



Bar Council response to the Ministry of Justice consultation paper 'Reform of the legal requirements for divorce.'

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled 'Reform of the legal requirements for divorce.'¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Retention of the sole ground for divorce

Consultation Question 1.

Do you agree with the proposal to retain irretrievable breakdown as the sole ground for divorce?

Tickbox: Yes

Comment box: "The concept of irretrievable breakdown is clear and easily understood. It is a sensible and realistic basis on which to frame the test for divorce and does not need or benefit from being redrafted or reframed."

¹ [Ministry of Justice \(2018\) Reform of the legal requirements for divorce](#)

Replacement of the five facts with notice of irretrievable marital breakdown

Consultation Question 2.

In principle, do you agree with the proposal to replace the five facts with a notification process?

Tickbox: Yes

Comment box: "The imperial and anecdotal evidence from practitioners is clear that the current requirement to evidence one of the five facts to obtain a divorce serves to fuel conflict between divorcing spouses and is inimical to the welfare interests of the children of divorcing parents.

The evidence suggests that the "facts" relied upon are rarely representative of the reality of the breakdown of the marriage. This demonstrates that the five facts have become a hoop to jump through rather than a genuine foundation for a grant of decree nisi. It inadvertently runs the risk of pitching spouses against each other in terms of whose fault it is that the marriage has broken down. Further, there is a risk of bargaining and abuse of power in terms of the factual basis on which the divorce is granted or delay of the process by entering into a factual dispute.

There is a real potential for children to be exposed to this conflict and to be over aware of their parents' stress, anxiety and allegations. There is the real risk that divorcing parents have their focus skewed away from focussing on the welfare of their children as they negotiate the grounds of their divorce.

'The Owens' case in the Supreme Court provoked widespread debate and concern at the notion that one partner could be "trapped" in a marriage because the court had determined that their spouses' behaviour had not been sufficiently intolerable to satisfy the ground required, even though the test is subjective rather than objective.

The proposal will also address the fact that adultery is a ground of divorce in marriage (s. 1 MCA) but not a ground in respect of civil partnerships due to the definition of adultery requiring sexual intercourse with someone of the opposite sex. A spouse or civil partner having sexual intercourse with someone of the same sex is not technically adultery although in many cases it would lead to the irretrievable breakdown of the marriage or civil partnership."

Consultation Question 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?

Tickbox: Yes

Comment box: "If both parties to the marriage agree that their marriage has irretrievably broken down they should have the opportunity to give a joint notification. It is inappropriate in those circumstances for one spouse only to be able to give notice.

A provision that both parties to the marriage may give notification may enable a greater sense of fairness and a reflection of the reality of the breakdown of many marriages. If both parties agree that the marriage has irretrievably broken down they will benefit from both taking responsibility for bringing the marriage to an end. This would seem to be an important practical step away from fault-based divorce and could promote honesty and co-operation. Joint notification may also protect children of the marriage from perceiving one parent rather than the other as the cause of the breakdown of the marriage and be able to maintain a positive relationship with both parents during and post-divorce."

Minimum timeframe of the divorce process.

Consultation 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?

Tickbox: Yes

Comment box: "The principle of the two-stage decree is easily understandable to divorcing couples. It is logical to agree the end of the marriage in principle and then to move to finalising financial and other matters between the spouses before finalising the divorce."

Consultation Question 5.

What minimum period do you think would be most appropriate to reduce family conflict, and how should it be measured?

Tickbox: Six weeks (the current minimum period is six weeks and a day)

Comment box: "As a general observation, a period of 6 months may cause an unacceptable delay to spouses who do not have dependant children or whose financial affairs are straightforward to resolve and to spouses who have lived separately prior to the divorce.

It is not clear whether there is empirical or anecdotal evidence that the current period of 6 weeks and 1 day is too short a period of time and what the reasoning is for extending it to 6 months. The period is a minimum and a decree absolute will not be made until the court is satisfied that to make a decree absolute will not cause hardship

and, in the case of a marriage with dependant children, that satisfactory arrangements have been made for the children. (s.2 MCA 1973)

The suggestion in the consultation that a 6 month period allows "a sufficient period for most couples to consider the implications of divorce and reach agreement on practical arrangements, while not being so long a period of uncertainty that it would have a long-term effect on children" may not give sufficient weight to the serious consideration that spouses give to petitioning for divorce at the outset rather than in the period between nisi and absolute decrees."

Consultation Question 6.

Are there any circumstances in which the minimum timeframe should be reduced or even extended?

Tickbox: Yes

Comment box: "Statistically there are a small number of cases where an application is made to reduce the minimum time-frame, examples being to grant decree absolute prior to imminent death or to allow re-marriage prior to a child being born or prior to death. The ability to re-marry in such circumstances is of great significance to the individuals concerned and should be retained notwithstanding the small number of cases this will apply to."

Consultation Question 7.

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

Tickbox: Undecided

Comment box: "This is a matter of social policy at this stage. There is a difference in law between nullity - where a marriage is void (s11MCA) or voidable (s12 MCA) - and the end of a valid marriage. (s12A MCA sets out the grounds on which a marriage converted from a civil partnership is void or voidable.) s13 MCA sets out the bars to relief when a marriage is voidable.

The answer to this question will also depend on what minimum period is introduced. As a general observation a longer minimum period would be more likely to be inappropriate in nullity cases."

Removal of the opportunity to contest

Consultation Question 8.

Do you agree with the proposal to remove the ability to contest as a general rule?

Tickbox: No

Comment box: "The Committee is mindful of the sensitivities within some communities of divorce and the stigma it may bring, more often to the ex-wife than the ex-husband. The Consultation will be assisted by other contributors as to the merits of retaining the ability to contest divorce so as to avoid unilateral divorce that may bring with it intended or unintended detrimental consequences to the respondent spouse.

Protection is already provided to some spouses by S10A of the MCA 1973 which currently provides that once a decree of divorce has been granted but not made absolute and the parties to the marriage concerned (a) were married in accordance with - (i) the usage of the Jews, or (ii) any other prescribed religious usages; and (b) must co-operate if the marriage is to be dissolved in accordance with those usages. This is to protect against a spouse being stuck in legal no man's land where the civil marriage has been dissolved but the religious marriage has not.

It may be proportionate to retain the ability to contest divorce but with permission being required to contest. The objective of this filter would be to protect a vulnerable spouse and children but to otherwise promote the objectives of the reform of the law."

Consultation Question 9.

Are there any exceptional circumstances in which a respondent should be able to contest the divorce?

Tickbox: Yes

Comment box: "There may be exceptional circumstances where the welfare of a spouse or dependant children may require that the spouse should be able to contest the divorce. The Committee would consider specific proposals in detail if consulted about draft legislation."

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

Consultation Question 10.

Do you agree that the bar on petitioning for divorce in the first year of the marriage should remain in place?

Tickbox: Undecided

Comment box: "The intention of the law reform under consultation in respect of the decision of a spouse who has concluded that the marriage is over. The bar on petitioning for divorce in the first year of marriage could be seen to be at odds with

that aim. However, there is no evidence in the consultation paper as to the impact of this bar on couples seeking to divorce within the first year of marriage. This is a matter of policy rather than law for the Committee to comment upon at this stage.”

Retention of other requirements.

Consultation Question 11.

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

Comment box: “There are no comments at this stage on the proposal to retain the power of the Queen's Proctor or the requirement on legal practitioners to certify whether they have discussed reconciliation or the power to stay proceedings if there is a prospect of reconciliation prior to decree absolute being granted.”

Impact assessments

Consultation Question 12.

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

Comment box: “This is not a matter on which the Law Reform Committee can assist the consultation.”

Bar Council

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² Prepared by the Law Reform Committee for the Bar Council.