



## Briefing on Government Consultation

**Deadline 10 December 2018**

**“Reducing family conflict:**

**Reform of the legal requirements for divorce”**

### What is the Government proposing?

The government is consulting on a radical and controversial overhaul of the law on divorce in England and Wales.<sup>1</sup> One of the main reforms would be to allow divorce on mere notification of irretrievable breakdown by either one or both spouses, abolishing any need to provide evidence of fault, i.e., providing a legal reason why the marriage has broken down. This would make divorce into a purely administrative process where one spouse could in effect walk free of the marriage by notification.

When the reason for marriage breakdown is not legally needed as a condition for divorce, this is sometimes known as “no-fault” divorce. Other aspects of the proposed changes include abolishing the right of a spouse to contest a divorce. Of the consultation, the Government “seeks views on the detail of how best to change the law to reduce family conflict and strengthen family responsibility.”<sup>2</sup> It claims this consultation marks its “commitment to strengthen support for children and families”.<sup>3</sup>

### Brief Background to the Consultation

The last major reform of divorce law took place nearly fifty years ago.<sup>4</sup> In 1990, the Law Commission produced a report proposing the introduction of no-fault divorce.<sup>5</sup> Following this, in 1995, Lord Mackay of Clashfern, as Lord Chancellor, introduced the abolition of fault-based divorce, subsequently incorporated into the Family Law Act 1996. The Act’s provisions were “aimed at reducing the bitterness of divorce and the damaging impact on all involved in divorce.”<sup>6</sup> Following the 1996 Act, a series of pilot schemes for conflicted married couples was rolled out. In 2001, the then Lord Chancellor, Lord Irvine of Lairg, agreed with research findings suggesting the test schemes were not “good enough” for implementing the relevant part of the 1996 Act.<sup>7</sup> He invited parliament to repeal the Act. Never enacted, the 1996 Act was repealed in 2014.<sup>8</sup>

More recently, *The Times* newspaper<sup>9</sup> and the Marriage Foundation<sup>10</sup> headed by Sir Paul Coleridge, have been pushing for a number of legal reforms of marriage and divorce, including the introduction of no-fault divorces. A controversial study published in 2017, *Finding Fault?*<sup>11</sup> recommended the abolition of fault-based divorce and the introduction of a notification system, where one or both spouses register that the marriage has broken down irretrievably. This Report claims the new system would be a “more honest approach, that would also be fairer, more child-centred and cost-effective”.<sup>12</sup>

## What is the current law on divorce?

Those seeking divorce under the current law<sup>13</sup> must give evidence of one or more of five facts (listed below) as demonstrating irretrievable breakdown of the marriage. Irretrievable breakdown is actually the sole ground for divorce under current law, but must be supported by evidence. The divorce process is in three stages. First, the divorce petition; then a *decree nisi*, a provisional stage that allows opportunity for the couple to reconcile, while also providing the court time to check the legality of the application; and, finally, the *decree absolute*. The statutory minimum period between stages two and three is six weeks and a day, though many divorces in practice take longer than this timeframe.

The five facts include: 1) adultery; 2) unreasonable behaviour; 3) desertion (one of the spouses has left without consent for at least two years); 4) spouses have lived separately for at least two years and both consent to a divorce; 5) spouses have lived separately for at least five years (consent for divorce is not needed from both spouses).

## Online Questions Asked by the Government

Following an opening brief section on personal details and then a reminder of what the Questionnaire is about, there follows the following questions. Use your own words for your answers in the boxes provided. Answers appearing to be worded the same way will probably be rejected by the Government.

For online questionnaire: [Read here](#)

For the Government’s Overview of the Consultation: [Read here](#)

For the Government’s Consultation document: [Read here](#)

## Retention of the sole ground for divorce

**Question 1: Do you agree with the proposal to retain irretrievable breakdown as the sole ground for divorce?** We suggest you answer “yes”. This answer should not be seen as moral approval of the many reasons why people already seek a divorce. It is true that the existing divorce procedure allows marriage to be legally dissolved for reasons which, morally, are questionable. The sad reality of our society is that people do end their marriages and the solemn commitments underpinning them. The Government is not proposing to abolish the sole ground of irretrievable breakdown, so this aspect of the law is not changing.

## Replacement of the five facts with notice of irretrievable marital breakdown

**Question 2** is the most controversial question of this Consultation: **In principle, do you agree with the proposal to replace the five facts with a notification process?** We urge you to answer ‘no’. We encourage you to write in your own words the reasons why you think the five facts should not be abolished. You may wish to start by reminding the Government that traditional Christian belief holds that marriage can only be legitimately ended where adultery has been committed.

What is the Government’s main argument? It claims the current law puts in place “requirements which can themselves introduce or aggravate conflict, and which encourage a focus on the past...”<sup>14</sup> It further argues that its “policy objective is to reduce family conflict.”<sup>15</sup> This appears to be a laudable aim but it is essentially utopian, ignoring the fact that when marriages break down, there will almost inevitably be some bitterness and pain. Pretending that a change to legal procedures will either eliminate or strengthen conflict is unrealistic.

Key arguments in favour of retaining the five facts include:

- Marriages do not break down as result of consensual apathy, and refusal to acknowledge cause may well intensify conflict and prevent what is commonly called ‘closure’ for the injured party.
- Wedding vows are intended as solemn promises and commitments for life and become all the more serious when the marriage has produced children. Proposals allowing one party to end the marriage, effectively at whim, fatally downgrades that commitment and risks reducing marriage to the status of a temporary contract - that will last only so long as both parties remain ‘happy’. It therefore fundamentally undermines any concept of marital stability.
- Removing the requirement of ‘fault’ trivialises the marriage contract because it allows one (or both) spouse(s) to apply for divorce without providing any supporting evidence of breakdown. Few divorces, even where uncontested, are without some element of conflict, and merely removing the evidential requirement of ‘facts’ does not, and cannot, diminish this. Recent research indicates that though children do not flourish when exposed to parental conflict, there is little support for the view that divorce removes them from that conflict.<sup>16</sup>
- The law should not create mechanisms that put vulnerable people at risk of the pain, isolation and desertion that inevitably follows a divorce. Vulnerable groups of individuals include those who are disabled and who suffer terminal illness. If no-fault divorce is introduced, husbands or wives can walk free of a marriage by merely stating that the marriage has broken down irretrievably. Advocates of no-fault divorce like to stress that the ‘blame game’ should be eradicated. However, the reality is that divorces should not be legally facilitated where the supporting facts (in everyday

language, 'reasons') do not count. If divorce can be granted for 'no reason' other than a declaration (from one or both spouses) of irretrievable breakdown, it will inevitably trivialise marriage, in one fell swoop removing any idea of serious and intended life-long commitment.

- In answer to critics who argue that allowing no-fault divorce will encourage higher rates of divorce, it is often claimed that though there may be an initial spike in numbers, this will soon level out. This assessment is questionable. If an increase in divorce is known to follow the introduction of no-fault divorce, whether permanent or temporary, this is surely detrimental to families and children and should not be treated lightly as a mere academic statistical spike on a graph.
- Advocates of no-fault divorce point to findings apparently showing how the law is abused by petitioners dishonestly choosing one of the five Facts when they petition for divorce. For example, adultery may be cited, when the real 'fact' may be a reason that would make divorce more difficult, or even impossible.

In a 2015 survey of divorced and separated individuals conducted by YouGov,<sup>17</sup> it was found that 27% of the people who were interviewed, had dishonestly cited adultery or unreasonable behaviour as the facts of the divorce, as these options more easily facilitated the divorce process. However, a truer picture is to acknowledge that if 27% has not been legally honest, it suggests 73% were. All fields of law are open to abuse. Merely citing questionable evidence of misuse of parts of divorce law fails to justify a compelling case for abolition of those requirements.

In another poll involving only a few hundred people,<sup>18</sup> those involved in a fault-based divorce were asked how closely the Fact depended on by the petitioner matched the actual reason: 29% of respondents reported that the Fact "closely matched" the reason. Apportioning undue weight to this figure risks obscuring the complexities and nuances of relationships. Among petitioners, 65% said the fault-based Fact chosen "very closely" matched the reason for the marriage breakdown. These figures have been interpreted to bring into question "perceptions of the 'accuracy' or 'truthfulness' of the petition" that depend upon who is asked. While dishonest use of law cannot be eradicated, judging different perceptions of why a marriage breaks down as indicating dishonesty ignores the reality that perceptions are subjective.

**Question 3: Do you consider that a provision should be made for notice to be given jointly by both parties to the marriage as well as notice to be given by only one party?**

We suggest you answer 'no', because agreement implies approval of the current proposed changes.

## Minimum Timeframe of the Divorce Process

**Question 4: We have set out reasons why the Government thinks it helpful to retain the two-stage decree process (decree nisi and decree absolute). Do you agree? We urge you to answer 'yes'.**

The Government accepts the principle that the divorce process, following the petition, should continue being a two-stage process but is seeking views on whether this should be retained. We strongly recommend retention of the period between *decree nisi*, a provisional stage, and the final *decree absolute*, which serves as a crucial period allowing potential reflection during which the couple may reconsider their decision.

**Question 5: What minimum period do you think would be most appropriate to reduce family conflict, and how should it be measured? Please give your reasons in the text box.**

This question is about the *time period* or interval between the two-stage divorce stage mentioned above. Currently, the minimum period is six weeks and a day. (In exceptional cases, this period can be shortened but in practice is generally longer). Essentially, you are being asked not just if this interval period should be increased, but for what reasons. Taking account of the immediacy of effect of the petition under the proposed changes, the Government proposes to make it six months. Of the options provided, we suggest you choose 'six months' or 'nine months'. Those with experience of family law or couple mediation may appeal to their professional experience and cite reasons why the period should, if appropriate, be six months or more. For others, we suggest you make the point that While some couples have clearly decided to divorce, in some cases, the prospect of reconciliation remains possible. While it is recognised there can be no perfect timeframe, a longer interval would help facilitate possible reconciliation and should therefore be retained.

**Question 6: Are there any circumstances in which the minimum timeframe should be reduced or even extended? If so, please explain in the text box.**

We suggest you answer 'yes'. Where a woman has been subjected to forced marriage on religious grounds, either in this country or abroad, and this is established, an interim period of some months may allow for continued abuse by her ex partner and/or family who oppose an ending of the marriage.

**Question 7: Do you think that the minimum period on nullity cases should reflect the reformed minimum period in divorce and dissolution cases?**

We do not offer comments on this question.

## Removal of the opportunity to contest

**Question 8: Do you agree with the proposal to remove the ability to contest as a general rule? You may wish to give reasons in the text box. We urge you to choose 'no'.**

Having the right to contest (known as "defending") a divorce petition enables a spouse to argue against a divorce petition. Opponents of this provision have two main arguments.

First, that contested divorces are very rare, suggesting that numerically they are not of great importance. For example, Sir James Munby, at the time President of the Family Division, has said the number of those attempting to contest is 'utterly trivial'.<sup>19</sup> However, the suggestion that low numbers mean the ability to contest should be removed makes a mockery of justice. Large or small numbers should not be the test, but the question of whether or not justice is upheld. An aggrieved party should have the right to be heard.

The second argument is that having the right to contest means one spouse is locked into a marriage that is no longer 'wanted', and it is argued this provision may be misused by a coercive, controlling partner. The Government heavily relies on the single Supreme Court case of *Owens v Owens*<sup>20</sup> in its rationale for abolishing contested divorces in general. In this case, Mrs Owens' petition for divorce was contested by her husband, with the result it was ruled she would have to wait five years. The national press made much of the fact she was unfairly trapped in a marriage she did not want. While it may be acknowledged the finding was bad for Mrs Owens, this type of case is rare; exceptional circumstances should not be exploited to become the basis for wholesale change. Balance needs to be struck between the competing claims of those legitimately contesting divorce, and the rare cases where an aggrieved party attempts to coerce their partner by wrongful manipulation of the law. There should be a discretionary right retained by the court to rule on the facts.

**Question 9** is worded in a way suggesting that contested divorces will not be permitted in most cases but should be allowed in some. **Are there are any exceptional circumstances in which a respondent should be able to contest the divorce? Please explain these exceptional circumstances in the text box.** If, in the preceding question, you have disagreed with the proposal to remove the ability to contest a divorce in general, you should choose 'yes' and give reasons why this right should be retained.

## Retention of the bar on divorce petitions in the first year

**Question 10: Do you agree that the bar on petitioning for divorce in the first year of the marriage should remain in place? You may wish to give reasons in the text box.**

Legally, divorce cannot be sought within the first year of marriage. The government makes it clear it has no plans to remove this bar but seeks views nonetheless. We urge you to choose 'yes'. You may explain in your own words that by retaining the one year bar, divorce cannot be commenced too swiftly.

## Retention of other requirements

**Question 11: Do you have any comment on the proposal to retain these or any other requirements?**

We do not offer comments on this question.

---

<sup>1</sup> Scotland has its own legal system and therefore has its own legal rules on divorce.

<sup>2</sup> <https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/>

- 
- <sup>3</sup> *Reducing Family Conflict: Reform of the Legal Requirements for Divorce*, Ministry of Justice, September 2018, Foreword, p. 4.
- <sup>4</sup> The Divorce Reform Act 1969, whose provisions came into effect in 1971, became the Matrimonial Causes Act 1973.
- <sup>5</sup> *Family Law: The Ground for Divorce*, No. 192, 31 October 1990.
- <sup>6</sup> Children and Families Bill, Explanatory Notes, session 2012-2013, 4 February 2013, paragraph 140.
- <sup>7</sup> HL, Written Answers, 16 January 2001, Col: WA126.
- <sup>8</sup> Children and Families Act 2014.
- <sup>9</sup> "Modern Marriage", *The Times*, 17 November 2017.
- <sup>10</sup> Reforming Family Law: Why Marriage Foundation has been campaigning for full scale Family law reform since launch; <http://marriagefoundation.org.uk/wp-content/uploads/2017/11/MF-family-law-reform-briefing.pdf> (Accessed 26 November 201).
- <sup>11</sup> *Finding Fault? Divorce Law and Practice in England and Wales*, Liz Trinder et al, Nuffield Foundation, 2017.
- <sup>12</sup> *Ibid.*, p. 10.
- <sup>13</sup> Matrimonial Causes Act 1973.
- <sup>14</sup> *Reducing Family Conflict: Reform of the Legal Requirements for Divorce*, Ministry of Justice, September 2018, Foreword, p. 5.
- <sup>15</sup> *Ibid.*, p. 24.
- <sup>16</sup> *Parents, parenting, and family breakdown*, John H Tripp and Monica Cockett, *Archives of Disease in Childhood*, 1998; 78: 104-108. See also: 'Parental Predivorce Relations and Offspring Postdivorce Well-Being,' Alan Booth and Paul R. Amato, *Journal of Marriage and Family* (2001), 63(1), 197-212; *Parental separation and children's education in a comparative perspective: Does the burden disappear when separation is more common?* *Demographic Research*, Martin Kreidl et al, 36 (3), 73-110, 2017.
- <sup>17</sup> Cited in a Resolution Press Release, *No Fault Divorce Bill, House of Commons, Second Reading*, 4 December 2015.
- <sup>18</sup> *Finding Fault? Divorce Law and Practice in England and Wales*, Liz Trinder et al, Nuffield Foundation, 2017, p. 39-40.
- <sup>19</sup> [2017] EWCA Civ 182, para.98.
- <sup>20</sup> *Owens v Owens* [2018] UKSC 41.

