

Title: Reducing Family Conflict: Reform of the legal requirements for divorce IA No: MoJ017/2018 RPC Reference No: Lead department or agency: Ministry of Justice (MoJ) Other departments or agencies: HMCTS	Impact Assessment (IA)			
	Date: 14/09/2018			
	Stage: Development/Options			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
Contact for enquiries: Reducing-Family-Conflict@justice.gov.uk				

Summary: Intervention and Options **RPC Opinion:** N/A

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
N/A	N/A	N/A	N/A	Not in Scope

What is the problem under consideration? Why is government intervention necessary?
 The current legal process for obtaining a divorce, civil partnership dissolution and judicial separation ("matrimonial") proceedings has been shown to aggravate conflict between parties. Currently it is necessary to establish irretrievable breakdown by proving one of five 'facts' to obtain a decree or order involving stress, effort and costs for the parties, yet may not reflect the real reason for the breakdown. Government intervention is necessary to reduce the possible harm from conflict during and after the legal process, either directly (for spouses) or indirectly (for children and other family members).

What are the policy objectives and the intended effects?
 The objective is to remove from the legal process the requirement to establish irretrievable breakdown by proving a 'fact'. We propose to retain safeguards that ensure the decision to legally end a marriage or civil partnership remains a considered one, with sufficient opportunity to change course. The revised process will remove legal requirements that may achieve nothing for spouses or for society and that may increase conflict with potential consequential poorer outcomes for children. It is also proposed to remove the opportunity, in most cases, for one spouse to contest (defend) the proceedings, preventing coercive and controlling behaviour through the legal process. Most divorces are not contested.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 Two options are considered in this Impact Assessment:
 Option 0: Do Nothing (Baseline): Maintain the current legal process for establishing irretrievable breakdown through proving one or more of the following five "facts": adultery, 'unreasonable behaviour'¹, desertion, or separation for two years (if both agree to the proceedings) or five years otherwise.
 Option 1: Remove from the legal process the requirement to establish irretrievable breakdown by proving one of the five facts. One (or possibly both) spouses would instead give notice to the court that their marriage or civil partnership has irretrievably broken down.
 Option 1 is the preferred option as it best meets the policy objectives.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year				
Does implementation go beyond minimum EU requirements?			N/A	
Are any of these organisations in scope?			Micro Yes	Small Yes/No
			Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:	
			Non-traded:	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:  Date: 14/09/2018

¹ 'Unreasonable behaviour' is often used as a short-hand for the full legal test, which is that the respondent spouse has behaved in such a way that the petitioning spouse cannot reasonably be expected to live with the respondent.

Summary: Analysis & Evidence

Policy Option 1

Description: Remove the requirement to prove a “fact” from the legal divorce process

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)
Low	Optional		Optional		Optional
High	Optional		Optional		Optional
Best Estimate					
Description and scale of key monetised costs by ‘main affected groups’					
N/A					
Other key non-monetised costs by ‘main affected groups’					
There would be implementation costs to HM Courts and Tribunals Service (HMCTS) for making changes to systems and training staff and transition impacts from dealing with temporary impacts of volume changes. There would be implementation costs to legal professionals and legal stationers from updating business processes and from changes to customised court application forms.					
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)
Low	Optional		Optional		Optional
High	Optional		Optional		Optional
Best Estimate					
Description and scale of key monetised benefits by ‘main affected groups’					
N/A					
Other key non-monetised benefits by ‘main affected groups’					
Divorcing couples and their children would benefit from a reduction in conflict affected matrimonial proceedings. There would also be cost savings to divorcing couples who would no longer have to spend time and effort (including through a solicitor) on working up narrative particulars in support of conduct or separation based facts. Changes in process timing will provide a minimum fixed period for the legal process to ensure the parties have sufficient time to make arrangements for the future. We propose to focus on the period between the first stage (decree nisi) and the final decree of divorce (decree absolute) but will consider any alternatives put forward in consultation.					
Key assumptions/sensitivities/risks					Discount rate
Assume no change in divorce rate.					
Assume that the loss in revenue for the legal profession will be offset by lawyers redirecting their resources for productive uses elsewhere in the economy of equal or next best economic value.					
No quantitative assessment is being made at this stage but once we have consulted on the particulars of the revised process, we will be in a position to conduct a robust quantitative Post-Consultation Impact Assessment.					

BUSINESS ASSESSMENT (Option 1)

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

Evidence Base (for summary sheets)

A. Background

Introduction

1. The law on divorce and judicial separation in England and Wales is set out in the Matrimonial Causes Act 1973, with mirroring provisions for dissolution of civil partnerships in the Civil Partnership Act 2004. The court will grant a decree or order for divorce or dissolution only if it is satisfied that the marriage or civil partnership has broken down irretrievably. A spouse seeking a divorce must give evidence of one or more of five 'facts' (or one of four for dissolution of a civil partnership). When seeking a judicial separation there is no requirement to establish irretrievable breakdown but one of the facts must nevertheless be demonstrated. This means that an incentive exists under the current legal requirement to give evidence of spousal conduct in order to avoid waiting a minimum of two years for a separation 'fact' to apply. This has been shown to introduce or aggravate family conflict and impair agreement on future arrangements, especially about children. Parents, in particular, who are ending their relationship with each other need to maintain a positive and constructive ongoing parenting relationship for the sake of their children.
2. Of the 106,713 divorces in 2016, 27% were for separation (two years and consent), 15% were for separation (five years), 11% adultery, 45% behaviour, with the remainder either desertion or a combination of adultery and behaviour.²
3. In cases where adultery, behaviour or desertion are proven, the minimum time between decree nisi and decree absolute is six weeks and one day. However, most cases take longer than this and the mean time between decrees in 2017 was 25 weeks.³

Problem under consideration

4. 'Fault' can create and exacerbate conflict and there is no evidence that the current legal process protects marriage (Trinder 2017)⁴. The key issue driving the policy is to reduce conflict between spouses who have made the considered decision to legally end their marriage or civil partnership, particularly when the futures of any children they have may be at stake.
5. The research referenced in the previous paragraph highlights how reliance on the conduct-based facts can shift focus from the wellbeing of children onto the alleged behaviour of the adult parties. Even in situations where relations between the parties were initially amicable, introducing conduct allegations can distort negotiations about property, finance and future child care arrangements. This may encourage damaging behaviour from the parties for example; manipulation of children, threats to share details of the alleged conduct of the other spouse with their children or the court. Such

² ONS (2017) Divorces in England and Wales Dataset (Table 5)

³ MoJ (2018) Family Court Statistics Quarterly: January to March 2018 (Table 12)

⁴ Trinder, L., Braybrook, D., Bryson, C., Coleman, L., Houlston, C. and Sefton, M. (2017) Finding Fault? Divorce Law and Practice in England and Wales

behaviour is likely to be highly detrimental to a child and undermine their relationship with their parents. Individuals divorcing will also save the time, cost and effort needed to establish that their marriage or civil partnership has irretrievably broken down.

6. The Government has concluded that it is necessary to remove the requirement to prove a “fact” and is now consulting on the detail of implementation. The consultation will ask for views on, among other matters:
 - Moving to a notification of irretrievable breakdown system
 - The minimum length of time for the revised legal process to end a marriage (or civil partnership), which it is proposed should focus on the period from decree nisi to decree absolute (or conditional order to dissolution order)
 - Removing the ability of a spouse to contest these matrimonial proceedings
 - Retaining the bar on divorce or civil partnership dissolution in the first year following legal formation of the relationship
 - Retention of other procedural requirements and safeguards. This includes the requirement that legal professionals should certify whether they have advised their client about the possibility of reconciliation and sources of appropriate help and advice.
7. This Impact Assessment (IA) seeks to support the consultation. A further IA will therefore be prepared post-consultation which will examine options for the reform of the law governing these matrimonial proceedings, following the consideration of consultation responses.

B. Rationale and policy objectives for intervention

Policy Rationale

8. The rationale for intervention is to reduce the harm resulting from conflict created by the use of conduct facts within matrimonial proceedings. This is expected to lead to a less confrontational process and thereby allow the discussions relating to children, property and finance to progress more effectively.

Policy objective

9. The associated policy objective of the Government’s options considered in this IA is to remedy the difficulties created by the current statutory requirement to establish irretrievable breakdown by proving a conduct or separation ‘fact’. The preferred option would seek to amend the law primarily to the extent that it relates to that requirement. The basic structure that underlies the legal process in these matrimonial proceedings would remain the same, including safeguards for reconciliation and the two-stage process for legal ending a marriage or civil partnership which will continue to provide couples with an opportunity to change their minds. The balance of changes and retained provisions would ensure that the decision to initiate matrimonial proceedings remains a considered one, with the opportunity for the couple to change course, while removing the legal requirements that benefit neither them nor society.
10. In doing so, the changes aim to reduce acrimony and conflict and the risk that this leads to poorer outcomes for children. Only a small number of matrimonial proceedings are

contested and one driver is for perpetrators to exert power and control in cases of domestic abuse⁵. In December 2015 a new domestic abuse offence to capture coercive and controlling behaviour in intimate and familial relationships was introduced into the Serious Crime Act 2015. This offence recognises that those who suffer psychological and emotional abuse are just as much victims as those who suffer physical violence. The policy may confer some benefits to those suffering domestic abuse. Removing the opportunity for respondents in most cases to contest matrimonial proceedings or evidence relied upon in them also removes the risk that a perpetrator could continue to coerce and control their spouse through a protracted legal process. This policy does not directly change the law on offences that constitute domestic abuse or protective remedies available to victims, which remain governed by distinct legislation.

C. Affected Stakeholder Groups, Organisations and Sectors

11. The groups most affected by the options assessed in this IA are as follows:

- Spouses who wish to bring their marriage or civil partnership to a legal end, or who wish to legally live apart without certain ongoing obligations to each other, and their children and families
- HM Courts and Tribunals Service (HMCTS) and the family judiciary
- Legal Profession

D. Options under Consideration

12. In order to meet the policy objectives, two options are assessed in this IA:

- **Option 0: Do Nothing (Baseline)**
- **Option 1: Remove from the legal process the legal “fact” requirement to establish irretrievable breakdown by proving one of the five facts.**

13. The Government’s preferred option is option 1 as it best meets the policy objectives.

Option 0: Do Nothing (Baseline)

14. Under this option the current divorce system would remain in place. This would require continued use of one or more conduct or separation “facts” to meet a legal threshold to establish irretrievable breakdown.

15. Continued use of the conduct facts (adultery, behaviour, or desertion) will retain the incentive for spouses to make allegations about the other’s conduct in order to secure a divorce without otherwise waiting a minimum two years to use a separation fact. The continued use of conduct facts will continue to introduce or increase conflict in some cases, working against other policies intended to reduce conflict and support better outcomes for children and families.

⁵ Trinder, L., Sefton, M. (2018) No Contest: Defended Divorce in England & Wales

Option 1: Remove legal “fact” requirement from the divorce process.

16. The option would remove from the legal process the legal requirement to establish irretrievable breakdown by proving one of the five ‘facts’. The underlying law would in most other respects remain the same except in relation to the timescale in the divorce process. The Government proposal focuses on the period between interim and final decrees of divorce (and orders for civil partnership dissolution) and a longer minimum period of six months to better support couples to make the transition and finalise their arrangements for the future.
17. Provisionally, the Government envisages utilising a notification process where one (or possibly both) spouses give notice to the court of the irretrievable breakdown of their marriage or civil partnership, retaining this as the sole legal ground for divorce or civil partnership dissolution but removing the need to demonstrate one of the conduct or separation facts. The court would then be able to grant a provisional decree of divorce (the decree nisi) or dissolution of a civil partnership (conditional order). Either spouse would then be able to apply to the court to finalise the legal ending of their relationship through a decree absolute (in respect of divorce) or a dissolution order (in respect of a civil partnership). Under the current law, a period of at least six weeks must elapse before a final decree or order may be obtained.
18. The Government also believes that the digitisation of less efficient paper-based processes combined with the removal of the need for parties to draft particulars in support of a ‘fact’ (and consideration by the court of those particulars) would likely result in a considerable reduction in the period from the start of the legal process to the first interim decree or order. The Government is therefore proposing to set a minimum timeframe between the interim and final decree or order of six months as a period during which couples would finalise arrangements for the future but has set out options for consultation on alternative periods. In all other respects, the underlying law will remain the same.
19. The family court would retain its function in granting interim and final decrees and orders for divorce and dissolution and orders for judicial separation. There are important public policy interests in ensuring that only a legally valid marriage or civil partnership is capable of obtaining a legal divorce, dissolution or judicial separation. It is also important that the family court exercises its powers only in respect of cases where it has the legal jurisdiction to do so, and to guard against the risk of fraudulent proceedings.
20. The court would no longer be required to inquire into the alleged conduct or separation facts in order to be satisfied as to irretrievable breakdown. The Government believes that spouses should have autonomy to decide for themselves that their marriage or civil partnership has broken down beyond the point where it can be saved, and the legal process should not put in place unnecessary barriers to bringing their legal relationship to an end. Along with removing the conduct and separation facts, the new policy also proposes to remove the opportunity to contest the divorce because it serves no practical purpose. We seek views on this and whether in any exceptional circumstances the ability to contest a divorce or civil partnership dissolution should be retained.
21. The Government is satisfied that citing conduct in legally ending a marriage or civil partnership serves neither the interests of the parties nor society, and will not therefore

be consulting on the principle of removing these facts together with the separation facts. Instead, the Government is consulting on the mechanics of how the amended legal process should work. The views on which the consultation is seeking input are outlined in paragraph 6.

E. Cost and Benefit Analysis

22. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.
23. Where possible, this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the options under consideration. These impacts are compared to those of the 'do nothing' option. As the 'baseline' option is compared to itself, the costs and benefits are necessarily zero, as is its Net Present Value (NPV).
24. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, positive or negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are non-monetisable.
25. The costs and benefits presented for option 1 are based on the presumption that the revised system would be implemented as laid out in this IA. However, all these costs and benefits will be subject to revision post consultation. In addition, no quantitative assessment is being made at this stage but once we have consulted on the particulars of the revised process, we will be in a position to conduct a robust quantitative Post-Consultation IA.

Option 1: Remove legal “fact” requirement from the divorce process.

Costs of Option 1

HMCTS

26. There would be implementation costs to HMCTS from implementing the revised legal process. These would include; implementation team costs, business redesign costs, training costs and costs of producing guidance.
27. As divorce in most cases would no longer be able to be contested, in the very small number of cases that are currently contested and have court hearings we expect savings to HMCTS.
28. It is also possible that there could be a temporary increase in the volume of matrimonial proceedings. This would be as a result of spouses currently planning to wait to use a two or five year separation fact being able to obtain a divorce, civil partnership dissolution or judicial separation at the point of implementation of these reforms (without completing the separation period currently required) and move to a notification process. The type of case that this could apply to is detailed in the benefits section below (paragraphs 34 and

35). There may also be those who choose, whilst the revised process is being implemented, to delay their application in order to use the revised process.

29. The net impact of this could cause a temporary peak in work for HMCTS, who would require additional administrative and judicial resource to maintain timeliness or, during the transition period, some divorces may take longer to progress to the decree nisi. Similarly, there may be temporary impacts for court fee income. These are expected to be short-term transition issues and once any peak is dealt with we would expect timeliness to return to normal.
30. The scale of this peak will be modelled post consultation once key variables including the minimum period are known. It should be noted that this spike would not be indicative of any change in the divorce rate, but simply a change in the timings of when divorces are occurring.

Legal Profession

31. We would expect this option to reduce work for the legal profession as lawyers are involved in the process of drafting supporting particulars for a conduct or separation 'fact'. As is standard practice in an IA, it has been assumed that the loss in revenue to the legal profession will be offset by a reduction in the work conducted. Therefore, it has been assumed that lawyers would be able to redirect their resources for productive uses elsewhere of equal or next best economic value.
32. We expect there would be business as usual implementation costs to legal professionals and legal stationers from updating business processes and customised court application forms to reflect changes to the legal process. We expect these costs to be relatively small but would aim to mitigate them through a suitable lead-in time ahead of implementation and by aligning these changes so far as possible with any other business as usual changes around common commencement dates.

Benefits of Option 1

Divorcing Couples

33. The primary benefit of Option 1 is that it is expected to reduce the level of conflict between parties in matrimonial proceedings by no longer requiring a conduct "fact" to be proven. This in turn is expected to encourage divorcing couples to focus more on the future rather than dwelling on the events of the past and prevent a worsening of the situation for the couple and their family, in particular for their children.
34. In cases where separation would now otherwise be cited to establish irretrievable breakdown, there is likely to be a significant shortening of the time to secure a divorce. This is because the necessity to wait either two years (if the parties both agree) or five years if they do not to establish irretrievable breakdown will be removed. Along with the removal of the ability to contest, this should reduce stress for those involved and allow parties to continue with their lives and to plan for their future.
35. Conversely, there may be a disbenefit for some new cases where the time between the interim and final decree or order could increase over the current minimum of six weeks and one day. This is likely to be mitigated with some potential shortening of the period from initiation of proceedings to interim decree or order. This would be due to the impact of digitisation of paper-based processes that is currently occurring and more particularly

from the removal of ‘facts’ and supporting particulars from the legal process. Parties have up to a year after the issue of the interim decree or order to apply for the final decree or order legally ending their marriage or civil partnership.

36. The revised legal process should reduce legal costs to spouses in matrimonial proceedings. As referenced in paragraphs 31 & 32, there is no expected ongoing net impact on lawyers, beyond some initial implementation costs. Therefore, we can consider this a benefit to spouses who would previously have incurred additional legal costs.

37. The removal of contested divorce, dissolution and (judicial) separation proceedings would also reduce legal costs to those who would have previously gone to a legal hearing on the case. The revised process would be easier to navigate and so could also impact the rate of litigants in person as there may be a reduced need for formal legal representation.

Net Impact

38. The Government believes that, for the reasons laid out in this impact assessment, option 1 – the removal of legal “fact” from the process – would have a net benefit to society. Once we have consulted on the particulars of the revised process, we will be in a position to conduct a robust quantitative Post-Consultation IA.

F. Assumptions and Risks

39. The assessment of options in this IA are based on a number of assumptions. In the table below, we set out some of the key assumptions we have made and the potential impact if that assumption is not accurate.

Assumption or risk	Impact of assumption not holding
We have assumed no changes to the divorce rate.	Evidence from international jurisdictions suggests no correlation between the existence of a ‘no-fault’ process and increased divorce rates (Trinder et al 2017) ⁶ . However, there is a possibility that it could impact rates and consequently costs and benefits of the policy. However, we do not anticipate that it would encourage those families who still have a chance of reconciliation to seek divorce or dissolution of a civil partnership.
We have assumed a reduction in the period from initiation of proceedings for a divorce or civil partnership dissolution to interim decree or order due to existing work to digitise the legal process and, in particular, due to the removal of ‘facts’ and supporting particulars from the legal process. We	This would affect the demand impacts upon implementation.

⁶ Trinder, L., Braybrook, D., Bryson, C., Coleman, L., Houlston, C. and Sefton, M. (2017) Finding Fault? Divorce Law and Practice in England and Wales.

<p>have then assumed that the minimum length of time from interim decree or order to final decree or order is six months but as noted the Government is consulting on alternative options.</p>	
<p>We have assumed that there is no impact of these changes on the outcome of divorce settlements.</p>	<p>Spousal conduct in relation to a divorce petition is a separate consideration from spousal conduct as a matter the court must take into account (if it would be inequitable to disregard it) in other proceedings about finances.</p>

Status of Marriage

- 40. Whilst there may be some views that the proposed changes would devalue marriage, the existing evidence does not seem to support this. Whilst the changes would remove the conduct and separation facts from the legal process, they would not remove irretrievable breakdown as the sole ground for divorce, civil partnership dissolution or judicial separation or impact on any of the services for couples to attempt to reconcile if they so choose. Additionally, in many cases, the proposed changes would reduce stress and acrimony, not time.
- 41. Under the present system, there is the potential that a spouse seeking to assign fault and setting out subjective reasons for why the marriage or civil partnership has irretrievably broken down can lead to increased acrimony and conflict with the other spouse whilst having no impact on the rate of divorce or dissolution.

G. Wider Impacts

Equalities

- 42. In developing these policy proposals, we have assessed their potential equality impacts in line with the public sector equality duty. For further detail please consult Annex D Consultation Equality Impact Assessment, published alongside this IA.

Family Impact Test

- 43. As set out above, the changes would ensure that the decision to divorce remains a considered one, while removing the legal requirements that benefit neither the couple or any children nor society. In doing so it aims to reduce acrimony and conflict and the risk that this leads to poorer outcomes for children.

H. Implemantion and Monitoring

Implementation plan

- 44. The purpose of the consultation is to consult on the mechanics of how divorce law should work. Regardless of the outcome and how the final process looks, we anticipate inevitable changes to court process, judicial training and the IT systems.

45. How such changes are implemented will be addressed as part of a post-consultation Impact Assessment.