



**Response from Rights of Women on the Government consultation
Reducing Family Conflict
Reform of the legal requirements for divorce**

10th December 2018

1. Do you agree with the proposal to retain irretrievable breakdown as the sole ground for divorce? Yes/ no/ undecided. You may wish to give reasons in the text box.

Divorce laws should not grant overly extended or intrusive powers to the state and instead should serve to enable freedom of choice and respect people's autonomy in such personal matters. As a starting principle in relation to the rights of women in society, we believe it is retrogressive that the current law enables the state to refuse an application for divorce, effectively overriding an individual's decision on whether they wish to remain married to another person.

Divorce law reform is long overdue. The current law dates to 1973 and society has changed since then. It is not just that current divorce law is not fit for purpose, it is that it is not functioning at all. The current process is based on the premise that there are 5 facts, one of which will satisfy the court that the marriage has broken down irretrievably. The problem with the current system is that a petitioner must prove one of these facts to the court and the "fault-based" facts are overwhelmingly relied upon because they are quicker than the separation facts. In practice, the courts do not scrutinise the behaviour or "fault" alleged and discourage respondents from contesting divorces even where they indicate they do not agree with the behaviour. They will accept applications for divorce based on very weak behaviour because the drive is to deal with the paperwork with as little delay as possible. Spouses are encouraged to use this 'workaround'. Legally, it doesn't matter whether the behaviour alleged is actually the cause of the marital breakdown. But for some of the most vulnerable in our society, this approach leaves them at greater risk. For those who have access to legal advice and support, they will be let in on the secret of the 'workaround' and are able to obtain a divorce reasonably quickly. For the increasing number of women who are unable to access legal advice, they are left trying to navigate a legal system where what they expect the law to do is largely ignored.

We support the removal of the opportunity to contest or defend a divorce application and to move to a process of notification of intention to divorce. If the intention is to

maintain a requirement that a petitioner must **prove** to the court that the marriage has broken down irretrievably with the opportunity for the respondent to oppose this, then we do not support this proposal.

If the legal position becomes that you notify the court of your intention to divorce and there is no opportunity to contest or defend that application, then it is not really relevant to the legal process that there is a “ground for divorce”. It is really being maintained for social and political reasons. We understand the intention to create a simple process of declaring on the application form that the marriage has broken down irretrievably and confirming this with a statement of truth at the end of the form. This may give some spouses pause for thought but our experience is that once someone has decided to fill in the form, the decision has been made.

We do not object to irretrievable breakdown being retained as the sole ground for divorce for social and political reasons provided it does not have unintended legal consequences. In particular, the phrasing in the consultation at page 26 is:

“in the two-stage decree process that we propose to retain, the court would not be able to grant the first and interim decree (the decree nisi) **if it was not satisfied** that the marriage had broken down irretrievably” (emphasis added)

We believe this wording – “...if it was not satisfied....” – suggests a requirement to prove something to the court. It should be clear that the applicant is merely notifying the court of the fact that the marriage has broken down irretrievably. It is an administrative process, not a judicial decision.

If there continues to be a process of having to prove to the court that the marriage has broken down irretrievably, we believe this would lead to a similar level of confusion and dishonesty as we find at present.

2. In principle, do you agree with the proposal to replace the five facts with a notification process? Yes/ no/ undecided. You may wish to give reasons in the text box.

Yes

We believe the current requirement to establish one of the five facts is discriminatory against women and has a disproportionately negative effect on women who have experienced domestic abuse and/or are of a low income. We have set out below the ways in which the current requirement affects these women.

Experiences of women on a low income

In our experience, women on a low income are discriminated against by the current divorce law. It is often not financially possible for a couple to live separately for 2 or 5 years before applying for divorce; therefore, women in this situation effectively have no option but to rely on a fault-based fact. They simply do not have the ability to fund

two separate homes. Where a couple's financial settlement on divorce will be based on the competing needs of each spouse and the children, it may be not be advisable for either (in terms of protecting their own separate interests) to leave the family home.

The family courts have, over time, developed a way around this by accepting that a couple can apply for divorce based on 2 or 5 years separation where they have lived in the same household but lived "separately". In our experience, particularly if the couple have children, such an enforced state of affairs imposes needless strain. They, therefore, either resort to reliance on a fault-based fact or spend what is likely to be a very unhappy 2 or 5 years living in the same household but living separate lives.

The effect is that couples often rely on behaviour because they wish to end the marriage sooner, enabling them each to move on with their lives. The negative effect of having to do this in relation to heightening tensions in other proceedings and adding "needlessly to the human misery involved" (The Law Commission (1990) *The Ground for Divorce*, London: HMSO, para 2.16) is well documented. We are not alone in noticing the discriminatory effect of the current law on women on low incomes; the Law Commission recognised this in their 1990 report:

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. (The Law Commission (1990) *The Ground for Divorce*, London: HMSO, para 2.12)

Survivors of abuse on low incomes

The options for women on low incomes who have suffered domestic abuse are particularly stark. The support available to exit an abusive relationship is diminishing as funding is being cut to support services and refuges. In our experience, many women who have been subject to abuse are often reluctant to rely on allegations of behaviour for fear of reprisal. However, the fact is that for some of the most vulnerable in our society, the option of waiting 2 or 5 years to get divorced is, in some cases, impossible.

Some women will be able to obtain a non-molestation order and occupation order (which could include a requirement for the spouse to continue to pay the rent or mortgage on the property) or find a place in a refuge. It is highly unlikely that protective orders will last for the full 2 or 5 year period required to rely on separation. In any event, women who have left an abusive relationship should not have to wait 2 years (with the perpetrator's consent) or 5 years to finally sever their legal ties to their abusive spouse.

This means women in this situation are left having to rely on a fault based fact to apply for divorce. We speak to many women on the advice line who are still living with abusive spouses and are attempting to go through the divorce process. They may

have a non-molestation order. Our experience is that family court judges are reticent to make occupation orders where the family home may play a part in the divorce process forcing women to choose between living with their abusive spouse while divorcing or leaving the home themselves. This is something which many cannot afford to do, especially if they have children.

Survivor experiences of navigating the fault-based process

Some survivors of domestic abuse do not want to have to rely on domestic abuse in their application. This is largely due to a desire not to anger the respondent. The fear of raising and/or pursuing allegations of domestic violence within an application for divorce results in some women declining to do so, forcing them instead to remain in abusive marriages, at least for longer than they would otherwise have done.

After the application has been issued, survivors then struggle with the fault-based system because so much of it relies on co-operation from the perpetrator of abuse and/or is so complicated that survivors find the process incredibly difficult to navigate their way through. When this is put together with the heightened risks of retaliation from the perpetrator by relying on a behaviour petition, the situation becomes intolerable.

The other side of this is when survivors of domestic abuse are the respondent in divorce proceedings. The “hypocrisy and lack of intellectual honesty” (Munby P in *Owens v Owens* [2017] EWCA Civ 182, para 95) is galling to all respondents but our callers find this position particularly outrageous where they feel the reason for the relationship breakdown was their spouse’s abusive behaviour but they end up accepting facts based on their own behaviour.

If a woman is unaware of the “intellectual dishonesty” of the system, they are often scared to accept their spouse’s facts in case it has an effect on other proceedings and it is, at times, raised by the perpetrator in other court proceedings. In reality, the family court would rarely find the contents of an application for divorce relevant to any other proceedings. It is also completely unacceptable that a survivor, who cannot defend an application or cross apply because of her means or fear, should have to agree to a divorce based on fault in her own behaviour.

A further factor that has a disproportionate impact on survivors of domestic abuse is the way in which tensions that are raised in the divorce process can bleed into other proceedings such as children and financial proceedings. Even if the court will not be interested, in other proceedings, with what was written in the divorce petition, the ability of the divorce petition to raise tensions does have an effect on the way in which parties will conduct themselves in other court proceedings.

There is a final, perhaps less obvious problem with the fault-based system which relates to women’s experiences of feeling dismissed and unsupported by the system in the context of contested divorces. The process of leaving an abusive marriage is an incredibly difficult one and there are many barriers women face along the way both

from the perpetrator and the system itself. There are some survivors who will have decided that they do wish to set out the abusive behaviour of their spouses as there may be a catharsis to this process. If the abusive spouse defends the divorce, there is an impression that the courts support the abusive spouse's position. This is because the case will be listed for directions and pressure may be put on both the woman and her solicitor, if they have one, to remove the abuse from the particulars so that the perpetrator will agree to it. Undoubtedly, this stems from a desire to progress the case, not to use court time unnecessarily and to keep tensions down. However, symbolically, for the victim involved, it appears as if the court is siding with their perpetrator and dismissing their experiences of abuse. As with the discussion above about 'workaround', this is yet another example of how the current law has the capacity to undermine public faith in the family justice system as a whole.

Post separation abuse

For women in abusive relationships who wish to divorce their spouses but are unable to live separately they have no choice but to rely on fault in the application for divorce and are left with no other option but to do so while living with an abusive spouse. This increases the risk of abuse as the perpetrator will receive the application and read the facts set out by the victim while they are living together.

Women who are able to exit the abusive relationship before applying for divorce are not safe from repercussions post-separation. Research shows that post-separation abuse is common, in *Finding The Costs of Freedom* (Kelly, L., Sharp, N., Klein, R. (2014)), 88% of the women that took part in the study continued to experience post-separation abuse of some kind. The most common type of post separation abuse was physical, sexual or verbal abuse (including threats) which was experienced by 74% of the women that took part. As shown in *Finding Fault?* (Trinder, L., et al. 2017), the use of fault-based facts does raise tensions during the divorce process. As set out above, the majority of survivors of domestic abuse are subjected to ongoing abuse following separation. The use of behaviour in the petition will, therefore, place survivors at greater risk of retaliation from the perpetrator. If they remain living in the same household, this risk is even higher. This knowledge can have a significant effect on the ease with which survivors can navigate their way through the system.

It is well understood by professionals working in this area and shown in *Finding Fault?* that being able to keep tensions as low as possible will make the whole process easier. It is obvious that a perpetrator receiving an application on which the survivor has listed "incidents" of domestic abuse will raise tensions and therefore place the survivor at greater risk of ongoing abuse. This is a risk even when a watered-down application is issued. Women who do not have legal advice are more likely to set out the domestic abuse if it is the actual reason for the relationship breakdown and, therefore, are at greater risk of further abuse.

Access to legal advice

There are still a significant number of survivors who cannot afford to pay for legal advice but are not eligible for legal aid (either because they fail the oppressive means test for legal aid or because they do not have a form of evidence of domestic abuse which can enable them to access legal aid). Women who can afford to instruct a solicitor will be advised that they do not have to rely on domestic abuse if they do not wish to because an application based on behaviour with mild particulars can be issued in order to keep tensions as low as possible. However, if women are not able to come across this information because they are on a low income and cannot afford legal advice or have particular vulnerabilities, it is easy to see why they would believe they have to set out the domestic abuse as the reason for divorce.

There are a number of reasons why women believe this. These include the public understanding that “unreasonable behaviour” means something serious and the belief that the facts relied on for divorce should be the actual reason for the relationship breakdown. It is really a legal technicality that there does not have to be a link between the reason the marriage has broken down and the fact relied on in the application for divorce. Any layperson would expect one to be the cause of the other.

It is completely unacceptable that the current system puts survivors in a position where their experiences of abuse are undermined by the expectation that they “water down” the behaviour of the perpetrator. This is particularly damaging in the context of controlling and coercive behaviour where a survivor may have spent years being told that their experiences and feelings are not legitimate. The impact that this has on the survivor is rarely (perhaps even never) considered.

Retaining the five facts in parallel to the new procedure

We have heard suggestions that the five facts should be retained and that the notification-based divorce procedure should be introduced in addition to, not instead of, the current procedure. We disagree with this suggestion and are of the view that the facts should be removed altogether and replaced by a new notification based procedure. Retaining the five facts would mean that many of disadvantages of the current system will remain and create additional disadvantages, for example:

- There will still be the potential for increased hostility if the petitioner chooses unreasonable behaviour and all the consequences related to this which have been discussed above;
- There will still be the potential that a survivor who is the respondent in divorce proceedings will be pressured to accept reasons presented by her abuser as the reasons why the marriage broke down;
- There will still be the potential that parties will feel the need to state allegations or defend allegations in case it has an impact on other related proceedings;
- The system will become even more complicated (not simpler, which is the intention), especially for litigants in person who will now have to choose between two parallel procedures and may be confused about the consequences of each option;

- Two systems will be more expensive to administer than one simplified system. This is not a sensible use of resources and there are many better ways of using any extra resources including improving access to legal aid, providing special measures in all courts, banning direct cross-examination of victims by perpetrators, increasing the number of judges and court staff so that families and children do not have to wait many months for hearings.

3. Do you consider that provision should be made for notice to be given jointly by both parties to the marriage as well as for notice to be given by only one party? Yes/ no/ undecided. You may wish to give reasons in the text box.

Yes

We support the addition of a provision for notice to be given jointly. We agree that in some circumstances, this may be a good option for spouses who wish to attempt as amicable a divorce as possible.

However, it must be the case that once a joint application is made, it is possible for one spouse to apply to finalise the divorce or there is a risk that if one spouse changes their mind, the other will be trapped, having to reapply and start the process from the beginning.

4. We have set out reasons why the Government thinks it helpful to retain the two stage decree process (decree nisi and decree absolute). Yes/ no/ undecided. Do you agree?

Yes,

We understand the Government's proposal is that the applicant will make an application to the court, notifying the court of the fact that the marriage has broken down irretrievably and upon receipt of that application, the court will provide the decree nisi which starts the minimum timeframe. After the minimum period has elapsed, the applicant can apply for the decree absolute.

We agree with maintaining a two stage process to enable couples to resolve financial issues before finalising their divorce. This is an important process and there are important legal rights that come to an end as soon as a couple is divorced such as home rights, inheritance rights and pension rights. Ideally, couples will resolve the financial arrangements before the marriage is legally ended so that they do not lose these rights and having a two stage process enables this.

There are also other technical details that need to be considered as part of this process. These are issues which are currently resolved prior to or at the time of the grant of decree nisi.

The first is how service will fit into the two stage process. We believe that the proposed timeframe should start running from when the application is issued. The papers have to be served on the respondent and substituted or deemed service applications made in the event that it is not possible to serve by post. The court will have to have a mechanism through which they have confirmation that the respondent has received the papers before the divorce can be finalised.

The second is jurisdiction. At the moment, if a party does not believe the court in England and Wales has jurisdiction to hear the divorce they raise this in the Acknowledgement of Service and it will be resolved prior to the decree nisi being granted. Under the new system, should a party wish to contest the court's jurisdiction they will require a mechanism through which they can apply to the court to raise this issue.

The final technical issue would be applications for costs which are dealt with at the decree nisi hearing, in the event that a spouse has applied for costs.

We do not believe these issues are insurmountable nor do they require a different process to that proposed in the consultation, but they do need to be accounted for in any new system. When considering the appropriate period between the two stages account should be taken of the other processes that may be involved in an application (such as service) and whether these will add to the length of time it takes to get divorced or whether the minimum timeframe should run from application and these issues can be resolved within the minimum timeframe.

5. What minimum period do you think would be most appropriate to reduce family conflict, and how should it be measured? 6 weeks/ 3 months/ 6 months/ 9 months/ different/ undecided. Please give your reasons in the text box.

We favour a short minimum period to ensure that women who are divorcing abusive husbands are able to do so quickly while enabling those who have financial arrangements to resolve have the time to do so and do not risk losing important financial rights by simply not acting quickly enough. We favour a minimum timeframe of 3 months and oppose any minimum timeframe longer than 6 months.

We believe that the minimum period chosen needs to take into account the system as a whole. For example, at the moment there is a short minimum period of six weeks and one day between decree nisi and decree absolute but the process itself takes many months because of the length of time it takes the court to process paperwork and the steps that need to be taken before decree nisi stage. When deciding what the minimum period should be, the Government needs to put this in the context of the how long the whole process will take from sending the application to the court to receiving the final order.

Another important aspect of the minimum period is how this will work with applications for financial order. It is currently possible for the court to grant a financial order once the decree nisi has been made. We have heard suggestions that the minimum

timeframe should have passed before any further applications can be made including financial orders. We strongly oppose this. It must be possible to apply to the court for financial orders as soon as the application for divorce is made. It would be unacceptable to have to wait for the timescale to pass before being able to apply to resolve the financial arrangements otherwise women in abusive relationships who cannot afford to live separately would be trapped, waiting out the timeframe before they can take steps to finally separate from an abusive husband.

6. Are there any circumstances in which the minimum timeframe should be reduced or even extended? Yes/ no/ undecided. If so, please explain in the text box.

Yes.

We do not believe that having already lived apart for a certain period of time should not be a reason to reduce the timescale. Although we have sympathy for couples who will find the timescale frustrating if they have already lived apart for some time and agreed all of the arrangements on separation, we believe it is more important to implement a system that removes elements of the divorce process that can be used as a bargaining tool for one spouse to exert control over the other or achieve a more favourable outcome simply because the other wants to process to be shorter. As a result, we do not believe that the minimum timeframe should be reduced or extended without good reason and without an application to the court.

We can envisage exceptional circumstances where it might be appropriate to shorten the minimum timeframe. There should be a simple application form for this purpose.

We believe that there should be a process under which a spouse (applicant or respondent) can apply to delay the granting of the decree absolute. There are a number of reasons why a party may seek to delay the granting of the decree absolute.

At present, it is possible for the court to delay the grant of a decree absolute under sections 9 or 10 of the Matrimonial Causes Act 1973 or under the inherent jurisdiction. The law is inaccessible to a lay person managing their own divorce. These provisions will have to be amended in any event as some are dependent on the specific fact chosen and they will make no sense under the proposed divorce process. We envisage the court being given a discretion to delay the grant of decree absolute on application from either the applicant or respondent where it would be equitable or just to do so. We believe the court would be likely to draw heavily on the current case law in interpreting this which largely relates to complicated financial proceedings where it would make a significant difference to one spouse to no longer be legally married, for example, where money is held in another country.

7. Do you think that the minimum period on nullity cases should reflect the reformed minimum period in divorce and dissolution cases? Yes/ no/ undecided.

No

We do not believe that reforms that simply replicate the proposed divorce process for the nullity process are appropriate. Nullity cases are very different in nature and in some cases, such as forced marriage, it would not be appropriate to have any timescale.

This does not mean that we believe the current law in relation to nullity does not need to be reviewed. There are a number of aspects of the law in relation to nullity that are outdated such as the ability to nullify a marriage that is not consummated or where the wife was pregnant by someone else at the time of the marriage. However, reform of the law in relation to nullity is something which should be consulted on properly before any changes are made.

8. Do you agree with the proposal to remove the ability to contest as a general rule? Yes/ no/ undecided. You may wish to give reasons in the text box.

Yes

Given what is known about the lack of importance placed upon the contents of the application in other proceedings, where there has been domestic abuse in a marriage, it is not unreasonable to conclude that defending a divorce is often used as a method to perpetuate further abuse. This is borne out by research in relation to children proceedings which supports the argument that perpetrators of abuse frequently use the Family Court as a method of perpetuating their abuse and, unfortunately, the Family Court is not always equipped to deal with it. It was confirmed by recent research which found that, “the ability to defend can also be misused. There were cases where it appeared respondents were defending the divorce as a means to exercise control, to be obstructive or as a bargaining tactic.” (Trinder, L., et al. 2018 *No Contest: Defended Divorce in England and Wales*, Nuffield Foundation, page 80)

The effect on survivors of domestic abuse is significant and is present from when the intention of the respondent to defend the divorce is known, through to the final hearing. Women will continue to experience emotional and psychological harm throughout the process and perpetrators are able to use it as a method of continuing to intimidate and harass their spouse. The prospect of defending a divorce opens up additional reasons to correspond with each other, additional pressures of preparing court documents and opportunities for the perpetrator to undermine the victim in writing.

There are also the additional court hearings. Women’s experiences of attending court hearings where there has been domestic abuse in the relationship are largely very negative. Issues relating to the lack of special measures and cross-examination in the family court have been widely discussed by Rights of Women and other organisations supporting survivors of domestic abuse. Despite promises to the contrary and a stated

commitment, the Government has failed to ban the direct cross-examination of victims by perpetrators. Any reform to divorce law should remove the ability to defend a divorce. This would remove this avenue of abuse for perpetrators.

Introducing a notification based divorce process would not completely overcome all the problems experienced by women on low incomes and/or facing abuse but would certainly make the process easier and potentially safer. Their safety needs to be considered throughout the process as it is developed.

9. Are there any exceptional circumstances in which a respondent should be able to contest the divorce? Yes/ No/ undecided. Please explain these exceptional circumstances in the text box.

No.

We refer to our answer to question 8. We see no reason why it should be possible to force someone to stay married to someone they do not wish to be married to. We wish to make clear that our position in relation to applications to delay the grant of the decree absolute are about delaying the divorce and not about preventing it from happening at all.

10. Do you agree that the bar on petitioning for divorce in the first year of the marriage should remain in place? Yes/ no/ undecided. You may wish to give reasons in the text box.

No

We do not believe there is any justification for a bar on petitioning for a divorce in the first year of marriage. Abuse can happen at any time in a marriage, including in the first year so we see no reason to have a bar preventing women from applying to leave a marriage as quickly as possible.

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

We have no comment on the proposals to retain the power of the Queen's Proctor.

Nor do we have any comment on the power to stay proceedings if there is a prospect of reconciliation save to make clear that it must be both parties that are seeking this.

We do not believe it is necessary for legal practitioners to certify that they have discussed reconciliation with their clients prior to the application for divorce. Our view is that this requirement is based on a flawed understanding of what happens when a spouse seeks legal advice. The nature of giving advice on divorce and the consequences of it will, of course, make anyone who is unsure think twice. It is not the solicitor's decision to file for divorce, they give advice and if the client wishes to

proceed, then they proceed. However, we do not object to it remaining if it means the Bill is more likely to pass.

Terminology

The terms ‘petition’, ‘decree nisi’ and ‘decree absolute’ are alien to anyone outside the legal profession or divorcees. The experience of the women that call our advice line is that these are terms that need to be explained to them as they have not come across them before. This is a good opportunity to stop using these terms altogether. We would suggest replacing ‘petition’ with ‘application’, which is already being used interchangeably with ‘petition’ by the courts and practitioners and on some of the formal paperwork. We suggest ‘decree absolute’ is replaced with ‘divorce order’. The paperwork sent to the respondent once the application has been made could be referred to as the “notice of intention to divorce”. Even if these terms are not adopted, sensible terms that everyone can understand and, most importantly are not Latin, should be used.

Thinking about the safety of survivors

Research has shown that perpetrators of domestic abuse use the court system as a way of continuing their abuse. Sometimes through direct intimidation in the court building but more often by exerting power and control through the use of delaying tactics. In *Finding the Costs of Freedom*, the use of the divorce process was experienced by 33% of women as post-separation abuse through the delay or holding up of divorce proceedings (*Finding the Cost of Freedom*, page 49). This may be as a result of failing to respond to correspondence or acknowledge service, failing to comply with directions, making unnecessary applications or threatening to defend the divorce. This whole process is particularly distressing for survivors of domestic abuse.

We acknowledge that the ability of a perpetrator to use the court system in this way would not be entirely removed by a reformed divorce system. There are likely to be other legal issues that need to be addressed through the courts. However, a combination of simplifying the divorce process and removing the requirement to set out the perpetrator’s fault would remove some of the avenues through which the perpetrator can abuse the system and potentially reduce the risk of perpetrators pursuing those avenues that remain.

We would like to see a system established that has considered how an abusive spouse might exploit the system at each stage of the process to ensure that these problems are not designed into the system. If there are certain elements that have to be maintained for legal reasons, then relevant support, information and signposting should be provided to ensure that any risk of harm is minimised as much as possible.

12. We invite further data and information to help update our initial impact assessment and equalities impact assessment following the consultation.

N/A