Law Society response
Reform of the legal requirements for divorce
December 2018
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Preface

1. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

Introduction

2. We welcome the opportunity to respond to this consultation and strongly support this move to remove fault from the divorce process. It has been long established in the legal and academic community that the requirement for divorcing couples to allege one of the five fault-based facts exacerbates conflict between separating couples. This does not only result in drawn out protracted proceedings, but crucially, it makes it much harder for separating parents to focus their minds on the needs of their children when making child arrangements.

3. We also welcome the proposal to allow for joint applications, though an application for the final decree must be allowed by a sole applicant if the other applicant has change of heart.

4. The questions in this consultation around the length of the divorce process and the two-stage decree process are more difficult to answer. It is not clear how these proposals are intended to operate in practice. For example, question five asks respondents to suggest a timeframe for the divorce process which will limit the harm caused to families. In our view, further consultation on the length of the divorce process would be welcome, particularly given the changes being made to the court process through the HMCTS reform programme. It is also difficult to envision the practical implications of these proposals without knowledge of the government’s intention for financial proceedings, which are a key aspect of divorce for many families.

5. The length of time it will take couples to legally dissolve their union is necessarily impacted by the accessibility of expert help and advice. Government has tried and failed to increase the take up of alternative dispute resolutions to ease the cost and burden of court caseloads. For example, the move to mandate MIAMs (Mediation Information Assessment Meetings) for disputes around finances and child arrangements has been proven to have failed\(^1\). The removal of legal aid has meant that couples are not encouraged towards mediation as they once were before the devastating cuts introduced through the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

6. We reiterate our ongoing recommendation that reviews into aspects of family law must be taken holistically. The divorce process cannot simply be understood through the lens of how long it takes parties to reach decree nisi or decree absolute. To successfully reform the process to ensure it operates efficiently, both for government and users, all

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aspects of the process must be clear, easy to understand and navigate.

7. Divorcing couples must be supported and empowered to understand their financial responsibilities to each other, and any children of the relationship, as well as supported to focus their minds on the best interest of those children. It is simply not enough to move the application process online and hope for the best. We therefore strongly recommend the reintroduction of legal aid for early advice for separating couples.

Consultation questions

1. Do you agree with the proposal to retain irretrievable breakdown as the sole ground for divorce? You may wish to give reasons in the text box.

Yes.

2. In principle, do you agree with the proposal to replace the five facts with a notification process? You may wish to give reasons in the text box.

Yes. The recent research conducted by Trinder et al (2017) demonstrates that use of the fault-based facts can have a destructive impact on families and can promote conflict and acrimony. Furthermore, the fact that fault is required for the divorce petition, yet is very rarely relevant in financial remedy proceedings, can cause confusion for parties. There is no ascertainable purpose for the state requiring petitions to be based on fault. Indeed, the evidence suggests that requiring parties to allocate blame can have a detrimental impact on children, which is something that the state should avoid at all costs. However, government must carefully consider the impact on communities where an element of fault or blame is required for a religious divorce.

As part of its drive for efficiency, it is not clear why government did not use this opportunity for reform to explore an administrative divorce process. There is certainly an assumption within the legal profession that an administrative process is the most sensible option, given the move towards online systems and a streamlining of legal processes.

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? You may wish to give reasons in the text box.

Yes, we would welcome parties being the option to give notice jointly. Allowing joint petitions recognises the reality that sometimes both parties have come to realise the relationship has broken down. This would also support the position that the Government want to recognise individual’s personal autonomy.

However, it may add further confusion to the process. Would the government be suggesting that the ‘petitioner’ and ‘respondent’ labels be changed? If not, how would court documentation refer to the parties where the petition has been jointly issued? This consultation exercise presents an opportunity for government to remove legal jargon to ensure those facing the process without legal help or representation understand the law.

It should also be made clear to parties that either of them can continue to make an application for decree absolute even if the other party to the joint application has a change of
heart. In other words, issuing a joint application initially does not require the parties to reach consensus at each stage of the process for the application to progress.

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?

It is difficult to answer this without details of the government’s plans for financial proceedings.

While it is unrealistic to believe that the two-stage process leads to marriages being ‘saved’ in the sense of the parties changing their minds, it is sensible to retain the two-stage decree process while the divorce and financial process remain intrinsically linked. The current process allows financial matters to be resolved before the decree is made absolute, which provides vital breathing room for parties to resolve their financial affairs, for example where there are joint assets or outstanding issues relating to pension entitlement etc.

If government proposes to do away with ‘defences’ under section 10 of the Matrimonial Causes Act 1973, the Thakker [2016] case makes it clear that the decree absolute will only be postponed in exceptional circumstances (in that case Mr Thakker on the one hand claimed to be a billionaire and on the other stated his personal wealth was limited to less than £500,000). His disclosure was patchy at best with international assets, and Mrs Thakker did obtain a delay on the pronouncement of the decree absolute.

However, we recognise that reform offers an opportunity to ensure the divorce process is aligned to the needs of the public today. The two-stage process, and the six weeks wait between proclamation of the decree nisi and decree absolute are remnants of an archaic process.

The increase in litigants in person places a stronger onus on government to carefully consider the journey of those experiencing the justice system without the benefit of legal representatives. According to statistics from the Ministry of Justice, there were 690 unrepresented applicants and 1,586 unrepresented respondents in divorce proceedings in 2017 alone.² For these users particularly, a single proclamation of divorce would likely be welcomed and easier understood.

Furthermore, the gradual separation of the dissolution and financial remedies process in divorce presents an opportunity for government to reinforce to the public the vital need to think carefully about the impact of divorce on their finances. With adequate signposting and resources given to empowering parties to reach fair arrangements, financial orders could be made on or after the decree absolute. In such cases, and in line with the government’s intended aim of respecting autonomous decision making, before parties apply for the decree absolute, they could be required to both sign a statement explaining the financial order they have agreed, or that they are happy to proceed with the divorce without one.

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.

We support with the aim that the divorce process should be as pain-free for couples as possible. To achieve that, we do not consider divorcing couples should be made to wait a mandatory period before they can conclude their divorce, bringing an end to what will always

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be a difficult process. The Government itself admits that a desire to avoid waiting either two or five years is likely to be a driving factor behind the use of fault-based facts.

As noted above, it is highly unlikely that a mandatory waiting period would save marriages. It is paternalistic and patronising to imply that parties do not know their own minds and require a lengthy period to consider their actions.

However, we do acknowledge that some couples would appreciate a period of time to reflect on their circumstances and seek independent advice on their rights and obligations and reach the best arrangements for their future once the reality of their situation dawns. Many spouses will be going through the divorce process at different speeds with diametrically opposite perspectives. Imposing a minimum wait before a divorce is finalised may have significant benefits for ‘reactive’ spouses, who are as impacted by a divorce as a death and will start a profound and lengthy bereavement period and in the initial shock state, their functioning is limited, and their emotions shredded. Any bitterness and damage resulting from a process which has totally run away from them can have major long-term consequences.

If a minimum period is to be mandated by legislation, there does not seem to be a particularly strong case for changing the existing period of six weeks (rather than six weeks and a day) from the grant of decree nisi to the grant of decree absolute. In reality, the period will very often be longer due to court backlogs and delays in resolving financial matters. If courts are sufficiently resourced and processes streamlined to support quicker resolution of issues, we would support six months as a target to finalise divorces. This would provide some assurance to parties and help to ensure everyone is working to the same targets.

The consultation has not considered the option of a separation period before the process starts, either after a notification or otherwise, as is very common elsewhere. Many jurisdictions vary the length of the separation period depending on whether the divorce is mutual or not. We would welcome clarity that government has given sufficient consideration of the advantages and disadvantages between the more common pre-issue separation waiting time period and the more unusual post-issue processing time period which is being proposed.

We would welcome clarity on whether there has been an assessment of the impact of these proposal on the ‘left behind’ spouse in a non-mutual divorce. To provide a considered response, it would be immensely helpful to know whether there is a risk that the reaction to a process launched without warning might trigger a negativity in that spouse that could then impede good outcomes for children and financial matters.

We would also encourage government to consider whether the possibility of immediate issue online increases the risk that the divorce process itself may become weaponised. A heated, but normal, spousal argument could lead to an online issue of divorce even just moments later.

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

The court should retain the ability to delay the making of the decree absolute in religious marriages (under s10A of the Matrimonial Causes Act 1973). The section should be extended from just the Jewish community to any faith-based community where there is not gender equality in seeking a religious-based divorce. Government may wish to consider a
break clause to stay the process until a religious divorce is obtained and invite parties to submit evidence that this has taken place before proceedings can continue.

Likewise, if there is any prejudice or potential prejudice, there should be a delay on the decree absolute, with the burden on the applicant for the decree absolute showing why it should be granted rather than the respondent pleading the prejudice. There are instances where a party will be so slow in giving disclosure that one reaches the decree absolute without any reliable disclosure and in those circumstances, we recommend that the court is empowered to delay grant of the decree absolute to bring them to the negotiating table and make disclosure. There are many cases where there would be real prejudice of the final financial order before a pension sharing agreement was put in place or nominations under policies.

The court should also retain its ability to expedite or extend the divorce process where a party wishes to conclude matters before their death, or the birth of a child. Parties should also be able to seek an extension where a party is vulnerable, for example because they lack mental capacity, or experience learning difficulties, which may prevent them from engaging with the process.

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

Yes.

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.

The removal of the ability to contest a divorce may cause consternation among those opposed to excessive liberalisation of the process. However, the principle respect for individual autonomy means that the state should never require an individual to have to remain in a marriage against his or her will. The fact is that contesting a divorce is largely fruitless (even in the Owens case); it serves little to no purpose. Any potential hardship caused to an unwilling respondent can usually be dealt with through financial orders. Consent must be at the very heart of marriage - a fact that is acknowledged in the consultation. Once one party no longer wishes to remain in a marriage, the relationship has surely lost its quality of being a voluntary union for life.

9. Are there any exceptional circumstances in which a respondent should be able to contest the divorce? Please explain these exceptional circumstances in the text box.

Notwithstanding the above, it is important to ensure that there are safeguards in place for those cases where the inability to contest a divorce may have significant consequences. For example, in those communities where divorce would cause the respondent grave hardship that could not be addressed through financial orders, or where there are implications for the dissolution of religious marriages, there may be a case for allowing a petition to be contested. However, the circumstances in which respondents can contest a petition should be limited to very exceptional cases to reduce the likelihood of everyone attempting to apply the exception.
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.

There does not appear to be compelling evidence presented in the consultation suggesting that the one-year bar causes undue hardship to parties. Until there is such evidence, it should arguably remain in place.

However, removing the one-year bar would be in line with the government’s stated support towards recognising the personal autonomy of divorcing parties. It does not follow that although parties can enter into marriage relatively freely, they must wait a year before dissolving their union, even when it has become apparent that the union has failed. Couples in this unfortunate situation are currently forced to apply for judicial separation before divorce, which incurs additional financial burdens.

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

The aim to remove the element of blame will have underlying ripples for religious divorces in some cases. In particular with the Sharia Council and the talaq/khulla (Islamic divorce) where there is a certain requirement to allege fault to secure the divorce.

This is more so the case where a woman is seeking an Islamic divorce. It remains to be seen how this process would be affected by the proposals in this consultation, but it is unlikely that parties will be able to simply state that they have reached a decision to no longer continue with their marital obligations and that no one is to blame. This will increase pressure on many to remain married under religious laws and may leave them with no way out of the religious marriage.

This will pose many difficulties for the woman seeking a Khulla if at the same time her divorce under English law is a no-fault divorce, as usually, evidence provided for unreasonable behaviour serves as additional support to those seeking the dissolution of religious marriages. We strongly recommend further consultation with religious communities to ensure the impact of these proposals are well understood before they are enshrined in law.

While we support the proposal to remove the ability to contest as a general rule, government may wish to evaluate and address the implications this may have on a couple’s financial matters. For example, some clients instruct their lawyers to contest a petition as a way to negotiate costs.

Furthermore, there is nothing in the consultation document about cross-petitions, though we note that this could be remedied with joint notices.

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

N/A