

## **Reducing family conflict: Reform of the legal requirements for divorce**

### **Annex: Equality Statement**

#### **Policy aim**

1. The aim of the policy is to reduce conflict between couples involved in divorce and judicial separation by removing from the legal process for divorce the requirement to assert irretrievable breakdown of the marriage by proving one or more of five “facts” involving conduct or separation. Removing this requirement will support better outcomes for the adults involved and any children from the marriage.
2. 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, references to divorce and marriage in this statement will include references to dissolution and civil partnerships as appropriate.

#### **Background**

3. 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.
4. 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 agreement on arrangements for children’s futures.
5. The policy change is to reform the legal requirements for divorce, principally to remove the requirement to evidence conduct or separation to establish irretrievable breakdown, while making sure that the decision to divorce remains a considered one, 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, which can introduce or increase acrimony and conflict and lead to poorer outcomes for children.
6. The policy objective of the Government’s proposal is to 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. The proposed reform seeks to amend the law in this respect in relation to this requirement. The legal ground for divorce, the irretrievable breakdown of

marriage, will remain. The Government believes that, in place of the requirement to prove one of the five “facts” to prove irretrievable breakdown, the revised process should be a notification process in which the person seeking to divorce (or possibly both parties together) would give notice of their intention to the court and state that the marriage had irretrievably broken down.

### **Equality Duties**

7. 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)
8. 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.
9. 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**

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

### **Direct Discrimination**

11. Our initial assessment is that changing the law to remove the requirement to prove one of the five facts in a divorce petition 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**

12. Our initial assessment, based on the limited information available, is that changing the law to remove the requirement to prove one of the five facts in a divorce petition 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**

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

## Harassment and victimisation

14. 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

15. The MoJ is mindful of the duty to consider advancing equality of opportunity and the new policy will minimise disadvantages for two groups.
16. Evidence shows that women are disproportionately affected by domestic abuse (in April 2016- March 2017 64% of victims were women<sup>1</sup>). Research evidence shows that perpetrators may contest evidence in divorce applications so they can continue coercive and controlling behaviour through the legal process<sup>2</sup>. 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

17. 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 property, finance 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<sup>3</sup>. 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.

## Methodology

18. When analysing the potential equalities impacts of these proposals, we have considered the impact on:
  - **Families:** We have studied the divorce statistics for 2016 published by ONS in October 2017 to provide some details about the protected characteristics of individuals involved in divorce cases and dissolution cases in England and Wales<sup>4</sup>

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<sup>1</sup> Office of National Statistics (2017) Domestic abuse in England and Wales: year ending March 2017

<sup>2</sup> Trinder, L. and Sefton, M. (2018) No contest: defended divorce in England and Wales.

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

<sup>4</sup> Divorces in England and Wales 2016, ONS, 2017.

19. 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.

## **Analysis**

20. The individuals impacted by these changes are married or civil partnered individuals petitioning for divorce, dissolution or (judicial) separation.
21. 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 ground for obtaining a divorce will remain unchanged, the legal court process will be simplified and easier to navigate, especially for litigants in person.

### *Potential age impacts*

22. The average (mean) age at divorce for opposite-sex couples in 2016 was 46.1 years for men and 43.7 years for women. The average age at divorce has increased year-on-year since 1985, rising by more than 8 years for both men and women.
23. The number of divorces was highest among both men and women aged 45 to 49 among opposite-sex couples in 2016. However, more women than men divorced below the age of 45; at older ages, more men than women divorced. This pattern reflects the fact that on average men marry women who are younger than themselves.
24. 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 para. 22 above.

### *Potential marriage and civil partnership impacts*

25. 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 partnerships<sup>5</sup>.
26. 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.
27. Although they are governed by a different statute, it is Government policy that Civil Partnerships should mirror marriages. 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.

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<sup>5</sup> Civil Partnerships in the UK, 2017, ONS, 2017

#### *Potential religion impacts*

28. There may be the potential for differential impacts. We do not have available evidence to quantify the potential for any differential impact and will take account of any new evidence received during the consultation.

#### *Potential sex impacts*

29. Most divorces of opposite-sex couples in 2016 where a decree absolute was granted were petitioned by women (61%). Between 1980 and 2000, this proportion had consistently been at or above 70%. The most common fact relied upon to establish irretrievable breakdown in that period was the behaviour fact, with 36% of all men and 51% of all women petitioning for divorce on this basis.
30. The behaviour fact has consistently been the most common fact relied upon by women petitioning for divorce since the late 1970s; before this, behaviour 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 husbands petitioning, while between 1999 and 2005 it was separation (two years with consent).
31. 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 to avoid waiting through a separation period.

#### *Potential sexual orientation impacts*

32. In 2016, there were 112 divorces among same-sex couples in England and Wales, which was five times more than in the previous year, when there were 22. Over three-quarters (78%) of these divorces were among female couples. Marriages of same-sex couples have only been possible in England and Wales since 29 March 2014.
33. Behaviour was the most common fact relied upon among same-sex married couples, accounting for 96% of divorces among men and 93% of divorces among women.
34. 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.

#### *Potential disability, 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 characteristics.

#### **Professionals working in the Family Justice System**

36. Due to the change in the evidence required to support a divorce petition (i.e. it will no longer be necessary to prove one of the five facts), there may be a reduction in income for legal professionals who will no longer need to draft narrative particulars in support of the fact or facts relied upon. The legal process for applying for divorce will also be simpler to navigate although the ground for divorce will remain unchanged. This may mean that fewer

people take legal advice (or people take only limited legal advice) when preparing their petition. The net impact on legal professionals will depend on what other business they engage in instead of dealing with uncontested divorce cases.

37. 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**

38. It is not anticipated that there will be any adverse outcomes for any groups from the proposals to remove fact based conduct from divorce and to set a minimum timeframe requirement as part of the revised legal process.
39. Care will also need to be taken to ensure that adults with mental health issues or learning difficulties are not disadvantaged due to these proposals. We will continue to consider this issue.
40. 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 ethnicity and religion.
41. This limits government understanding of the potential equality impacts of these proposals. We will review our initial assessment further after considering the consultation responses.

#### **Equalities questions**

42. We have asked for views on potential equalities impacts in the consultation paper.

**Ministry of Justice  
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