

Reducing family conflict: Reform of the legal requirements for divorce

Equality Statement

Policy aim

1. The aim of the policy is to reduce conflict between couples involved in divorce, dissolution and legal separation. The policy objectives are in line with 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 objectives are:
 - To ensure that the decision to divorce or dissolve a civil partnership continues to be a considered one
 - 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
 - To make the legal process fair, transparent, and easier to navigate
 - To reduce the opportunities for an abuser to misuse the legal process to perpetrate further abuse

Policy proposals following the consultation

2. To achieve the aim and objectives, the following policies are recommended:
 - To retain the ground of irretrievable breakdown of the marriage or civil partnership but to remove the requirement to evidence one of five facts about conduct or separation
 - To introduce a minimum timeframe of six months for the divorce process between petition and final decree, with the potential for the court to expedite this in exceptional circumstances
 - To remove the opportunity to contest a divorce or civil partnership dissolution
 - To provide an option for jointly initiating proceedings
 - To retain the bar on divorce in the first year of marriage or civil partnership
3. We believe that implementing these policies will support better outcomes for the adults involved and any children from the marriage or civil partnership.
4. Please note that under the Civil Partnership Act 2004, the requirement to establish irretrievable breakdown by evidencing a conduct or separation fact also applies to the equivalent processes of obtaining dissolution and separation orders for civil partnerships. For convenience, further references to divorce and marriage in this statement will include references to dissolution and civil partnerships as appropriate and related legislative provisions.

Background

5. The Matrimonial Causes Act 1973 is the principal statute governing how people may divorce in England and Wales. A spouse petitioning for divorce must prove one or more of five “facts” set out in the Act, so that the court can hold that the marriage has irretrievably broken down, which is the sole ground for divorce. Two of these five facts (the “separation facts”) require the couple to have been separated immediately prior to the divorce petition either for two years (if both spouses agree to the divorce) or for five years (otherwise). The three other facts (the “conduct facts”) are adultery, behaviour and desertion. These three conduct facts do not require prior separation, meaning that a divorce can usually be obtained more quickly following marital breakdown. This means that, at an already stressful time in their lives, the law incentivises parties to focus on conduct and make allegations about the events of the past, potentially introducing or aggravating ongoing conflict.
6. The key driver for the reform proposal is to reduce family conflict, both for the divorcing couple and for any children of the marriage. Conflict in the legal divorce process can hinder future co-parenting and agreement on arrangements for children’s futures.

7. The proposed policy changes are set out at paragraph 2. The key change is to reform the legal requirements for divorce, principally to remove the requirement to evidence conduct or separation to establish irretrievable breakdown. This would remedy the difficulties created by the requirement to prove a conduct fact if the parties cannot wait to use, or do not wish to use, a separation fact. Instead, the person seeking to divorce (or possibly both parties together) would give a statement of irretrievable breakdown to the court.
8. We aim to make sure that the decision to divorce remains a considered one and that spouses have an opportunity to change course, but that they are not required to justify the decision to end the marriage through proof of a "fact", particularly one based on conduct.

Equality Duties

9. Section 149 of the Equality Act 2010 ("the EA") requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:
 - Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the EA.
 - Advance equality of opportunity between individuals (those who share a relevant protected characteristic and those who do not); and
 - Foster good relations between individuals (those who share a relevant protected characteristic and those who do not)
10. The 'due regard' duty relates to the relevant "protected characteristics" under the EA – namely race, sex, disability, sexual orientation, religion and belief, age, gender recognition, pregnancy and maternity and marriage and civil partnership.
11. The Ministry of Justice (MoJ) has a legal duty to consider how the proposed policy proposals are likely to affect those people with protected characteristics and take proportionate steps to mitigate or justify the most negative ones and advance the positive ones.

Summary

12. Consideration has been given to the impact of the proposals against the statutory obligations under the EA. These are outlined below.

Direct Discrimination

13. Our initial assessment is that the proposed changes to the divorce law in England and Wales would not be directly discriminatory within the meaning of the EA, as any changes would apply equally to all legally married couples and civil partners and those who marry in the future, whether they have a protected characteristic or not.

Indirect Discrimination

14. Our initial assessment, based on the limited information available, is that the proposed changes to the divorce law in England and Wales would not be indirectly discriminatory within the meaning of the EA since any resulting changes to divorce law are unlikely to result in anyone sharing a protected characteristic being put at a particular disadvantage, compared to those who do not share that protected characteristic.

Discrimination arising from disability and duty to make reasonable adjustments

15. Our initial assessment based on the limited information available is that the proposals will not result in discrimination arising from disability.

Harassment and victimisation

16. We do not consider that the proposals will give rise to harassment or victimisation within the meaning of the EA 2010. Indeed, removing the ability of a spouse to make allegations of conduct about the other spouse will prevent such allegations from being made where the objective is to exercise coercive control.

Advancing equality of opportunity

17. The MoJ is mindful of the duty to consider advancing equality of opportunity and the new policy will minimise disadvantages for two groups.

18. Evidence shows that women are disproportionately affected by domestic abuse (in April 2016-March 2017 64% of victims were women¹). Research evidence shows that perpetrators may contest evidence in divorce applications so they can continue coercive and controlling behaviour through the legal process². Due to fear of reprisals, victims may be unwilling to cite the perpetrator's behaviour as evidence of one of the conduct based facts and relying upon one of the separation facts may not be an option. By removing the requirement to prove one of the facts, the policy is likely to help women when divorcing their abusers. However, this policy does not change the law on domestic abuse, which remains a matter for criminal law, nor does it weaken the civil remedies available to victims of domestic abuse through applications under the Family Law Act 1996 for a non-molestation or occupation order.

Fostering good relations

19. Our initial assessment, based on the information available, is that it is likely that the proposals could have a positive impact regarding this area of the duty. Even in situations where relations between divorcing individuals were initially amicable, introducing allegations of conduct based facts can distort negotiations about financial and child care arrangements. This encourages damaging behaviour from the individuals applying for divorce and those responding including manipulation of children, threats to share details of "unreasonable" behaviour with their children and threats to disclose historic reports of domestic abuse.³ Removing the need to prove one of the facts and the incentive to rely upon the conduct-based facts would minimise conflict and improve relations between divorcing couples, allowing them to focus on their future needs and the needs of any children. Low parental conflict during separation and co-operative parenting post-separation are key protective factors against adverse child outcomes following parental separation.⁴

Methodology

20. When analysing the potential equalities impacts of these proposals, we have considered the impact on:

- **Families:** We have studied the divorce statistics for 2017 published by ONS in September 2018 to provide some details about the protected characteristics of individuals involved in divorce cases and dissolution cases in England and Wales.⁵

21. Where we have identified that individuals with certain protected characteristics may have different outcomes due to the proposals, we have noted that the evidence we have available suggests the potential for a differential impact.

¹ Office of National Statistics (2017) *Domestic abuse in England and Wales: year ending March 2017*.

² Trinder, L. and Sefton, M. (2018) *No contest: defended divorce in England and Wales*.

³ Trinder, L., Braybrook, D., Bryson, C., Coleman, L., Houlston, C. and Sefton, M. (2017) *Finding Fault? Divorce Law and Practice in England and Wales*.

⁴ 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.

⁵ ONS (2018) *Divorces in England and Wales 2017*.

Analysis

22. The individuals impacted by these changes are married or civil partnered individuals petitioning for divorce, dissolution or (judicial) separation.
23. Overall, we anticipate that there may be a benefit to individuals petitioning for these decrees or applying for these orders as they will no longer have to prove one of the five facts. While the grounds for obtaining a divorce will remain unchanged, the legal court process will be simplified and easier to navigate.

Potential age impacts

24. The average (mean) age at divorce for opposite-sex couples in 2017 was 46.4 years for men and 43.9 years for women. The average age at divorce has increased year-on-year since 1985, rising by more than nine years for both men and women.
25. Among opposite-sex couples in 2017, more women than men divorced below the age of 45; at older ages, more men than women divorced. This pattern has remained unchanged since 2014 and reflects the fact that on average men marry women who are younger than themselves. The number of divorces was highest among both men and women aged 45 to 49 years.
26. Individuals in the age ranges most likely to divorce could potentially benefit from these proposals should the need for a divorce arise as set out in paragraph 2 above.
27. A concern raised in some consultation responses was that these changes have the potential to make it easier for older men to abandon their wives in favour of younger women. We have not found any evidence that this risk will be affected by the proposed changes.

Potential disability impacts

28. Due to limitations in the available evidence we are unable to identify any potential impacts in relation to the above protected characteristics. However, a concern raised in some consultation responses was that these changes have the potential to make it easier for anyone to abandon their disabled partner, leaving them vulnerable. We have not found any evidence to suggest that this is more likely to happen as a consequence of the proposed changes.
29. Various existing provisions will remain which protect vulnerable parties. These include the possibility for a litigation friend to be appointed on behalf of a spouse who lacks capacity, and the separate consideration of financial provision on divorce within which the court must have regard to any physical or mental disability of either of the parties to the marriage when making decisions about whether and how to make a financial order.

Potential gender reassignment impacts

30. The consultation asked respondents for their views of any equality impacts that they saw as a result of the proposed changes and no impacts about gender reassignment impacts were received.

Potential marriage and civil partnership impacts

31. There were 908 civil partnerships formed in England and Wales in 2017. There were 1,217 civil partnership dissolutions granted in England and Wales in 2017, of these 57% were to female couples. Since civil partnership dissolutions were first recorded in 2007, more civil partnership dissolutions have occurred between female than male couples although a greater number of men have formed civil partnerships⁶.

⁶ ONS (2017) *Civil Partnerships in the UK, 2017*.

32. The Civil Partnership Act 2004 enabled same sex couples in England and Wales to obtain legal recognition of their relationship by registering as civil partners of each other. The Marriage (Same Sex Couples) Act 2013 enabled same sex couples in England and Wales to marry from 29 March 2014. It also has related provisions, including the opportunity for those in a civil partnership to convert that relationship to a marriage if they choose to do so. These other provisions came into force on 10 December 2014. The Act does not remove the availability of civil partnerships for same sex couples.
33. Removing the adultery fact will remove the existing disparities of the adultery fact not being available to civil partners or to spouses where the alleged act took place between the respondent and a person of the same sex.
34. Although they are governed by a different statute, it is Government policy that provision for civil partnerships should mirror provision for marriage where appropriate. Therefore, the impact of the proposed changes for those in a civil partnership or who choose to form one will be the same as those who are dissolving a marriage as this change extends to those dissolving civil partnerships.

Potential pregnancy and maternity impacts

35. Due to limitations in the available evidence we are unable to identify any potential impacts in relation the above protected characteristic.

Potential race impacts

36. There is a lack of data collected about ethnicity and divorce. No impacts were raised in the consultation responses.

Potential religion impacts

37. There may be the potential for differential impacts for those practicing religions where stigma about divorce remains, although it is worth noting that the removal of conduct-related facts can avoid it being used against a spouse in a way that they feel is unfair. Specific concerns raised in some consultation responses about the potential for impact for women of various religions are outlined below.
38. Jewish community – there are no identified impacts on Jewish communities. We have heard from the Board of Deputies of British Jews that no requirement to allege fault is in line with the religious divorce process (the GET). The current provision that enables the final divorce decree to be delayed allowing time for the religious divorce to take place will remain in place to protect the interests of Jewish women (Section 10A of the Matrimonial Causes Act 1973).
39. Muslim women – the Muslim Women’s Network UK were uncertain how Sharia councils will treat civil ‘no-fault’ divorce, because under an Islamic divorce a woman may have a right to a Mahr (marriage dower) if her husband is at fault, but not if there is a no-fault divorce. However, we note that Muslim women have the same access to financial orders as other women, and the court has the flexibility to account for each party’s needs.
40. Christian community – some raised concerns that adultery is the only biblical ground for divorce, and it may be important to have this recorded as the reason within the legal divorce process which would not be possible if it is removed as a fact. It is worth noting that the Church of England, while disagreeing with other proposals, supports the removal of conduct-based facts from the legal process, as the reason for relationship breakdown is a matter for the couple themselves rather than the court.⁷

⁷ Church of England consultation response

Potential sex impacts

41. Most divorces of opposite sex couples in 2017 where a decree absolute was granted were petitioned by women (62%). Between 1980 and 2000, this proportion had consistently been at or above 70%. The most common fact relied upon to establish irretrievable breakdown in 2017 was the behaviour fact (often referred to as 'unreasonable behaviour'), with 37% of all men and 52% of all women petitioning for divorce on this basis.
42. The behaviour fact has consistently been the most common fact relied upon by women petitioning for divorce since the late 1970s. The behaviour fact has only been the most common fact for men petitioning since 2006; in the 1980s and 1990s adultery was generally the most common fact for men petitioning, while between 1999 and 2005 it was separation of two years with consent.
43. This data suggests that, as women are more likely to evidence their petition with the behaviour fact, then they are likely to benefit from the changes proposed which will decrease the need to rely upon a conduct-based fact.
44. Evidence shows that women are more likely to be victims of domestic abuse than men. The year ending March 2018, Crime Survey for England and Wales showed that an estimated 7.9% of women (1.3 million) and 4.2% of men (695,000) aged 16 to 59 had experienced domestic abuse in the last year⁸. Consequently, they will be more likely to benefit by this change as we have heard that victims feel disadvantaged by the following elements of the current system which we propose to remove (use of facts and the ability to contest):
 - Some victims feel that they must make a choice between risking further harm or heightened tensions by setting out conduct-based facts, or remaining in a legal relationship with perpetrator
 - Some victims feel that the court is colluding with their abuser if they are asked to 'water down' particulars to encourage the other side to accept them; and
 - Some current provisions can be misused by abusers to perpetrate post-separation abuse, such as alleging false facts against victim, or obstructing the divorce by contesting it which can risk the parties meeting at court.
45. Some respondents raised concerns that retaining the existing one-year bar would pose a particular disadvantage to women who are more likely to be victims of domestic abuse than men. We believe that the various protective orders – non-molestation orders, occupation orders and the proposed domestic abuse protection orders (set out in the Domestic Abuse Bill) are the remedy to support victims at any time in their marriage.
46. Similarly, some respondents asked whether victims of domestic abuse should be given an exception to the new minimum timeframe before a divorce is granted. We believe that, as a general rule, clarity and predictability for the legal process would benefit from a single timeframe, without exceptions. The introduction of criteria to the legal process for divorce which, if met, could reintroduce problems identified in the current system where allegations can be manipulated, contested, and used by parties for bargaining positions. This runs counter to our objectives to remove sources of conflict and minimise the adversarial nature of the legal process. As above, while awaiting the divorce to be finalised, victims of domestic abuse can make use of available protective orders and the court is able to make interim financial orders in cases with urgent need of financial provision before the divorce is finalised.

⁸ ONS (2018) Domestic abuse: findings from the Crime Survey for England and Wales - Appendix tables. Table 8 (Year ending March 2018).

Potential sexual orientation impacts

47. In 2017, there were 338 divorces among same sex couples in England and Wales, which was three times more than in the previous year, when there were 112. Almost three-quarters (74%) of these divorces were among female couples. Marriages of same sex couples have only been possible in England and Wales since 29 March 2014.
48. Behaviour was the most common fact relied upon among same sex married couples, accounting for 73% of divorces among men and 83% of divorces among women. These percentages are lower than for 2016, when behaviour accounted for 96% of divorces among men and 93% of divorces among women.
49. The changes to the law will also apply to the dissolution of civil partnerships, so there will be no differential impact. These changes will remove the existing disparities of the adultery fact not being available to civil partners and of the definition of the act of adultery being restricted to specific conduct between members of the opposite sex. Hence the current situation where reference to the 'behaviour' fact within same sex couples can include having a sexual relationship with somebody of the same sex.

Professionals working in the Family Justice System

50. We have considered the potential for the proposals to impact on equalities in relation to legal professionals working in the family justice system. We have not been able to find evidence to assess the equalities impacts.

Mitigation and Justification

51. The consultation sought evidence on the range of proposals. It is not anticipated that there will be any adverse outcomes for most groups from the proposals listed above (see paragraph 7).
52. We have listed mitigations where relevant within the relevant sections above to take account of concerns raised. In particular, existing provisions within the legal process will be retained which assist vulnerable adults including some women, victims of domestic abuse, and adults with mental health issues or learning difficulties (see paragraphs 29, 38, 39, 45 and 46).
53. The Government acknowledges that there are gaps in the data collected about the protected characteristics of those who divorce, especially for the protected characteristic of disability, ethnicity, pregnancy and maternity, and religion.

**Ministry of Justice
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