beyond the long-list stage.

## **E. Cost and Benefit Analysis**

32. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.
33. Where possible, IAs identify both monetised and non-monetised impacts on individuals, groups and businesses in the UK with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, positive or negative. The costs and benefits of each proposal are compared to option 0, the do nothing or 'baseline' case. As the 'baseline' option is compared to itself, the costs and benefits are necessarily zero, as is its Net Present Value (NPV).
34. Where possible this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the options under consideration. However, it should be noted that the options assessed in this IA are driven by objectives which focus on impacts that cannot practically be monetised, such as the impacts on the wellbeing of individuals and families.
35. The costs and benefits presented for Option 1 are based on the presumption that the revised system will be implemented as laid out in this IA. However, these would need to be revised if the policy direction is changed within any Bill introduced in Parliament. The impacts for all the other options are subject to the same conditions. However, only Option 1 is intended to be put into a draft Bill and is therefore the only option subject to change at this stage.

### **Option 1: Removal of the five facts, introduction of a new minimum timeframe, removal of the ability to contest, and provision of the option of joint applications**

#### *Overview of Impacts*

36. Based on the available evidence, removing the facts is expected to reduce the amount of conflict within the divorce and dissolution process. This will be achieved by removing elements that make divorce or dissolution more painful and acrimonious (conduct-based facts), and that are unavailable to those who cannot afford to run two households before resolving their financial arrangements on divorce, dissolution or following a legal separation (separation-based facts). Retaining the sole legal ground of irretrievable breakdown will assist considered decisions to divorce or dissolve a civil partnership, whilst still providing a legal threshold in order to obtain a legal end to the relationship.
37. By removing the ability to contest the legal proceedings, the Government recognises that being in a marriage or civil partnership is a consensual status. This is expected to reduce the conflict that

can be created within the legal process and remove an option that can be misused by abusers to exercise coercive control.<sup>15</sup>

38. Introducing an option for spouses to jointly initiate the legal proceedings is expected to encourage a consensual basis for agreeing issues within that process.
39. Introducing a minimum timeframe for the divorce process will provide greater opportunity for both parties to reflect on the decision to divorce or dissolve a civil partnership and to change course or, where divorce or dissolution is inevitable, to agree arrangements for the future. The minimum timeframe of 26 weeks from petition stage to the point at which a decree absolute or dissolution order may be applied for has been chosen as, in the opinion of the Government, it will give couples time to consider the implications of the decision to legally end their relationship, and agree arrangements for the future if ending that legal relationship is inevitable. It balances this need against the need to avoid unnecessarily delaying the divorce which could cause hardship and conflict (this is discussed further in the Government's response to the consultation). This timeframe is inclusive of a six-week minimum period between the initial decree (or conditional order) and the final decree (or dissolution order), in line with the current requirement. The minimum timeframe for obtaining a legal separation will be 20 weeks measured from petition stage to legal separation decree as this is a single stage decree or order.
40. The table below shows the expected impact on the timeliness of the divorce process based on different proposed time periods. The proposed time periods all retain the 6-week minimum from Decree Nisi to Decree Absolute, with time periods of 7, 20, 33 and 46 weeks considered for the minimum time from Petition to being eligible to apply for Decree Nisi. This gives a total minimum time period of 13, 26, 39 and 52 weeks<sup>16</sup> as shown in the table below.
41. These impacts are the changes in the median<sup>17</sup> time taken to complete the divorce process and the percentage of cases expected to be affected. The impact is considered compared to a baseline including the impact of digitising the divorce process. The three columns to the right show the following:
  - a. Average Weeks Added – All Cases: This is the expected change in the median time to complete the divorce or dissolution process if the relevant minimum time period was adopted. The median time from Petition (or application) to Decree Absolute (or Dissolution Order) after the introduction of digital divorce and dissolution service<sup>18</sup> is expected to be 15 weeks where there is no Financial Remedy and 29 weeks where a Financial remedy is involved.
  - b. Average Weeks Added – Affected Cases Only: As above, with the exception that the change is calculated only for cases that currently take less than the proposed minimum timeframe
  - c. % Cases Affected: As estimate of how many cases will take longer from Petition (or application) to Decree Absolute (or Dissolution Order), based on each minimum timeframe<sup>19</sup>

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<sup>15</sup> Trinder and Sefton (2018) *No Contest: Defended Divorce in England and Wales*, London: Nuffield Foundation; Corbett, N.E. and Summerfield, A. (2017) Alleged perpetrators of abuse as litigants in person in private family law: the cross-examination of vulnerable and intimidated witnesses.

<sup>16</sup> 3, 6, 9, and 12 months

<sup>17</sup> The median is defined as the middle value in a series. It is used for data series, such as divorce timings, where there are some extremely large (or small) values that would lead the mean average to be unrepresentative.

<sup>18</sup> FamilyMan Divorce data January 2011-June 2018 combined with indicative information from HMCTS.

<sup>19</sup> The percentage of affected cases is based on the assumption that cases will take longer than 6 weeks to go from Decree Nisi to Decree Absolute.

Average Change in Process Weeks Due to Reform All Facts Cited By Possible Minimum period from Petition to Decree Absolute (Mean Difference in Median Time)		a) Average Weeks Added - All Cases <sup>20</sup>	b) Average Weeks Added - Affected Cases Only <sup>21</sup>	c) % Cases Affected
13	<b>No Financial Remedy (NFR)</b>	0.8	2.1	39%
	<b>Financial Remedy (FR)</b>	0.8	2.0	39%
26	<b>NFR</b>	9.3	12.0	78%
	<b>FR</b>	9.7	11.9	82%
39	<b>NFR</b>	20.3	23.0	88%
	<b>FR</b>	21.1	23.2	91%
52	<b>NFR</b>	32.0	34.7	92%
	<b>FR</b>	33.3	35.1	95%

## Costs of Option 1

### *Costs to spouses*

42. As shown in the table above, a minimum period between the petition or application and the decree absolute is likely to make the divorce process take longer for most cases. This may have negative impacts on:
- Individuals seeking a divorce who want it to be finalised more quickly for personal reasons. The additional wait for some cases could be mitigated by the greater predictability of the new process. The court is likely to retain its current flexibility to shorten this period in exceptional circumstances, such as where one party is terminally ill and wishes to remarry before their death.<sup>22</sup>
  - Individuals seeking a divorce who want it finalised more quickly for financial reasons. As financial orders can only be made at decree nisi stage and can only come into effect on the granting the decree absolute, divorcing couples may take longer to have these in place. This may be mitigated by more time between petition and decree nisi to make appropriate arrangements, so that the time period between decree nisi (or conditional order) and decree absolute (or dissolution order) reduces. Processes to allow interim financial orders (maintenance pending suit) in cases of more pressing financial need will continue to be available.<sup>23</sup>
43. A spouse who wants in principle to specify the conduct which has led them to seek a divorce, dissolution or legal separation will be unable in future to use a fact to do this. This may be important to them personally on religious or other grounds. Some respondents to the consultation were concerned that a spouse who is unaware of their spouse's desire to seek a divorce, dissolution or legal separation will not be able to see a specific reason cited as part of the legal

<sup>20</sup> Based on expected change in time from Petition to Decree Absolute after full implementation of Digital Divorce and adoption of listed minimum timeframe.

<sup>21</sup> Cases already taking significant periods of time, for example due to complex financial negotiations are not expected to be impacted by the minimum timeframes as they already take longer than the proposed minimum.

<sup>22</sup> Matrimonial Causes Act 1973, section 1(5). In cases where an application is made to expedite the grant of a decree absolute, the court sets out how proceedings are to be conducted at Rule 7.32 of the Family Procedure Rules and gives further guidance at paragraphs 8.1–8.4 of the associated Practice Direction 7A. (The Rule is published at [https://www.justice.gov.uk/courts/procedure-rules/family/parts/part\\_07](https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_07) and the Practice Direction at [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_07a](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_07a).)

<sup>23</sup> Section 22 of the Matrimonial Causes Act 1973 provides for the court to “make an order for maintenance pending suit”. Such an order may, for example, be for one spouse to make monthly payments to the other while the divorce proceedings are continuing

process (although, as set out above, the current process does not require the fact used to be the underlying reason for the irretrievable breakdown or for seeking a legal separation<sup>24</sup>).

44. A spouse will no longer be able to apply to the court to prevent a divorce, dissolution or legal separation being granted. Some respondents to the consultation argued that this will remove an important opportunity to seek to save the relationship although, as set out in paragraph 2 above, for married couples in only 12% of initially defended divorces does the respondent deny that the marriage has broken down irretrievably<sup>25</sup>.
45. As separation-based facts will be removed, a spouse will no longer be able to withhold consent in separation cases, which in theory under the current law could extend the legal relationship until five years after separation. Some respondents to the consultation argued that allows time for 'cooling off' and reconciliation (although in such cases currently the evidence is that parties seeking divorce, dissolution or legal separation would use a conduct-based fact: five-year separation cases tend not to be driven by one party withholding consent, but are used by couples who have been separated for over five years). The introduction of a minimum period will mitigate the impact of removing separation periods, by still allowing for a period for 'cooling off' and reflection.

#### *Costs to HMCTS and the family court judiciary*

46. Implementing Option 1 will also incur transitional IT costs for HMCTS to adapt its systems for the changes set out. Work is under way with HMCTS to estimate these costs.
47. Option 1 will also require guidance and training for court staff and judges. We expect the associated costs to be relatively small but will aim to mitigate them through a suitable lead-in time ahead of implementation and by aligning these changes so far as possible with any other business as usual changes around common commencement dates. We will also work to produce clear guidance and training where appropriate.
48. It is likely that the number of divorce applications will initially spike after implementation of Option 1 which will cause a temporary increase in work for HMCTS. This will be driven by cases where people had previously been expecting to wait two or five years, but who will now become eligible to file a petition immediately. This is not indicative of an increase in divorce rates as the temporary increase will be cancelled out by a corresponding decrease over the next few years. The long-term number of divorces is not changed by this effect.<sup>26</sup>
49. Additional administrative and judicial resource may therefore be required to manage a temporary spike in work as detailed above or it may lead to a reduction in divorce timeliness. The impact has not been monetised at this stage whilst implementation plans are being developed in conjunction with HMCTS. There are no expected ongoing costs in steady state after transition.
50. Monetisation of these costs has not been possible. Training time will be absorbed into business as usual refreshes, as responding to changes in the law is already part of the work of the judiciary, and so estimating any additional impact of these changes is not possible. Costs due to updating the online systems are still being worked through by HMCTS and work is ongoing to understand the scale of any temporary spike in volumes.

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<sup>24</sup> **Lady Hale (Supreme Court Justice)** Owens (Appellant) v Owens (Respondent) [2018] UKSC 41: "a search for "blame"... is not required... The marriage has to have broken down irretrievably. One of the five "facts" prescribed in section 1(2)(a) to (e) of the 1973 Act has to be proved. But the Act does not require that there be a causal connection between them."

<sup>25</sup> Trinder and Sefton (2018) *No Contest: Defended Divorce in England and Wales*, London: Nuffield Foundation, p. 40.

<sup>26</sup> The divorces causing this spike are modelled as divorces that would have happened later, occurring at an earlier point in time due to the removal of the separation period. This is not due to an increase in divorce and importantly is expected to happen regardless of any unforeseen changes in the rate of divorce.

### *Costs to the legal services sector*

51. The initial impact of option 1 will require lawyers to become familiar with the new legal process, which is standard practice for the legal sector. It may require an update to associated forms and guidance documents that legal firms provide to their clients. There will therefore be business as usual implementation costs to legal professionals and legal stationers from updating business processes and customised court application forms to reflect changes to the legal process. As with the family judiciary, we expect these costs to be relatively small but will aim to mitigate them through a suitable lead-in time ahead of implementation and by aligning these changes so far as possible with any other business as usual changes around common commencement dates. We will carefully consider how to clearly communicate these changes to assist familiarisation.
52. As one objective of reform is to make the process transparent and easier to navigate, the steady state impact of option 1 after transition may include a reduced demand for legal assistance in divorce proceedings. Legal professionals will no longer need to draft supporting particulars for facts, and the legal process will be clearer for divorcing couples who may choose not to instruct lawyers to deal with the process of obtaining a divorce. We have heard from the Law Society that law firms' work on undefended divorce cases with no complications is estimated in standard cases to be around three hours work for petitioners and one hour's work for respondents. However, with contested particulars there is scope for this work to increase. Furthermore, the work to assist in obtaining a divorce provides a link to more substantive legal work involving arrangements for finances and children (the requirements for which will remain unchanged).
53. As per paragraph 62 (below), there is insufficient data to determine how much less time solicitors will need to spend on divorce cases following the reforms. As such, it has not been possible to monetise any loss in revenue to the legal sector.
54. However, as is standard practice in an IA, it has been assumed that any loss in revenue will be offset by a reduction in the work conducted. Therefore, it has been assumed that divorce lawyers will be able to redirect their resources for productive uses elsewhere of equal or next best economic value. For this reason, this cost is not included in the NPV of Option 1.

### *Costs to the wider public and voluntary sector*

55. The initial impact of option 1 will require familiarisation with the new legal process, which is standard practice for the public and voluntary advice sector. It will require updated training and guidance for staff who assist those considering divorce or are affected by the divorce process, and, if relevant, an update to guidance documents that organisations provide to users. These may include advice centres, alternative dispute resolution providers, relationship advice and counselling services, and refuges. We will carefully consider how to clearly communicate these changes to assist familiarisation.
56. The changes are not expected to impact on demand for these services. No concerns were raised by these groups during consultation about the direct impact them or on the number of users that they will work with. No concerns were raised about any impact on social services within local authorities.
57. There are no expected ongoing costs under a steady state after transition.

## **Benefits of Option 1**

### *Benefits to spouses*

58. Under Option 1 each spouse will have autonomy to decide for themselves that their marriage or civil partnership has broken down beyond the point where it can be saved or that they wish to

continue in their legal relationship but to live apart, without unnecessary barriers to obtaining those decrees or orders put in place by a legal process. The continued involvement of the family court will protect individual and public policy interests to guard against fraudulent or coerced applications, or applications by those without litigation capacity or a litigation friend.

59. The potential harm and conflict caused by setting out conduct-based facts will be removed. This is expected to benefit divorcing couples by helping them focus on the future rather than the past. While these proposals do not directly change related negotiations such as over finances and child arrangements (which can in themselves cause conflict), we anticipate that any reduction of conflict, where possible within the process of seeking a divorce, may assist in setting a more constructive path for these discussions.
60. Couples who cannot afford to wait for a minimum of a two-year separation period to elapse for practical or financial reasons will no longer be incentivised to use potentially harmful conduct-based facts. There is a risk that there is currently financial pressure for couples to use the conduct-based facts to 'expedite' their divorce. As has been discussed, in this situation, the law is not highlighting the actual reasons for the divorce, but is being manipulated by couples who do not have the financial resources to wait two years to separate.
61. Couples who currently plan to wait for two years to avoid the requirement to make conduct-based allegations will be able to legally end their relationship or seek a legal separation sooner, which will be welcomed by many who have taken a considered decision to end their legal relationship, or to remain within it but to live apart, and who wish to move on with their lives.
62. There may be reduced legal costs for couples. There will be no need for lawyers to assist in drafting particulars to support the facts. Furthermore, a simpler and more transparent legal process will be easier to navigate and may reduce the need for formal legal advice or instruction. However, we are unable to say how much less time will be required as a result of this option because data on how much time is currently spent explaining and agreeing the facts with solicitors is not collected. Additionally, it would not be possible to estimate how much additional solicitor time is currently due to conflict caused by the use of the facts and consequentially how much time will be saved. Parties may still require legal advice on the related financial aspects of their divorce, dissolution or legal separation, which will vary according to individual circumstances.
63. Victims of domestic abuse will no longer feel that they must make a choice between staying in a legal relationship with their abuser during a separation period, or risk heightened tensions or harm through setting out conduct-based facts. They will no longer have to accept allegations made against them by the other party. They will no longer be faced with what they report as feeling to be the collusion of the legal process with the perpetrator when they are asked to 'water down' the particulars to encourage the other party to accept them. They will also no longer face the concern that their spouse might contest the divorce, which would introduce delay and risk the requirement to meet their abuser in court.
64. A minimum period of 26 weeks which covers the entire legal process will give spouses greater clarity and predictability in how long each stage of the legal process is likely to take (the current minimum period does not cover a variable period between application and interim decree). This will also allow time for reflection and enable space for informed decision-making, which is important for agreeing arrangements for the future.<sup>27</sup> This can be particularly important for making financial arrangements before a divorce is finalised.<sup>28</sup>

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<sup>27</sup> Anne Barlow et al. (2014) Mapping paths to family justice, ESCR

<sup>28</sup> Emma Nash (2017) *The final decree of divorce: timing is absolutely everything*, International Family Law Group LLP, available at: <https://www.iflg.uk.com/guidance/final-decree-divorce-timing-absolutely-everything>

65. A minimum timeframe that runs from the initial application stage will assist in driving greater consistency in HMCTS service times across England and Wales, which is not currently achieved partly due to regional and staffing differences. This will aid in certainty and predictability for couples and allow them to better plan their future.<sup>29</sup>
66. The option of a joint application may benefit the wellbeing of a divorcing couple as an important symbol of a mutual decision, and can set a positive path for agreeing other arrangements for the future.

#### *Benefits for children of divorcing couples*

67. The evidence cited above shows that the fact requirement can increase acrimony between divorcing couples, which can be long-lasting. A comprehensive review of research shows that children's outcomes are affected by the quality of the relationship between the parents, not the structure of the family. Specifically, this review highlights that frequent, intense, poorly resolved, and child-related interparental conflict adversely affects long-term emotional, behavioural, social, academic development, and future intergenerational/ interpersonal relationship behaviours for children and young people.<sup>30</sup>
68. Reduced inter-parental conflict, a more conciliatory family justice system, and a focus on the future rather than the past can therefore assist parents to focus on their children's best interests.<sup>31</sup> Separated parents who can co-operate and communicate encourage positive child outcomes: low parental conflict during separation and co-operative parenting post-separation are key protective factors against adverse child outcomes following parental separation.<sup>32</sup>
69. Enabling parents to make a joint application for the divorce could benefit children because it can help parents to demonstrate that the decision to divorce is a mutual one and not something that one parent has done to the other. It can set a consensual tone for continued co-parenting after separation, and provide a stronger foundation for cooperation in making, operating and adapting arrangements for children.

#### *Benefits for HMCTS and the family court judiciary*

70. Removing the need for evidence in support of one of the five facts to be considered by legal advisors and judges will save time (although under current practice for cases that are not contested, this consideration is usually limited to a matter of minutes).
71. Removing contested hearings will save administration and court time, although this will be limited as only 2% of cases are formally contested, and only a small number of these will go on to have contested hearings. This will also involve qualitative benefits for the judiciary which "takes no satisfaction" in presiding over such cases.<sup>33</sup> This time could be spent on other family court cases, where there is currently pressure for sufficient court sitting time.

<sup>29</sup> Liz Trinder & Mark Sefton (2019), *Taking Notice? Non-standard divorce cases and implications for law reform*, Nuffield Foundation.

<sup>30</sup> Harold, G., & Sellers, R. (2018). Annual research review: interparental conflict and youth psychopathology: an evidence review and practice focused update. *Journal of Child Psychology and Psychiatry*, 59(4), 2018 pp. 374-402.

<sup>31</sup> Cafcass (2018) Cafcass response - Reform of the legal requirements for divorce 2018.

<sup>32</sup> Harold, G., et al. (2016) *What works to enhance inter-parental relationships and improve outcomes for children*. Early Intervention Foundation; Mooney, A., Oliver, C. and Smith, M. (2009) *Impact of Family Breakdown on Children's Well-Being: Evidence Review*. London: Institute of Education;

<sup>33</sup> **Lord Wilson (Supreme Court Justice)** Owens (Appellant) v Owens (Respondent) [2018] UKSC 41: "The degree of conflict between the parties which is evident in a fully defended suit will of itself suggest to the family court that in all likelihood their marriage has broken down. While it recognises that, unless and until repealed by Parliament, section 1 of the 1973 Act must conscientiously be applied, the family court takes no satisfaction when obliged to rule that a marriage which has broken down must nevertheless continue in being."

72. Due to the small scale and degree of uncertainty of the time savings involved, these impacts have not been monetised. There are not expected to be any sizeable savings to HMCTS in the long run from these changes.

### *Benefits for the legal sector*

73. There has been strong support from the legal sector<sup>34</sup> to remove the current requirement for evidencing facts, due to its detrimental impact on its clients during the divorce process and their ability to agree other related arrangements. One group noted in their response to the consultation that the current requirements are not fit for purpose in family law, which is based on principles of conciliation;<sup>35</sup> while another noted that it makes it harder for parents to focus on the needs of their children, and causes confusion for clients as 'fault' is very rarely relevant in ancillary proceedings.<sup>36</sup> The Family Law Bar Association noted that use of conduct-based facts "polarise couples, heighten acrimony and unhappiness, and this will then have a knock on effect on any children of the marriage."<sup>37</sup> More broadly the sector has noted that it would prefer to spend its time within divorce proceedings assisting divorcing couples to move on in the best way possible, rather than focus on drafting particulars about conduct allegations relating to the past that meet a legal threshold.
74. The benefits to legal professionals are therefore largely in terms of client satisfaction and improved outcomes. This is both in terms of a more harmonious working environment with their clients, but also for the large number of family lawyers who also work as mediators.<sup>38</sup> There is the potential that, if conflict is reduced, more couples may be suitable to use mediation or alternative forms of dispute resolution as a way to make arrangements for the future (see 'Benefits for the public and voluntary sector').
75. Resolution represents over 6,500 family lawyers and other professionals involved in family law. Those members will be better able to meet their code of practice, including to reduce conflict and encourage families to put the best interests of any children first: in the past they have noted that the current law makes these difficult to achieve.<sup>39</sup>

### *Benefits for the wider public and voluntary sector*

76. Alternative dispute resolution providers, such as the Family Mediation Council and National Family Mediation, have fed back that they expect to spend less time explaining the complicated legal requirements for divorce, and discussions will be less likely to go off track on any 'blame' that is included within conduct-based facts. They also noted that the option for divorcing couples to jointly initiate proceedings could similarly pave the way for working together in dispute resolution and promoting shared responsibility to settle issues. Support for the changes due to its predicted wellbeing benefits for some of their clients (couples taking a painful decision to end a relationship) has also been received from relationship support providers, including Relate, OnePlusOne, and Tavistock Relationships.
77. Mediation groups also suggested that the proposed reforms may promote access to mediation, by reduced conflict and improved emotional readiness to use mediation to resolve related disputes.

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<sup>34</sup> This includes responses from representative organisations including: The Law Society (represents over 170,000 registered legal practitioners) and the Family Law Bar Association (represents over 2,500 family law barristers), and Resolution (represents over 6,500 family lawyers, mediators and other family justice professionals); Chartered Institute for Legal Executives (20,000 members).

<sup>35</sup> Chartered Institute for Legal Executives consultation response.

<sup>36</sup> Law Society consultation response

<sup>37</sup> Family Law Bar Association consultation response

<sup>38</sup> We understand from the Law Society that in 2018 986 law firms in England and Wales specialised in family law (i.e. this accounted for at least 30% of their turnover); 629 firms also offer 'family law mediation' as an area of practice.

<sup>39</sup> Resolution code of practice <http://www.resolution.org.uk/code/>; Resolution survey of family law professionals found 90% of family law professionals agree the current law makes it harder for them to reduce conflict and confrontation between clients and their ex-partners, and 67% say the current law makes it harder for separated parents to reach an amicable agreement over arrangements for children. Accessed at: [http://www.resolution.org.uk/editorial.asp?page\\_id=1320](http://www.resolution.org.uk/editorial.asp?page_id=1320)

78. National demand on the family courts and Cafcass (the Children and Family Court Advisory and Support Service) for child arrangements cases could reduce if there is greater use of out-of-court dispute resolution providers. For both families who make child arrangements in and out of court, Cafcass has suggested that the removal of the opportunity to cite conduct could help shift focus to children, and that joint applications will provide a stronger foundation for cooperation in making arrangements for children.

### **Net impact of Option 1**

79. While it has not been possible to quantify many of the impacts, the Government believes that, for the reasons laid out in this IA, Option 1 will have a net benefit to society.

### **Option 2: Add a new 'statement' fact alongside the current facts**

#### *Overview of impacts*

80. The impacts of Option 2 are considered to be primarily the same as Option 1. The key exception is that the retention of the five facts opens the potential for spouses to seek to use the legal process as a means to attach blame to the other spouse. It is expected that the vast majority of cases in this situation would utilise the statement of irretrievable breakdown option for the sake of simplicity.
81. This option would allow those who wish to publicly state the reason for seeking a divorce to retain the opportunity to do so. However, the retention of the facts would keep open the opportunity for abusers to exploit the system to perpetrate post-separation abuse of their victims.
82. Additionally, the five facts could be used maliciously, where one spouse wished to blame the other which can create or exacerbate conflict.

### **Net impact of Option 2**

83. Whilst Option 2 is considered to have a net benefit to society, the retention of the five facts leaves open the potential for increased conflict and exploitation by abusers. As this runs directly contrary to the rationale behind the reforms, Option 2 is not preferred to Option 1.

### **Option 3: Shorten the separation periods to one year (with consent) and two years (without consent). Similar to the system currently in place in Scotland.**

#### *Overview of Impacts*

84. Option 3 differs from option 0 by reducing the time incentives to cite one of the conduct-based facts. As such the only impact of this change is likely to be a redistribution of facts cited from the conduct-based facts to the separation facts.
85. For those cases that change to a separation fact, the impacts would be as described in the analysis of Option 1. For all other cases, there would be no change to the existing system in terms of conflict.
86. For cases that had previously cited separation, divorces would occur more quickly as the separation period would be substantially faster. For cases that still choose to cite conduct-based facts, all the associated harms described throughout this Impact Assessment would remain.

### **Net impact of Option 3**

87. As Option 3 would be likely to reduce the number of cases using the conduct-based facts, it is considered to be a net benefit to society.

88. However, Option 1 is expected to achieve the aim of reducing conflict for a far higher number of cases and in a more comprehensive and fairer way. Option 3 is therefore not preferred to Option 1.

#### *Other Impacts raised in the consultation*

89. There were some additional possible impacts raised in a number of consultation responses. Where relevant, they have been addressed here; others are addressed in the Equalities Statement, the Family Impact Test and the Government's consultation response document.

## **F. Risks and assumptions**

#### *Key assumptions*

90. The costs and benefits in this impact assessment are based on assumptions, which are subject to change. The main assumptions are described in the following paragraphs.
91. It has been assumed that these changes will have no impact on the outcomes of divorce settlements: the removal of conduct-based facts does not affect financial provision on divorce. Any conduct affecting financial provision is a separate consideration for the court to take into account (if it would be inequitable to disregard it) in other proceedings about finances.<sup>40</sup>
92. We have assumed no permanent impact on divorce rates. This is because the evidence suggests that divorce rates are affected by a wide range of factors while the specific impacts of changes in the law are difficult to identify, particularly where these changes reflect corresponding social changes.<sup>41</sup> In particular, recent studies have shown that while it is common to have temporary effects in response to policy and legislative change, long-term divorce rates are not increased by 'no-fault' divorce laws.<sup>42</sup> A summary of the key findings of the papers referenced is shown below:
- a. Justin Wolfers 'Did unilateral divorce laws raise divorce rates? A reconciliation and new results' (2006) 96 *American Economic Review*, 1802;
    - (i) Evidence from the adoption of "unilateral divorce laws" in the USA, finds that whilst there is a short-term rise in divorce rates, this effect has disappeared after 10 years and is tentatively found to be lower.
    - (ii) They author was unable to establish a clear causal link between changes in the law and rates of family breakdown, which is the damaging occurrence to society. Theories which have been proposed to explain the short term statistical link found include that the laws are better reflective of society's views and thereby remove the stigma around divorce.
  - b. Betsey Stevenson and Justin Wolfers, 'Marriage and divorce: Changes and their driving forces' (2007) 21 *Journal of Economic Perspectives* 2;
    - (i) The authors look at the changing pattern of marriage over time and interpret the short-term increase found in the Wolfers paper (above) as attributable to a "pent up demand for divorce" as opposed to being a causal factor in family breakdown.
    - (ii) They also highlight that the literature shows that the negative outcomes associated with divorce are correlations and the relationship is not causal. Both are caused by family breakdown, which in turn has a far more complex set of causes.
    - (iii) This is important as for any, even a short run, change in divorce rates to offset the benefits of reduced conflict, it would be necessary for the change in the law to causally

<sup>40</sup> Matrimonial Causes Act 1973, section 25(2)(g).

<sup>41</sup> John Haskey (2018) Facts and figures: grounds for divorce since the 1969 Divorce Reform Act in England and Wales, Family Law, August 2018, pp.1006-1015.

<sup>42</sup> Justin Wolfers 'Did unilateral divorce laws raise divorce rates? A reconciliation and new results' (2006) 96 *American Economic Review*, 1802; Betsey Stevenson and Justin Wolfers, 'Marriage and divorce: Changes and their driving forces' (2007) 21 *Journal of Economic Perspectives* 2; <sup>42</sup> Liz Trinder et al. (2017), *Finding Fault?: Divorce Law and Practice in England and Wales*, London: Nuffield Foundation

impact on family breakdown. This is a relationship for which no evidence has been found.

- c. Liz Trinder et al, *Finding Fault?: Divorce Law and Practice in England and Wales*, London: Nuffield Foundation.
  - (i) Section 11.2 highlights recent international evidence that “no fault” or “unilateral” divorce has had no sustained impact on divorce rates.
  - (ii) Additionally, it cites the example of Scotland as having had a short spike in response to a shortening of the separation period, as expected within this IA, but that this was short lived and disappeared within 2 years.
93. A concern raised during the consultation relates to the assumption that there would be no change to long run divorce rates. It is important to draw a distinction between family breakdown and divorce.
  - a. Family breakdown is when constituent parts of the family unit no longer works. Family breakdown can have negative consequences for children if they are exposed to conflict between their parents, as well as negative impacts on the wider family.
  - b. Divorce is a process by which a legal end can be brought to a legal relationship between two people who may be part of a broader family unit. Whilst divorce is widely associated with negative outcomes for children and the wider family, it is family breakdown that is the cause of both divorce and these outcomes.
  - c. Whilst evidence suggests that there may be some transitional impacts on the rate of divorce, there is no evidence to suggest that family breakdown increases as a result of changes to divorce law.
94. We assume no adverse impact on the status of marriage: there is no evidence that the fact requirements or ability to contest a divorce protects marriage. Conduct-based facts have the potential to make divorce more painful and acrimonious and separation-based facts may be unavailable to low-income/asset couples (see section B). Retaining the sole ground for divorce of irretrievable breakdown will ensure that there is still a high and legal threshold, while introducing a minimum period will assist decisions to remain considered and allow sufficient opportunity to change course.
95. The modelling of the impact of the minimum time period relies on the following key assumptions
  - a. Fully implemented digital divorce will halve the time from petition to decree nisi, up to a maximum of half the current median time.<sup>43</sup>
  - b. No expected change to the median time between decree nisi and decree absolute in cases with and without financial remedy orders. It is possible that the additional time before decree nisi could be used to arrange financial and other arrangements and thereby reduce the time to decree absolute. However, in the absence of reliable evidence as to the extent of that saving, taking the same amount of time from decree nisi to decree absolute has been assumed.

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<sup>43</sup> The time saving is adjusted down for cases already taking less time to avoid predicting total times less than the existing statutory minimum. HMCTS believe that this estimate may be an underestimate, in which case the delay imposed by this policy would be even greater.

## Risks

96. The analysis in this IA is based on the assumptions described above. The main associated risks with these assumptions are set out below.
97. At implementation, there are risks in terms of the size of the temporary spike in applications. Given the amount of lead-in time, we expect to be able to appropriately plan for any measures that will need to be taken prior to implementation.

## G. Direct costs and benefits to business calculations (following Business Impact Test methodology)

98. The preferred option has no regulatory impacts. The changes being proposed only directly impact upon those immediately involved in the divorce process: couples and the justice system. The demand for legal services exists in part where the law is too complex<sup>44</sup> for individuals to navigate themselves. Laws therefore are not regulations on the legal services industry, but the reason that it exists. Should the Government therefore amend the law to render some of those services null, this is first-best solution to the asymmetric information<sup>45</sup> problem faced by individuals. This problem is currently solved through the second-best solution of employing legal services.
99. Individuals may still choose to employ a lawyer to help them navigate the system and to deal with other aspects that need to be resolved on divorce, dissolution or legal separation. However, these lawyers may have less work relating to the specific elements of the law that are being changed.
100. While these proposals will result in indirect costs to business, they do not meet the definition of regulation, that is 'a rule or guidance with which failure to comply would result in the regulated entity coming into conflict with the law or being ineligible for continued funding or other applied for schemes.' The proposals are considered out of scope of the Small Business, Enterprise and Employment Act 2015 and would not qualify for the business impact target.

### *Small and Micro Businesses Assessment (SaMBA)*

101. In order to ensure that we have accounted for the impact on smaller firms, the government engaged with a key representative body, the Law Society<sup>46</sup>. It indicated that some smaller law firms may be more exposed to the loss of demand for their some of their services, where the work required to obtain a divorce (rather than ancillary proceedings) makes up more of their workload in this area. However, it was also of the opinion that, given the engagement and amount of time to prepare for these changes, these firms are likely to be able to cope with the change. Additionally, for the reasons laid out in paragraphs 54, 99 and 100, the impact will not appear in the NPV.
102. The Law Society has additionally provided data regarding the indicative sizes of firms who work on Family Law (Public & Private Law). It has defined this as firms with more than 30% of turnover coming from Family/Matrimonial & Children work areas.

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<sup>44</sup> This complexity is often necessary for the effective functioning of the law.

<sup>45</sup> Asymmetric information – where one person in an interaction has less information than another. In this case couples navigating the divorce process will typically have almost no knowledge of the system. They therefore employ a lawyer to give themselves the amount of information about the law that they need to proceed.

<sup>46</sup> The Law Society (which represents over 170,000 registered legal practitioners) exists to represent, promote and support all solicitors, so they in turn can help their clients. ; it works to ensure that no-one is above the law and to protect everyone's right to have access to justice.

<https://www.lawsociety.org.uk/about-us/>

## 2018 data – Solicitor firms with greater than 30% of turnover from Family work<sup>47</sup>

Size of firm	Total turnover (2016/17)		Firms		Average turnover	Head count	
	£ billions	%	Number	%	£ millions	Practicing Certificate holders <sup>48</sup>	%
Sole owner	0.11	17.5	499	50.6	0.23	970	20.7
2-4 partners	0.32	49.6	427	43.3	0.76	2,306	49.1
5-10 partners	0.14	21.3	53	5.4	2.61	859	18.3
11-80 partners <sup>49</sup>	0.08	11.6	7	0.7	10.83	560	11.9
81+ partners	0.00	0.0	0	0.0	0.00	0	0.0
<b>Total</b>	<b>0.7</b>	<b>100.0</b>	<b>986</b>	<b>100.0</b>		<b>4,695</b>	<b>100.0</b>

103. The data gives an indicative size of the market, but shows revenue from sources of work beyond divorce, even within the sphere of family work. This data also indicates that many firms working on divorce cases are likely to be small (the firm listed sizes do not include support employees).
104. It must be noted that an exemption for small and micro businesses is not possible as the change in the law relates directly only to individuals and HMCTS and the judiciary. The following paragraphs will set out the approach to the SaMBA discussing mitigation where appropriate.
105. As above, an exemption is not legally possible and therefore it is necessary to consider if mitigation is needed. It is possible, based on information from the Law Society, that the burdens on smaller businesses from the proposed reforms may be higher. This is because we believe that they have a higher proportion of their family law work which relates to obtaining a divorce, rather than ancillary work such as financial and children arrangements (which are out of scope for this reform).
106. To mitigate these impacts the Government has sought to engage with these firms through the consultation and through dialogue with representative bodies. We understand that as many of these firms have been part of the campaign for the reform, they will be anticipating the impact of the changes. The Government's implementation timeframe will ensure that affected firms are given notice of the changes well before the changes come into effect. The Government is also considering options regarding additional communication of the changes, including the possibility of hosting training sessions. This will give firms ample time to prepare for the changes and seek work in alternative productive areas, as per paragraphs 51 & 54.

## H. Wider Impacts

### *Equalities Impact Assessment*

107. We have assessed the potential equality impacts of these proposals in line with the public sector equality duty. For further detail please consult the Equalities Impact Assessment, published alongside this document.

### *Family Impact Test*

108. We have assessed the potential impacts of these proposals on families and have taken these into account in further developing proposals for the preferred option.

<sup>47</sup> Source: Law Society Group Management Information.

<sup>48</sup> The number of Practising Certificates is indicative of the size of the firm, but does not list all employees, just all licensed lawyers employed. Firms are likely to have additional trainee and clerical staff, this can therefore be considered only as a lower bound for the number of staff.

<sup>49</sup> NB, typically reported by the Law Society as 11-25 & 26-80, but combined to prevent any firms being identifiable from the data

109. The removal of conduct and separation facts from the legal process supports the Government's existing policy to minimise conflict when family breakdown occurs, and in our responses to the Family Impact Test questions, we consider the impact of that change on families.

## **I. Implementation and Monitoring**

110. If proposals are taken forward in a Bill, an implementation date will be agreed to allow sufficient lead-in time for required changes prior to implementation, including to the court process, judicial training, forms and online systems. We anticipate that by this time the end-to-end divorce process will be available to be completed online.
111. Following the implementation date, any new applications will be treated under the reformed process. Any applications made before the implementation date will be treated under the former process.

## Appendix 1: Supplementary background on the current law

112. In addition to the background and rationale for intervention provided in paragraphs 1-11, further information is provided below on the current law and the problems with it.

### *Conduct-based facts*

113. The use of a conduct-based fact is incentivised for couples unwilling or unable, for practical or financial reasons, to wait for a minimum separation period of two years to elapse.<sup>50</sup>
114. Allegations about conduct create unnecessary antagonism and undermine efforts to help the parties reconcile their relationship or agree necessary arrangements about finances or children.<sup>51</sup> Parental conflict during and after separation is associated with child adjustment difficulties: while children who experience parental separation vary widely in their experiences, the weight of evidence indicates that key protective factors against adverse outcomes from separation include lower parental conflict during separation and co-operative parenting post-separation.<sup>52</sup>
115. Groups representing victims of domestic abuse including Women’s Aid, Welsh Women’s Aid, and Rights of Women have told us that communicating their spouse’s abusive behaviour to the court, within the context of the legal process for obtaining a divorce or dissolution, can put the victim at risk of further harm.<sup>53</sup> Some victims feel that they must choose between this risk or remaining in a legal relationship with their abuser.
116. There is also an inequality in access to the ‘adultery’ fact which is only available in relation to conduct between the respondent and a person of the opposite gender. While conduct between the respondent and a person of the same sex can be dealt with under the ‘unreasonable behaviour’ fact, there was strong perception by some respondents to the consultation that this is discriminatory.<sup>54</sup>
117. We have found no evidence that the use of conduct-based facts benefits couples or society by preventing poor conduct within marriage, protecting healthy marriages, or affecting the status of marriage.

### *Separation-based facts*

118. Feedback received during the consultation period has shown that the option of using a separation-based fact to avoid using a conduct-based fact may be unavailable to those who cannot afford to run two households without having financial orders in place to divide matrimonial assets. This

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<sup>50</sup> YouGov survey reported at [http://www.resolution.org.uk/news-list.asp?page\\_id=228&n\\_id=301](http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=301) in ‘MPs need to get behind no-fault divorce if they’re serious about reducing family conflict’, 3 December 2015: “27% of divorcing couples who asserted blame in their divorce petition admitted the allegation of fault wasn’t true, but was the easiest option”

<sup>51</sup> **Lord Wilson (Supreme Court Justice)** Owens (Appellant) v Owens (Respondent) [2018] UKSC 41: “damage [is] caused by the requirement under the current law that, at the very start of proceedings based on the subsection, one spouse must make allegations of behaviour against the other. Such allegations often inflame their relationship, to the prejudice of any amicable resolution of the ensuing financial issues and to the disadvantage of any children.”; **The Law Society**: “the requirement to assert one of the five fault based facts can have a destructive impact on families and can promote conflict and acrimony. Evidence suggests that requiring parties to allocate blame can have a detrimental impact on children” <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/>; **Resolution** (2018) survey of family justice professionals found that 90% say current law makes it harder to reduce conflict between ex-partners, and 67% say the current law makes it harder for separated parents to reach agreements [http://www.resolution.org.uk/news-list.asp?page\\_id=228&page=1&n\\_id=373](http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=373)

<sup>52</sup> See Cassandra Brown (2009) *Ameliorating the Effects of Divorce on Children*, 22 *Journal of the American Academy of Academic Lawyers* 461, 462; Mooney, A., Oliver, C. and Smith, M. (2009) *Impact of Family Breakdown on Children’s Well-Being: Evidence Review*, London: Institute of Education; Harold, G., et al. (2016) *What works to enhance inter-parental relationships and improve outcomes for children*. Early Intervention Foundation.

<sup>53</sup> Rights of Women (2018), *Briefing on divorce law reform*, <http://rightsofwomen.org.uk/wp-content/uploads/2018/07/Briefing-on-divorce-law-reform-260718.pdf>; Jenny Birchall & Shazia Choudhry (2018) “What about my right not to be abused?” Domestic abuse, human rights and the family courts, Women’s Aid and QMUL.

<sup>54</sup> Matrimonial Causes Act 1973, section 1(6).

echoes previous findings by the Law Commission.<sup>55</sup> Those arrangements, if the court is asked to make orders about them, can only come into effect once the legal process of divorce or dissolution is completed. The alternative of living separately within one household was reported as being difficult to evidence to the satisfaction of the court in practice, as well as the parties regarding such as an artificial distinction in living arrangements as undignified. This has been found previously by the Government to be “confusing and harmful to children”.<sup>56</sup>

119. Some of those couples who make use of a separation-based fact to avoid having to make allegations against their spouse reportedly find a period of two years as a minimum difficult.<sup>57</sup> We have found no evidence that demonstrates in other cases whether this provision encourages couples to reconcile during this time. The Law Commission found that if the test of separation was too strict “it is difficult for the couple to reconsider the position or attempt a reconciliation during this period”.<sup>58</sup> Supplemental provisions restrict the length of time that couples may try to live together again after they first separated.<sup>59</sup> Consultation responses from groups who work with divorcing couples suggest that two and five years are too long and can negatively impact families from moving on, and that a period of reflection often occurs before the decision to divorce is taken. Groups supporting victims of domestic abuse are concerned that long separation periods act to delay a victim from ending their legal relationship with their abusive spouse if the victim feels unable to bring the abusive spouse’s conduct to the attention of the court through a conduct-based fact.<sup>60</sup>

#### *How the legal process is initiated*

120. Even in cases where both parties are agreed about the decision to end their legal relationship, the law permits only one party to make the application ‘against’ the other, and – in conduct-based cases – lay ‘blame’ against that party. This adversarial approach can be conveyed unhelpfully to children by one or both spouses who may seek to place responsibility for the divorce with one parent.

#### *The opportunity to contest*

121. Specific research into how this provision is used has shown that the option to contest is usually not used as a route to attempt to remain in a legal relationship: instead it is commonly used to dispute allegations relating to the fact used or to create delay and expense as a malicious controlling tactic, often used in cases where domestic abuse may be a factor.<sup>61</sup> Where irretrievable breakdown itself is challenged (in a very small number of cases), this tends to be a tactical approach and falls into four broad types: money, mental health, power and control, religion and culture.<sup>62</sup>

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<sup>55</sup> The Law Commission (1990) *The Ground for Divorce*, London: HMSO, para 2.12: “It is unjust and discriminatory of the law to provide for a civilised “no-fault” ground for divorce which, in practice, is denied to a large section of the population. A young mother with children living in a council house is obliged to rely on fault whether or not she wants to do so and irrespective of the damage it may do.”

<sup>56</sup> Lord Chancellor’s Department, *Looking to the Future: Mediation and the Ground for Divorce*, Command Paper Cm 2799 (London: HMSO, 1995), p.11.

<sup>57</sup> *Finding Fault?*, p. 43.

<sup>58</sup> *Facing the Future*, p. 35.

<sup>59</sup> Matrimonial Causes Act, section 2(5).

<sup>60</sup> Briefing on divorce law reform, p. 4.

<sup>61</sup> Trinder and Sefton (2018) *No Contest: Defended Divorce in England and Wales*, London: Nuffield Foundation; Corbett, N.E. and Summerfield, A. (2017) *Alleged perpetrators of abuse as litigants in person in private family law: the cross-examination of vulnerable and intimidated witnesses*.

<sup>62</sup> *No Contest*, p.49.

122. Some senior family court judges are uncomfortable with the court's role in such cases,<sup>63</sup> and have noted its misuse to attempt to leverage concessions from the other spouse in relation to money or children, and its indication of a level of conflict that demonstrates the marriage has broken down.<sup>64</sup>

#### *Divergence between the law, practice, and public expectations*

123. A number of respondents to the consultation suggested that the application of the law in practice particularly disadvantages those who do not have access to legal advice, who understandably expect the law to work in a different way. Allegations of conduct-based facts (commonly referred to as 'fault') are a means to establish that a legal threshold has been met. It is a common misconception that the court will investigate the reason for the irretrievable breakdown of the marriage and apportion blame. In reality, the fact or facts relied upon by the petitioner have may no bearing on the real reason for the divorce,<sup>65</sup> or to the outcome of related proceedings in most cases.<sup>66</sup> In rare cases where conduct may be relevant it would need to be raised separately (such as financial misconduct which related to financial provision on divorce). Furthermore, the court does not require the fact used to be the cause of marital breakdown<sup>67</sup>, and in undefended cases evidence of the five facts, if sufficiently made out, must be accepted by the court at face value is not subject to further enquiry or scrutiny.

124. The family court judiciary has long spoken of the need to reform the five facts and the "lack of intellectual honesty" of how the current system works in practice which involves collusion and manipulation of the facts requirements by those who are aware of how to do this.<sup>68</sup> This practice is demonstrated by the Law Society's general guidance to solicitors: "Where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court."<sup>69</sup>

125. The lack of clarity about the process and degree of uncertainty was raised repeatedly as an additional source of worry and anxiety by interviewees within a specific study into how divorce law in England and Wales is currently working.<sup>70</sup>

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<sup>63</sup> Owens (Appellant) v Owens (Respondent) [2018] UKSC 41: **Lord Wilson** "uneasy feelings... Parliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances"; **Lady Hale**: "I have found this a very troubling case. It is not for us to change the law laid down by Parliament - our role is only to interpret and apply the law that Parliament has given us."

<sup>64</sup> **HHJ Newton**, VV v BH (Contested Divorce Proceedings) [2018] EWFC B68: "Mr H's whole case has indeed been completely futile, a huge waste of money, a tragic destruction of family relationships, and all, in my opinion, to satisfy Mr H's own vanity and need to be in control and for the other reasons I have suggested earlier. All he had to do was to not contest the divorce, a divorce he wanted, as virtually everybody else in the country does"; **Lord Wilson (Supreme Court Justice)** Owens (Appellant) v Owens (Respondent) [2018] UKSC 41: "The degree of conflict between the parties which is evident in a fully defended suit will of itself suggest to the family court that in all likelihood their marriage has broken down. While it recognises that, unless and until repealed by Parliament, section 1 of the 1973 Act must conscientiously be applied, the family court takes no satisfaction when obliged to rule that a marriage which has broken down must nevertheless continue in being."

<sup>65</sup> Finding Fault, p. 39: "Only 29% of respondents to a fault-based divorce reported that the Fact had very closely matched the reason and 29% said that it did not match the reason closely at all. Even amongst petitioners, only 65% claimed that the (fault) Fact chosen very closely matched the reason for the relationship breakdown."; YouGov survey reported at [http://www.resolution.org.uk/news-list.asp?page\\_id=228&n\\_id=301](http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=301) in 'MPs need to get behind no-fault divorce if they're serious about reducing family conflict', 3 December 2015: "27% of divorcing couples who asserted blame in their divorce petition admitted the allegation of fault wasn't true, but was the easiest option"

<sup>66</sup> Matrimonial Causes Act 1973, section 25(2)(g), sets out that In financial proceedings, the court will take conduct into account only if it would be inequitable to disregard it.

<sup>67</sup> **Lady Hale (Supreme Court Justice)** Owens (Appellant) v Owens (Respondent) [2018] UKSC 41: "a search for "blame"... is not required... The marriage has to have broken down irretrievably. One of the five "facts" prescribed in section 1(2)(a) to (e) of the 1973 Act has to be proved. But the Act does not require that there be a causal connection between them."

<sup>68</sup> **Lord Wilson (Supreme Court Justice)**, Miller Smith v Miller Smith in the Court of Appeal, [2009] EWCA Civ 1297, [2010] 1 FLR 1402: "Our society in England and Wales now urgently demands a second attempt by Parliament, better than in the ill-fated Part II of the [Family Law Act 1996], to reform the five ancient bases of divorce; meanwhile, in default, the courts have set the unreasonableness of the behaviour required to secure the success of a petition on the second basis, namely pursuant to section 1(2)(b) of the Act of 1973, even when defended, at an increasingly low level."; **Sir James Munby (then President of the Family Division)** Owens v Owens [2017] EWCA Civ 182: "the law which the judges have to apply and the procedures which they have to follow are based on hypocrisy and lack of intellectual honesty. The simple fact is that we have, and have for many years had, divorce by consent, not merely in accordance with section 1(2)(d) of the 1969 Act but, for those unwilling or unable to wait for two years, by means of a consensual, collusive, manipulation of section 1(2)(b)"

<sup>69</sup> Law Society (2015), Family Law Protocol, para 9.3.1.

<sup>70</sup> Finding Fault, p. 36.