DIVORCE, DISSOLUTION AND SEPARATION BILL - EUROPEAN CONVENTION ON HUMAN RIGHTS

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Divorce, Dissolution and Separation Bill ("the Bill"). This memorandum has been prepared by the Ministry of Justice. The Advocate General for Scotland and MoJ spokesperson for the Lords has made a statement under section 19(1)(a) of the Human Rights Act 1998 that in his view the provisions of the Bill are compatible with the Convention rights.

Summary of the Bill

2. In September 2018 the Government published a consultation paper on proposed changes to the legal requirements for divorce. The response to this consultation was published in April 2019.

3. Under the current law in England and Wales the ground for divorce or for dissolution of a civil partnership is that the marriage or civil partnership has irretrievably broken down. This ground has to be made out by demonstrating one of a number of conduct based or separation based "facts". The 'fact' requirements mean in practice that couples must either live apart for a period of time before they may divorce or dissolve their civil partnership, or else they must make allegations about their spouse's or civil partner's conduct. There are similar "fact" requirements for applications for judicial separation (for married couples) or a separation order[1] (for civil partners).

4. This requirement to show "facts" is sometimes perceived as showing that the other spouse is "at fault". This can cause further stress and upset for a couple, to the detriment of outcomes for them and any children. In the Supreme Court case of *Owens v Owens* [2018] UKSC 41, the respondent husband contested the divorce

[1] Separation orders do not end the marriage or civil partnership but have effects particularly in relation to property (for example, where a couple are judicially separated and one spouse dies intestate, the deceased spouse's property will fall to be distributed as if the other spouse were dead).

application successfully. The case was described by Lady Hale as “very troubling” and the judgment recognised that the family court takes no satisfaction when obliged to rule (within the current legal framework) that a marriage which has broken down must nevertheless continue in being. There have been wide calls to reform the law to address these concerns, often framed as removing the concept of “fault”.

5. The Government proposes to reform the legal requirements for divorce and dissolution of civil partnership so that the approach is consistent with the approach taken in other areas of family law, and to shift the focus from blame to supporting separating couples better to focus on making arrangements for their own futures and for their children’s.

6. The Bill will change the legal requirements for obtaining a divorce, dissolution or legal separation in England and Wales by amending the Matrimonial Causes Act 1973 and corresponding provisions in the Civil Partnership Act 2004. The following changes are made in relation to applications for divorce and dissolution to—

    a. **Replace the requirement to provide evidence of conduct or separation “facts” with a new requirement to provide a statement of irretrievable breakdown.** This retains the current sole ground for divorce and dissolution (irretrievable breakdown), but removes the requirement to show one of the facts currently specified in statute as evidencing breakdown, that relate to adultery (divorce only), behaviour, two years separation (if the parties agree to the divorce or dissolution), five years separation (without the need for agreement of both parties) and desertion. It thereby also removes the requirement for the court to inquire so far as it reasonably can into any such facts.

    b. **Remove the possibility of contesting the decision to divorce or dissolve the civil partnership, as the statement of irretrievable breakdown is to be taken as conclusive evidence that the marriage or civil partnership has broken down irretrievably**. This will remove scope for a respondent to dispute that the marriage or civil partnership has broken

down irretrievably. Divorce or dissolution proceedings could still be challenged for other reasons including jurisdiction, validity of the marriage, fraud and procedural compliance.

c. **Retain the current stages of a divorce and dissolution application but introduce a new minimum timeframe of six months (26 weeks) into stages**. This is made up of a new minimum 20-week period between the start of proceedings and confirmation to the court that a conditional divorce or dissolution order should be made, combined with the existing minimum six-week period between the making of the conditional dissolution or divorce order (presently, for divorce, the decree nisi) and the making of the final order (presently, for divorce, the decree absolute). The new requirement is intended to ensure, in the absence of showing one of the five "facts", that the decision to seek divorce or dissolution is a considered one. The Bill also retains the rule that no divorce or dissolution order can be made within one year of the marriage or civil partnership.

d. **Enable the Lord Chancellor by order made by statutory instrument to adjust the minimum time periods** between the start of proceedings and progression to conditional order of divorce/dissolution stage and between the conditional order of divorce/dissolution and final order of divorce/dissolution (should policy considerations indicate this is appropriate). This is subject to the proviso that the total statutory period may not exceed 26 weeks (six months). A similar delegated power (subject to the same bar on making the overall period longer than 6 months) is already in place for the current minimum timeframe between conditional order and final order in respect of civil partnerships, and a slightly different power, expressed as one to shorten the period from six months (and therefore not to be used to extend it beyond six months), is in place for the current minimum timeframe between decree nisi and decree absolute for divorce.

e. **Introduce a new option of a joint application** for cases where the decision to divorce or dissolve the civil partnership is a mutual one and couples wish to cooperate from the outset, in addition to retaining the current ability of

one spouse to initiate the legal process of divorce or dissolution. This is intended to enable an agreed approach to allow parties to move on in as constructive a way as possible.

f. **Update terminology** in the Matrimonial Causes Act 1973, for example replacing terms such as “decree nisi”, “decree absolute” and “petitioner” with “conditional order”, “final order” and “applicant”. This is intended to make the law more accessible, and more clearly consistent as between divorce and dissolution of civil partnership.

7. The relevant changes above are also reflected in the changes being made to applications for separation orders (in both the Matrimonial Causes Act 1973 and equivalent provision in the Civil Partnership Act 2004). This removes the ‘fact’ requirement in separation proceedings and replaces this with a statement that the applicant(s) seek to be judicially separated. Provision is made for both joint and sole applications for separation orders.

8. Minor changes are also being made in relation to proceedings for nullity of marriage (on grounds that the marriage is void or voidable, on grounds of defects in process, lack of capacity to marry, lack of observance of the necessary formalities, etc.) principally to provide the Lord Chancellor with a power to amend the minimum time period before a conditional nullity of marriage order can be made final. This will align the position with that currently found in the 2004 Act for nullity of civil partnerships, and replaces a power that currently exists in the Matrimonial Causes Act 1973 for the High Court to do amend the period.

ECHR issues raised by the Bill

2. Convention rights engaged by the Bill are summarised as follows:

Article 6

3. Private law family disputes may fall within the scope of Article 6 (the right to a fair trial) if the outcome of such proceedings is decisive for private rights and

obligations. The outcome of proceedings for "judicially ordered separation" (including divorce, dissolution, annulment and legal separation proceedings) is determinative of "civil rights and obligations" (*Airey v Ireland*[2]); and such disputes may fall within Article 6 (1). For Article 6 to apply in such family proceedings, there must be an arguable dispute as to the application of domestic law in a particular case.

4. There is wide discretion in relation to the domestic law on divorce (and dissolution)[3]. Article 6 does not create substantive rights which have no legal basis in the state concerned.

Clause 1 – Statement of irretrievable breakdown

5. Clause 1 of the Bill substitutes section 1 of the Matrimonial Causes Act 1973. The new section 1 provides that either or both parties to a marriage may apply to the court for a divorce order on the ground that the marriage has broken down irretrievably. The application must be accompanied by a statement by the applicant(s) that the marriage has broken down irretrievably. The court dealing with the application must take the statement to be conclusive evidence that the marriage has broken down irretrievably and make a divorce order. Replacing the requirement to satisfy the court of one or more of the facts with a statement of irretrievable breakdown removes the need to evidence breakdown by reference to "facts" and therefore removes dispute as to those "facts". The court will not be required to look into the irretrievable breakdown of the marriage (beyond considering whether the statement requirement has been complied with).

6. Currently a respondent may contest the divorce or dispute any of the facts relied upon. Contesting a divorce is rare. Any such applications are highly unlikely to be successful.[4] The effect of the new section 1(3) Matrimonial Causes Act 1973 substituted by clause 1 is that it will not be possible for a respondent to challenge

[2] (1979) 2 E. H. R. R 305
[3] Babiarz v. Poland (Application no. 1955/10)
[4] Owens v Owens [2017] EWCA Civ 182; paragraph 98 – highlighting the 'minutely small number of cases' of contested divorce hearings.

the applicant's statement that the marriage has broken down irretrievably as it is to be taken as conclusive evidence that the marriage has broken down irretrievably (beyond procedural compliance etc.).

7. It will remain possible to challenge divorce or dissolution proceedings on the basis of—

    a. jurisdiction (whether the court has jurisdiction to entertain proceedings for a divorce or dissolution order etc.)

    b. the existence of the marriage or civil partnership (whether there is a valid marriage or civil partnership to dissolve)

    c. fraud and procedural compliance (including service).

8. It might be suggested that replacing the fact requirement (and therefore the ability to dispute such facts and contest the divorce) with a subjective statement is incompatible with the Article 6 rights of the respondent. The Department does not consider this to be the case. This is within the wide discretion afforded in relation to the domestic law on divorce. There is no inherent right deriving from Article 6 to contest a divorce. Marriage is a voluntary union and when one party concludes that the marriage is at an end, they should not be forced to remain in the marriage indefinitely. Accordingly, there should be a balancing of rights between parties when their relationship is at an end. Whilst there is no inherent right for a respondent to contest the divorce, what matters is a procedurally fair divorce procedure. The procedural safeguards required by the right to a fair trial will be retained – these include that the respondent will have knowledge of and be able to participate in the proceedings, review and consider the applicant's statement before the court, as well as the possibility to challenge proceedings on the aspects identified above, and rights of appeal.

9. Whilst the statement of irretrievable breakdown may not be challenged to prevent a divorce, an application could be made that would delay the final divorce and dissolution orders. Amendments have been made by the Bill to section 10 of the Matrimonial Act 1973 and section 48 of the Civil Partnership Act 2004, to extend the special protection for respondents that currently only apply in separation cases to all cases. Under these provisions a respondent may ask the court to consider

their financial position prior to the divorce/dissolution order being made final. An application under this section may delay a final divorce or dissolution order being made.

Joint Applications

10. Either or both of the parties to a marriage will be able to apply for a divorce order. Where parties are in agreement a joint application can be made. The new section 1(10) Matrimonial Causes Act 1973 (and equivalent provision in the Civil Partnership Act 2004) makes (for the avoidance of doubt) provision that Family Procedure Rules may make provision for the procedure for a joint application to become a sole application. This is intended to prevent one party to a joint application preventing or excessively delaying the progression of those proceedings to final divorce or dissolution order, and considered to be Article 6 enhancing as part of the procedural safeguards within such applications.

Article 12 - the right to divorce

11. Article 12 is an absolute right and has two constituent rights – the right to marry and the right to found a family. The right is subject to the qualification in Article 12 that makes the right subject 'to the national laws' governing the right.

12. Article 12 makes no express reference to divorce. In *Johnston v Ireland*[5] the court held, in a society adhering to the principle of monogamy, that such a restriction does not injure the substance of the right guaranteed by Article 12. The *travaux préparatoires* to the Convention indicate that the reference to 'dissolution' of marriage in Article 16 of the Universal Declaration of Human Rights was intentionally excluded from Article 12 and only the right to marry had been guaranteed. The right to marry is not considered to include the right to divorce (but equally this does not mean that a right to divorce is incompatible with Article 12, or that Article 12 in some way requires divorce not to be made "too easy" – and see *F v Switzerland*, summarised immediately below).

[5] (1986) 9 EHRR 203

13. In *F v Switzerland*[6] the Court held that a divorce court's imposition of a 3-year ban on the applicant's right to remarry (following divorce) was an unjustified interference with Article 12 and the applicant's future spouse was "was personally and directly wronged by the measure". Divorce proceedings which lasted more than 5 years and prevented the applicant from marrying his new partner have also been found to violate Article 12[7]. Accordingly, if national laws allow divorce Article 12 secures the right to remarry without unreasonable restrictions.

26-week minimum timeframe

14. The minimum 26-week timeframe proposed by the new clause would also delay, for a short period, an applicant marrying a new partner. Discussion in *F v Switzerland* considered a mandatory delay prior to divorce not to be the same as a restriction on re-marrying following divorce and this is not considered to interfere with Article 12 (despite having the same consequences as a delay restriction on re-marriage post-divorce) since no right to divorce is protected by the Convention. The 26-week minimum time frame proposed is prior to divorce and is a short and reasonable period, clearly justified by the government's interest in ensuring the decision to divorce is a considered one and providing time to make practical arrangements that may be required on relationship breakdown.

15. The new section 1(8) also provides the court with discretion to shorten the 26-week period, so as to make either the conditional order or the final order, or both, earlier than the period specified in the statute, in a particular case. This would enable a court to shorten the 26-week period to enable an applicant to remarry sooner in exceptional circumstances, for example if they were terminal ill, or shortly due to give birth to a child with their new partner. The new section 1(6) makes provision for the Lord Chancellor, by order, to shorten or lengthen the constituent parts of the 26-week timeframe, but not so as to provide for a total period exceeding 26 weeks. These provisions provide further safeguards in relation to the minimum timeframe proposed.

[6] (1987) 10 EHRR 411
[7] VK v Croatia (App. No. 3830/08)

Article 8

16. Article 8 ECHR (the right to respect for private and family life) may be engaged in so far as these proposals may interfere with the right to respect for private or family life. The determination of an individual's legal relationship with others may constitute an aspect of private life as well as family life. The Court and the Commission have held that an application for judicial separation [8] and the annulment of marriage[9] may concern private life as well as family life. The State has a wide margin of appreciation with regard to 'respect for family life' (*Abdulaziz, Cabales and Balkandali v UK*[10]). In particular in the area of framing their divorce laws states enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention and to reconcile the competing personal interests at stake[11].

17. The right to respect for family life does not encompass the right to create a family through marriage or the right to divorce. Article 8 does not oblige states to introduce measures to permit divorce. The court considered in *Johnston v Ireland*[12] that a right to divorce which it has found to be excluded from Article 12 cannot be derived from Article 8 as a provision of more general purpose and scope.

18. Divorce proceedings, if excessively long, can affect enjoyment of the right to respect for family life (as illustrated by the *Berlin v. Luxembourg* judgment of 15 July 2003 concerning divorce proceedings lasting seventeen years). The Department considers there is no breach of Article 8 on the basis that the divorce procedure proposed is within the wide margin afforded within this area and the minimum periods of time proposed in the new sections 1(4) and 1(5) Matrimonial Causes Act 1973 (and equivalent provision in the Civil Partnership Act 2004) are not considered 'excessively long' at 26 weeks. Whilst these periods of time can be

[8] Airey v Ireland (1979) 2 E. H. R. R 305
[9] BENES v Austria, Application No. 18643/9; 72 D.R. 271.
[10] (1985) 7 EHHR 471
[11] Babiarz v. Poland (Application no. 1955/10)
[12] (1986) 9 EHRR 203

amended by order of the Lord Chancellor – this is subject to a maximum 26-week period.

19. The Department does not consider these provisions amount to a limitation on the parties' Article 8 rights; rather they reconcile the competing convention rights for both parties.

Ministry of Justice
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