
Divorce – the new law in Northern Ireland

An Equality Impact
Assessment of the
Matrimonial Proceedings
and Family
Law Bill 2002

How to respond to this consultation

This document is a statement of the Executive's policy on divorce. It describes the changes which a new Bill is going to bring about. We want to make sure that these changes will work in practice. We also want to make sure that we have taken all the impacts of the changes on equality of opportunity fully into account. We want to make sure that we have given these issues the right weight and that we haven't missed anything important. We would like to hear from people about all of these issues, especially people who have first hand experience of the divorce system. A questionnaire is included to help you focus on the things we would like to know. Please send us your views.

You can write to:

Gareth Johnston
Director of Law Reform
1st Floor
Lancashire House
5 Linenhall Street
BELFAST BT2 8AA

or send an e-mail to info@dfpni.gov.uk, or a fax on (028) 9054 2909.

If it would help to have this paper in another format such as large print, another language, or to have a meeting with us, let us know.

We have already consulted as to the broad policy of what should go into the new legislation. But that does not mean that we will not listen to any particular points you want to make. Your views will help us ensure that we prepare the Bill in the most effective way and that the new law works well in practice.

Gareth Johnston

Introduction

The Executive is committed to supporting children and their families. When families separate or parents divorce, it is not just a legal or administrative event. It is a huge transition for every member of the family. This Bill is part of a wider series of steps to promote better working together by professionals, and better information, to ensure that families undergoing separation or divorce have easy access to any help they need.

The Office of Law Reform is carrying out a rolling review of family law. This Bill is also part of that bigger project. It is based on major research carried out for the Office of Law Reform in 1996-1999 (published by the Stationery Office as *Divorce in Northern Ireland, Unravelling the System* and a public consultation carried out in 1999-2000 (*Divorce in Northern Ireland, A Better Way Forward*).

Section 75 of the Northern Ireland Act 1998 requires public bodies to have due regard to the need to promote equality of opportunity between:

- People of different religious belief,
- People of different political opinion,
- People of different racial group,
- People of different age,
- People of different marital status,
- People of different sexual orientation,
- Men and women generally,
- People with a disability and people without,
- People with dependants and people without.

Public authorities are also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

The policy-making process leading to this Bill has taken this duty into account. The formal consultation on this Bill took place before the Equality Commission's guidance on Equality Impact Assessments was produced. However, the Bill was the product of a wide and inclusive consultation process involving many individuals and organisations. We took full account of consultee responses and the Section 75 obligations in developing the Bill. The purpose of this document is to show how we assessed the equality implications of the Bill and, where possible, to show how the current Bill may lessen any adverse impact of the existing divorce law on the Section 75 categories.

This document, as you may remember maths teachers in school saying, "shows our working out" of the equality impacts. It is a summary of our thinking. If you would like more detailed information on the policies or divorce in Northern Ireland, you can find it in *Unravelling the System and Divorce in Northern Ireland: A Better Way Forward*.

What the Bill will do

The Bill reforms the facts and some procedures for divorce, judicial separation and orders for maintenance from the magistrates' court. It does not deal with the principles by which property or finances are divided on divorce, or with the law about children's residence and contact after divorce. We will look at these later. The Bill aims:

- to encourage good post-divorce relationships between the parties and between them and their children, by encouraging agreement.
- to limit unnecessary bitterness and distress in the divorce process. The Bill encourages mediation, and makes some procedural changes like giving a choice to some people not to have a hearing, or making it easier to change from a fault-based divorce to a separation-based one, to help reduce acrimony.
- to remind people that children's interests are important in divorce, by including this in a statement of principles.
- to make the law easier to understand.
- to remind people that any risk of domestic violence should be attended to by including this in a statement of principles.

The Bill also deals with three anomalies of family property law, which have to be amended or repealed in order to allow the UK government to ratify Protocol 7 of the European Convention on Human Rights. Article 5 of the Protocol requires the law to treat husband and wife equally. The three anomalies are:

- the presumption of advancement. We intend to repeal this presumption.
- the husband's common law duty of maintenance. We intend to repeal this duty which has been overtaken by statutory duties of both husband and wife to maintain the other.
- the common law rule in relation to housekeeping money – we propose that whether a husband makes a housekeeping allowance to his wife, or vice versa, that the savings and any proceeds will belong to both jointly.

The present law of divorce	The new law of divorce
<p><u>No statement of principles</u></p> <p><u>Domicile</u>: Any married people who have a link with Northern Ireland can divorce here. They do not have to have been married here.</p> <p><u>One ground for divorce</u> – irremediable breakdown of the marriage.</p> <p><u>Proved in five ways</u>:</p> <ul style="list-style-type: none"> Two years separation with consent Five years separation Adultery Unreasonable behaviour Desertion <p><u>A divorce is not available if</u>:</p> <p>The parties have not been married for two years</p> <p>The petitioner connived at (encouraged) the respondent's adultery</p> <p>The adultery was discovered or the behaviour occurred more than six months ago and the parties lived together for six months after it.</p> <p>The parties separated but then got together again for more than six months. They will have to separate for two/five years after that six month period.</p> <p>The divorce would cause grave financial or other hardship to the respondent.</p> <p><u>A divorce can be postponed</u> if the respondent asks the court not to make a decree before fair financial provision has been made for them.</p> <p><u>A court can refuse</u> to grant a decree until the arrangements for any children are satisfactory or the best that can be made in the circumstances</p> <p><u>The court can adjourn</u> a case for reconciliation</p> <p><u>At a hearing</u>, the petitioner has to give evidence in the High Court or County Court in every case even where the parties don't disagree.</p> <p><u>The decree is in two stages</u>. A decree nisi is made at the hearing. The petitioner applies for a decree absolute six weeks later.</p> <p><u>Finances</u>: When the couple get their divorce, they can agree about their child care and financial issues. The judge can make this agreement enforceable in court. If they cannot agree, the judge can decide for them.</p> <p><u>Judicial separation</u> is available for people who do not want to or cannot divorce, on five grounds, the same as the five facts in divorce.</p> <p><u>Maintenance from the domestic proceedings court</u> is available on proof of the divorce fault facts or failure to maintain the applicant or any child of the family.</p> <p>Terminology can be arcane and confusing.</p>	<p><u>Statement of principles</u> to help courts interpret the law.</p> <p>The law has not changed</p> <p>The law has not changed</p> <p><u>Proved in three ways</u>:</p> <ul style="list-style-type: none"> Two years separation with consent Three years separation Unreasonable behaviour including adultery (no co-respondent will be named) <p><u>A divorce is not available if</u>:</p> <p>The parties have not been married for two years</p> <p>In the circumstances it is not unreasonable to expect the parties to continue to live together</p> <p>Attempts to live together and reconcile which last up to six months do not stop any fact (fault or separation) being available, but periods over 6 months will.</p> <p>The divorce would cause grave financial or other hardship to the respondent.</p> <p>The law has not changed</p> <p>The law has not changed.</p> <p><u>Court can adjourn</u> for reconciliation or mediation</p> <p><u>The couple can choose not to have a hearing</u> only if basing divorce on separation and if both agree. They will have to fill in a bigger form to make sure their arrangements for children are satisfactory.</p> <p>The law has not changed except that the court will send out the decree absolute automatically unless a party asks it not to.</p> <p>The law has not changed. We will look at this law at a later stage.</p> <p><u>Judicial separation</u> is available for people who do not want to or cannot divorce, on three grounds, the same as the three facts in divorce.</p> <p><u>Maintenance from the domestic proceedings court</u> is available on proof of the divorce fault fact or that the applicant or any child of the family is in need of maintenance and it is reasonable for the respondent to provide it.</p> <p>A power will be given to simplify terms</p>

What are the equality impacts of the present law?

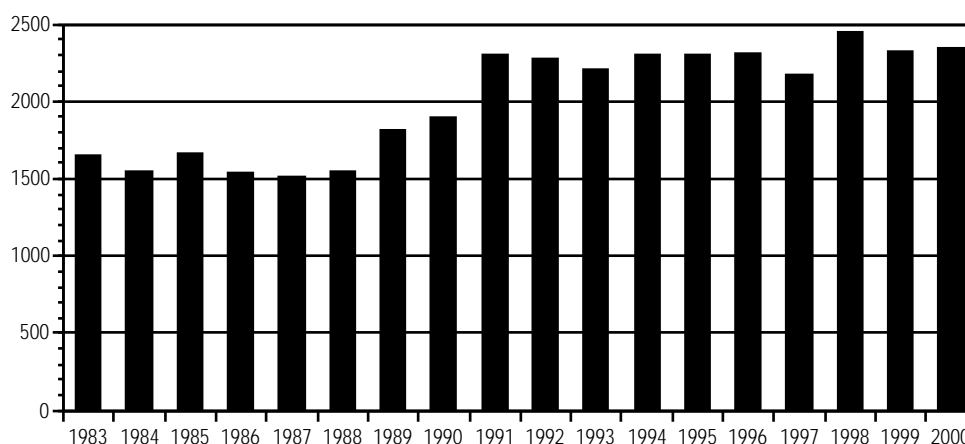
Consideration of Available Data and Research

When work began on analysing the divorce law of Northern Ireland, very little information was available. Some statistical work had been done, but there was very little qualitative data. The Office of Law Reform commissioned *Divorce in Northern Ireland: Unravelling The System* (Archbold et al, 1999 HMSO, Belfast) to provide some quantitative data to supplement General Registry Office and Court Service Statistics. These, with their English and Scottish equivalents are the main sources of the data summarised in this section.

How many divorces are there?

Northern Ireland is not a high-divorce society. In 1996, the rate of divorce here was 3.4 per 1000 married people compared to 13.5 in England and Wales and 10.9 in Scotland. The number of divorces each year in Northern Ireland has gone up, but has stayed fairly stable since the early 1990s.

Divorces in Northern Ireland 1983-2000

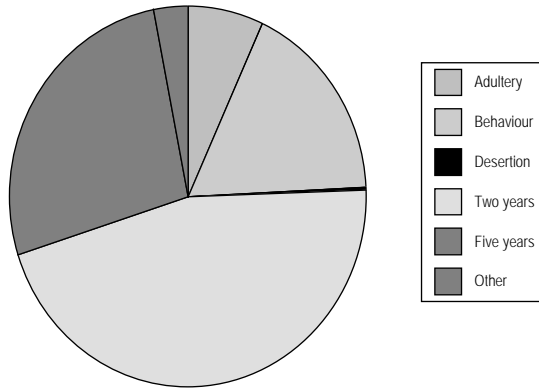


In 1999, there were also 50 petitions for judicial separation 4 petitions for nullity and 1,998 applications for maintenance from the magistrate's court.

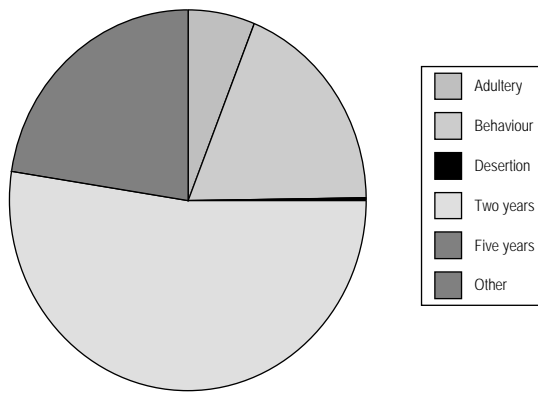
What fact do petitioners use?

Around $\frac{3}{4}$ of petitioners in Northern Ireland use the separation facts to prove their divorce, a consistent trend going back twenty years. The pie charts show that this is similar to Scotland, where more people used to use the behaviour fact, and different from England and Wales.

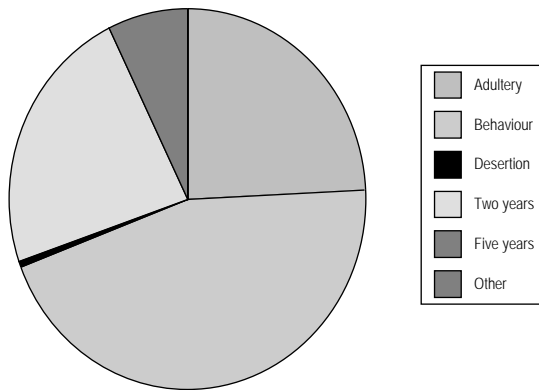
Facts for divorce, Northern Ireland, 2000



Facts for Divorce, Scotland 2000



Facts for Divorce, England, 2000



Divorce and gender

Analysis of use of the divorce system by gender is perhaps the best documented aspect of equality issues in relation to divorce in Northern Ireland. Women file around 70% of the divorce petitions in any given year. The judicial statistics show that they filed a proportionate number of adultery petitions (69%), are over-represented slightly in desertion cases (75%) and very much in behaviour case (92%). They are under-represented slightly in two year cases and more in 5 year cases. *Unravelling The System* found that violence was the most frequently-cited instance of unreasonable behaviour in

petitions. While the majority of interviewees in *Unravelling the System* believed that separation-based divorce was best for most people many added that they felt it to be unjust to a minority of petitioners. They often cited examples of women who had endured many things during the marriage, and who psychologically needed a court to say that the breakdown was not their fault.

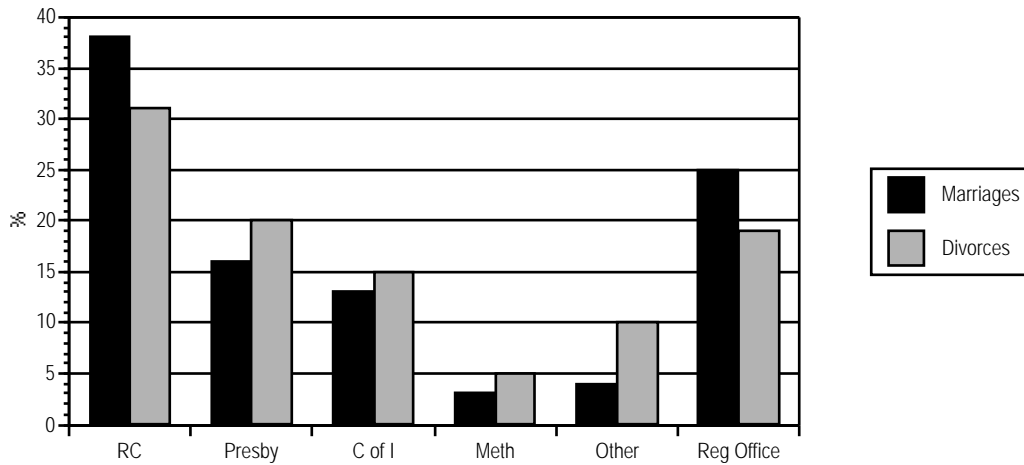
Women who marry at a younger-than-average age are more likely to divorce. As outlined below, the post-divorce poverty trap applies particularly to women, and women are much more likely than men to be their children's primary care givers after divorce. Men are a little more likely to remarry than women after divorce, with 13% of men and 11.9% of women getting married in 1998 being formerly divorced. The average age of divorced men and divorced women on remarriage in 1998 was ten years older than the average ages of those marrying for the first time.

Divorce and Religion

Religion interfaces with divorce in several ways. Perhaps the best known is that Roman Catholic church law does not permit remarriage after divorce. An annulment must be obtained from the Church authorities. Professionals dealing with divorce in Northern Ireland interviewed for *Unravelling the System* did not find many clients who did not wish to divorce at all for religious reasons. More had come across petitioners who wanted to obtain a fault-based divorce for reasons of conscience. Some Protestant denominations allow remarriage in church only where divorce has occurred as a result of one party's fault, or (more narrowly) adultery. We did not hear of any churches which required the *decree* to be based on fault in these situations, but understand that petitioners may wish this to be so as a matter of conscience. Jewish and Islamic religious law permit divorce in certain circumstances. We are eager to hear of anyone from these or other faith communities who have experienced problems with civil divorce law.

Statistics are not available on the religious beliefs of divorcing people in Northern Ireland. Some indication of the interface of divorce and religion may be obtained from the Registrar General's Annual statistics, but they show only the *method of celebration* of marriages and the method of celebration of those which end in divorce. It should also be recalled that not everyone who gets divorced in Northern Ireland marries here.

Marriages and Divorces by method of celebration of marriage, 2000



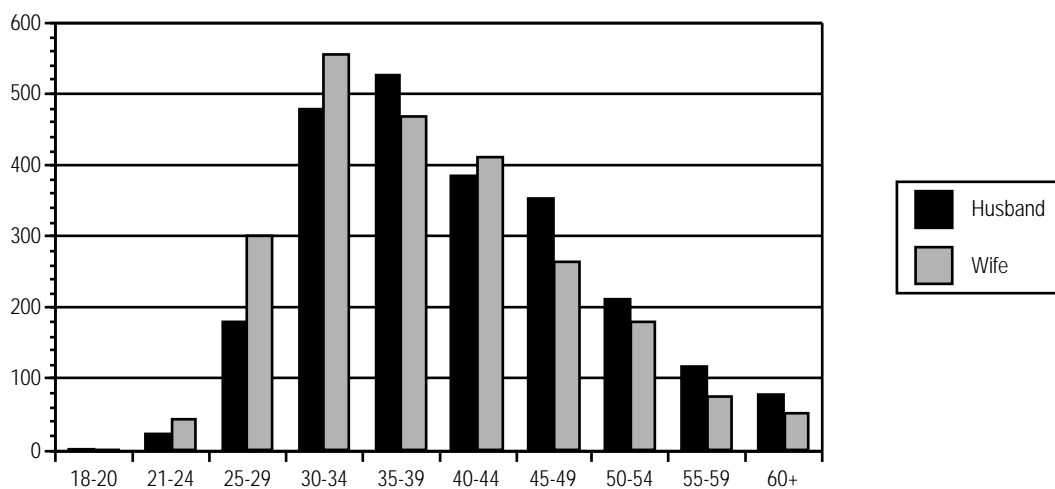
Judicial Separation, religion and gender

Over 9/10 of judicial separation petitions are brought by women. Unravelling the System explored the question of whether the decision to get a judicial separation is influenced by a conscience-based decision not to divorce. Interviewees told us that this is a very rare situation. It is more common for a judicial separation to be sought as a way of protecting pension entitlements or as part of a wider bargaining process.

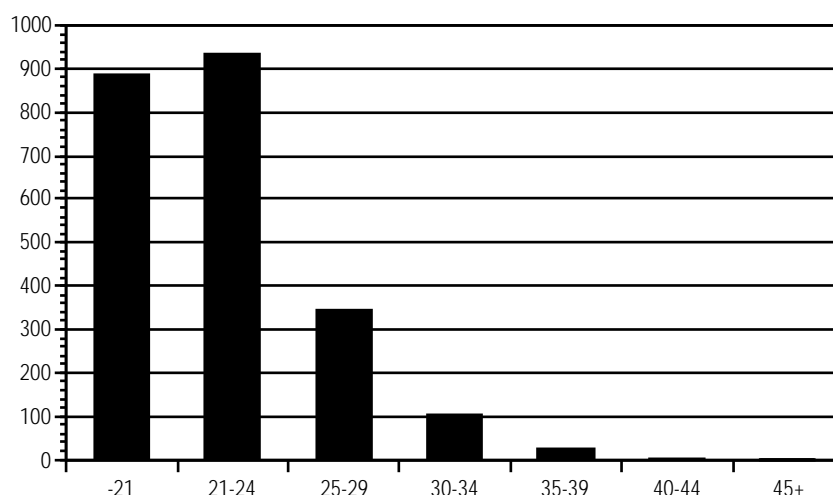
Age and Divorce

The Registrar General's statistics show that most divorces occur when the spouses are between 25 and 49. The most "at risk" time for women is between 30 and 34, and for men between 35 and 39. The average age of men at marriage in Northern Ireland is also higher than the average age of women, but there is no evidence available on which we can link these facts.

Age of husband and wife at divorce, 2000



Age of divorcing wives at marriage, 2000

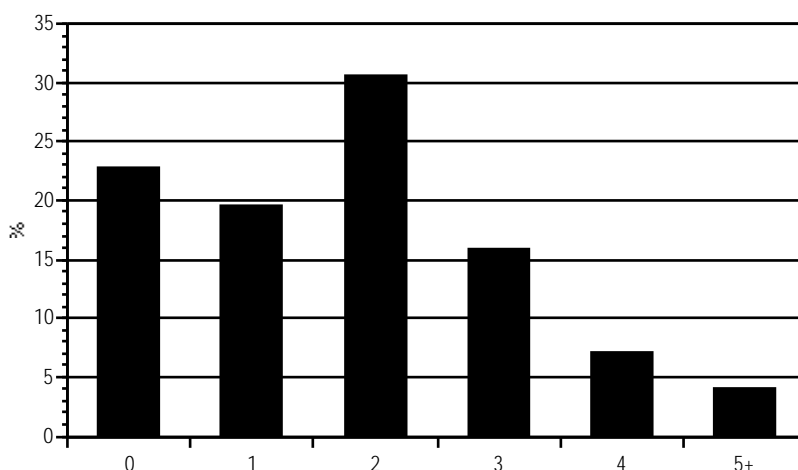


The Registrar General's statistics also show a striking number of divorces occurring where women married early. However, as we do not know how long these marriages lasted or how old the parties now are, it is not possible to draw any conclusions except to note research in England and the US which indicates a link between early marriage and divorce.

Age and Divorce – Children

Another very important group to consider when thinking about age and divorce is children. 2298 children under 16 were affected by their parents' divorce in 2000.

Divorce by number of children, 2000



We cannot draw scientific conclusions from such scant data. But other facts remind us of the significance of divorce for children. In 1998, 77% of families with dependent children were married or cohabiting couples, while 22% were lone mothers (5% were divorced mothers; 7% were separated), and 1% were lone fathers. Lone parents with dependent children were 8% of households overall, while married or cohabiting couples with dependent children were 30% overall. Married or cohabiting couples with no children formed 20% of total households. 20% of income support claims in Northern Ireland in 1999 were by lone parents, while lone mothers made 41% of claims for family credit.

The statistics do not tell us what the experience of divorce is like for children. Research findings are sometimes contradictory, but what is clear is that lessening parental conflict in divorce helps children. It is important that children do not become weapons in their parents' conflict with each other, and good post-divorce relationships and communication help everyone. Services to help with post-divorce arrangements about children, like mediation or contact centres, are beginning to be available in Northern Ireland. We are starting to think about the difficult situations that can arise around child contact where there is domestic violence, and about the problems where one parent does not want contact with the other parent to work. Direct solutions to these problems are outside the scope of this Bill, but are relevant background material.

Divorce and those with/without dependants

The statistics on divorce and children apply equally when we consider the different divorce experiences of those who are or are not parents. Information is not available in Northern Ireland as to whether parents are more or less likely to base a divorce on particular facts. When parents divorce, they have to take many factors into account which non-parents do not have to consider, like where the children will live and which parent will be primarily responsible for their day-to-day care.

The parent with primary care is likely not to be able to maximise their career potential after divorce. This will affect their earning capacity and their ability to generate savings and pension provision. Before divorce, that parent (most usually the woman) may have taken a career break, worked part-time, or even left the labour market. She may have done this to look after children, to allow her husband to prioritise his career or to discharge other care giving responsibilities such as looking after an elderly dependent relative. All of these will have affected her earning potential and her savings and pension provision. Where parents share care giving responsibilities, these facts will affect both of them. A parent who does not have primary care giving responsibility will still have to provide financially for his children, even if he starts another family, and this will have an effect on his ability to make financial provision for his own future.

All of these factors, together with continuing gender inequalities in the labour market mean that people with dependants are more likely to suffer economic detriment after divorce than people without dependants. The post divorce poverty trap identified by researchers in the UK and elsewhere applies especially to women.

Divorce and Marital Status

By its nature, divorce only applies to those who are married. As outlined above, 13% of men and 11.9% of women marrying in 1998 had previously been divorced. In that year, 6.2% of men and 6% of women who were divorced had been married and divorced previously. There were 0.5% of men and 0.8% of women divorced in 1998 who were formerly widowed. Regulation of non-marital relationships is outside the scope of this Bill.

Racial Group

There are currently no data collected in relation to the impact of the divorce system on racial group. Information from consultees will be most welcome.

Political Opinion

There are currently no data collected on the impact of the divorce system on political opinion. Information from consultees will be most welcome.

Disability

There are currently no data collected on the impact of the divorce system on this equality category. Anecdotal evidence obtained during research for Unravelling the System indicates that people with a physical disability may have had access problems. For example, petitioners who were wheelchair users could find access to courtrooms very difficult, and translators were sometimes unavailable for petitioners with hearing problems. Information from consultees will be most welcome.

Sexual Orientation

Divorce is available only on termination of a legally recognised marriage. In all but one anomalous situation¹, this will be a heterosexual relationship. There are currently no data collected on the impact of the divorce system on this equality category. Regulation of non-marital relationships is outside the scope of this Bill. However, information from consultees will be most welcome.

¹ A transexual can contract a legally valid marriage to a person of the same sex as their gender of choice, as the law considers them still to be of their gender of birth.

Assessment of equality impacts – the Bill

Part One - The new law on divorce

Statement of Principles

The Bill's statement of principles is designed as an interpretative aid for the courts, as well as a statement to people using the legislation as to how the law thinks about divorce. The principles it is proposed to enunciate are:

- The welfare of relevant children is a centrally relevant factor in divorce.
- Good post-divorce relationships between parties, and between each of them and any children, should be encouraged where possible.
- Acrimony and distress to the parties and to any children should be minimised where possible.
- Risks of violence to one party or to any children, by the other party, should be removed or diminished as far as is practicable.

Age and those with dependants

Two consultees made the point that children can be seen as a side-issue in divorce law. But in family life, children are central, and their welfare is something which everyone involved in a divorce wants to promote. It is important that their interests are taken fully into account in divorce cases. Mediation helps parents to focus on their children's needs. This Bill encourages the use of mediation. Where there is no divorce hearing, the parties will have to file a more detailed report about their child care arrangements, to allow the court to be satisfied that they are satisfactory.

Gender

Domestic violence is a scourge in Northern Ireland. Victims can be male or female. Around nine out of ten reported incidents have female victims. Children may be victims of domestic violence directly, but may also be harmed indirectly by witnessing violence between their parents. This Bill does not change the law on domestic violence, but reminds the court and the parties that it is unacceptable and that all necessary steps should be taken to deal with it.

Reducing acrimony

The law cannot make people have good post divorce relationships, or remove bitterness from the ending of every broken relationship. But the legal system can be alert to ways in which it adds to or diminishes the acrimony. This Bill takes several steps to do this, which are discussed in more detail below. They are:

- Allowing the court to adjourn cases for mediation.

- Reducing the incentives to use fault to obtain a divorce quickly by reducing the five year separation fact to three years.
- Allowing a party who has petitioned on a fault fact to change to a no-fault fact once two or three years have passed.
- Allowing the parties not to have a divorce hearing, if they agree and are using a no-fault fact.

These are of assistance to everyone, in particular to children.

The Ground for Divorce

The ground for divorce will remain the irretrievable breakdown of the marriage under the new law. It will be proved by:

- Two years separation and the respondent's consent, or
- Three years separation, or
- The fact that the respondent has behaved in such a way that the petitioner can no longer reasonably be expected to live with him or her. Such behaviour may consist of either adultery or other kinds of behaviour.

Reduction of the five year separation fact to three years will impact more on male petitioners, who are more likely to use the fact. Consultees agreed that five years was longer than necessary to prove that a marriage had broken down irretrievably, and prevented people who could not use a fault fact or agree to use two years separation from accessing the courts' help to reorder their lives.

We intend to retain the protection for respondents in three year cases. They can apply for the decree not to be made on the ground that it would cause them grave financial or other hardship. The respondent in two and three year cases may apply for a decree not to be made absolute unless satisfactory financial provision has been made for them.

There are strong arguments on both sides of the debate on whether or not to retain a fault fact. Some consultees argued that a pure no-fault system of divorce reduces acrimony, and encourages parties to look to the future, not the past. But the balance of equality argument is on the other side. It is a matter of conscience for some people that they obtain a fault-based divorce. Other consultees argued that it is important to a small minority of (mostly female) petitioners who have been badly abused, physically or in other ways, to have a judge say that they are not responsible for their marriage breakdown, or that they have been badly treated. These arguments do not relate to the amount of financial provision a petitioner will receive. That is not a matter for this Bill. They relate solely to the ground on which the decree is obtained.

Amalgamating the facts of adultery and behaviour emphasises that they will only be used in a minority of cases. It will reduce the bitterness and humiliation of divorce-by-private-detective, by allowing a

party who suspects adultery but cannot prove that full intercourse has occurred to proceed on the facts as he or she knows them.

Removing the fact of desertion from the law will work no great hardship. Only a very few people use it. Even if a party cannot obtain the deserting spouse's consent to a two year divorce, or plead other facts to found a behaviour divorce, they will only have to wait three years before divorcing on the basis of pure separation. Given the benefits of simplifying the law, this is not undue hardship.

In adultery cases, it will no longer be possible to name a co-respondent (the person with whom the respondent committed adultery) in proceedings. Unless a co-respondent is open about their relationship, it is difficult and distressing to try to prove his or her identity. It harks back to a former era. Little is achieved by naming a co-respondent, except (in a small minority of cases) to obtain an order for costs against them. On balance, and given the goals of the legislation, this is not a factor which is sufficient to make us retain the status of co-respondent in divorce proceedings.

Bars to divorce

We intend to retain the bar to divorce within the first two years of marriage, which is intended to prevent people rushing to the divorce courts during the difficult early years of marriage. Judicial separation is available for those in urgent need of a remedy.

In adultery cases the present law allows a court to refuse a divorce decree where the petitioner connived at the adultery; in other words, where they knew of it and did not disapprove; or indeed where they facilitated or encouraged it. In this situation, the adultery would not have caused the irretrievable breakdown of the marriage. The same result is achieved where the court has to ask itself the question "Given the adultery, is it reasonable that the petitioner be expected to continue living with the respondent?" The law of connivance is therefore not needed under the new law, and will be repealed. Where a party has lied in court about an act of adultery or their attitude to it, the law of perjury remains available as a sanction.

In fault cases, a petitioner cannot use a fact to found a petition where he or she lived with the respondent for six months after the fact happened, or after he or she found out about it. That means that the parties can live together and try to reconcile for up to six months. Longer periods will indicate that the fact in question did not cause the marriage breakdown. We intend to retain this provision, but to restate it so as to emphasise the opportunity for attempts at reconciliation which it provides.

We also intend to retain the provision that parties can live together for periods of up to six months while keeping open their two or three years of separation for the purpose of divorce. The clock will stop running for the time they are together, but only periods of over six months will make previous periods of separation unavailable to them. We intend to restate this provision so as emphasise the opportunity for attempts at reconciliation.

Further provision to reduce acrimony

We intend to make it easier to amend a fault based petition to a no-fault basis. Where a divorce has been brought on the basis of behaviour, before the parties have been living apart for two years, they cannot presently change the fact on which their petition is based if the two year period passes. They will have to issue a fresh petition, at fairly significant extra expense. We intend to allow parties to amend the petition if, at the time of the amendment, the no-fault fact is available, even though it was not available at the time the original petition was issued.

At present, every divorce case in Northern Ireland must have a hearing before a High Court or County Court judge, even where it is undefended and there are no matters in dispute between the parties. In cases which are:

- based on separation, and
- where there is no dispute between the parties about any ancillary issues, and
- where the parties both agree.

We intend to allow the case to be dealt with by summary procedure, without a full hearing and without the petitioner giving evidence. We will retain the judge's discretion in other, exceptional, cases to dispense with hearing the petitioner's evidence, for example because he or she is gravely ill.

Where parties indicate on the petition and acknowledgement of service that they do not require a hearing, they will have to fill in a more detailed form outlining their arrangements for any children. The judge will consider the papers. If he or she is satisfied that there are no difficult issues and that the arrangements for the children are satisfactory, the judge will list the case for a "callover" type hearing, and will grant the decree without the parties or their legal representatives having to attend court. If the judge wants to explore an issue like arrangements for the children, or whether the respondent's consent to the divorce was real, he or she can ask the parties or their legal representatives to attend the callover to give more information about the question. If the judge is not satisfied, he or she can require there to be a full hearing at a later date.

At present, the judge makes the decree nisi on the day of the hearing. The petitioner must apply six weeks later for the decree to be converted to a decree absolute. We intend that the decree absolute will issue automatically, subject to either party requesting that this should not be done. This will be simpler in the vast majority of cases, and will assist personal petitioners in particular.

Terminology in divorce cases can be arcane and confusing. We intend to give the Family Proceedings Rules Committee a power to make the terminology simpler, if such is needed.

Adjournment for reconciliation

We intend to retain the court's power to adjourn for reconciliation.

Mediation

We intend to make express the court's power to adjourn for mediation. This is within the court's inherent jurisdiction, but by putting it in the legislation, we intend to offer a reminder of the benefits of mediation. It allows parties to make their own arrangements for children, and perhaps in the future finances, with the help of an impartial third party. Agreements which the parties "own" are more likely to stick. Making their own agreement in appropriate cases helps to reduce acrimony. Parties who do this are more likely to be able to communicate and negotiate the ongoing minutiae of child care arrangements successfully. This is of benefit to both parties, but in particular to children, whose needs are seen as central in mediation.

Mediation provision is not widespread in Northern Ireland. The Office of Law Reform is working with other departments to consider ways of growing mediation provision in this jurisdiction.

Judicial separation

We intend to retain judicial separation and to reform the grounds for judicial separation to keep them in line with the facts on which divorce can be based. So the grounds for judicial separation under the new law will be:

- Two years' separation with consent.
- Three years' separation.
- That the respondent has behaved in a way (including by committing adultery) which means that the petitioner should no longer reasonably be expected to live with him or her.

The current law (Matrimonial Causes (NI) Order 1978, Art 20(2)) provides that where the parties are judicially separated and one of them dies, their property shall devolve as if the other were already dead. This provision is directly discriminatory on the basis of marital status. We intend to replace it with a provision that where the parties are judicially separated and one of them dies, their property will devolve as if the parties were divorced. Where the parties have, for example, not yet separated their financial lives because one of them died before financial provision has been made, the court will then be able to consider the matter under the Inheritance (Provision for Family and Dependents) (NI) Order 1979 and make fair provision for the remaining spouse.

The rationale for retaining judicial separation is the effect on two equality categories. Although very few, there are some petitioners who have a conscientious objection to divorce on religious grounds. They must not be deprived of a remedy. Judicial separation is also used by many more women than men. It may be that this is because of their need to preserve their pension entitlements or other assets. While there may be some use of judicial separation as a bargaining chip, to remove it from the law would be to deny a remedy to at least some of these people. The reform of Article 20(2) is a direct solution to discrimination against the judicially separated on the ground of their marital status.

Nullity

The law of nullity is complex and gives rise to several equality issues. It will be the subject of separate consideration and consultation.

Applications for maintenance under the Domestic Proceedings (NI) Order 1980

Because of the availability of child support and of orders about children issues in the Family Proceedings Court, fewer applications under the Domestic Proceedings (NI) Order are made than formerly. However, it is still very much a live part of our law. In order to maintain consistency, we intend to amend the grounds for making a maintenance order. At present these are:

- Adultery.
- Behaviour.
- Desertion.
- That the respondent has failed reasonably to maintain the applicant.
- That the respondent has failed reasonably to maintain a child of the family.

Under the new law, these will be:

- That the applicant is in need of maintenance, and that it is reasonable in all the circumstances that the respondent should provide it.
- That a child of the family is in need of maintenance and that it is reasonable in all the circumstances that the respondent should provide it.
- That the respondent has behaved in such a way (including by committing adultery) that the petitioner should no longer reasonably be expected to live with him or her.

Maintenance orders based on agreement or on established patterns of payment (DPO Arts 8 and 9) will remain available.

Under the former law, failure to maintain was intended to be a "no fault" ground. However, experience indicates that respondents in particular did not see a finding of failure to maintain as blame-free. The new formulation will reduce the acrimony of such cases while continuing to allow maintenance in the same circumstances. The removal of desertion will not be a bar to a remedy, as any applicant in need of maintenance can apply on a needs basis. It is necessary to retain the reference to maintenance for children, as not all children (for example, stepchildren and children over 18) are eligible for Child Support.

More women than men apply for orders under the Domestic Proceedings Order. A reduction in acrimony will benefit all parties, especially children.

Maintenance pending suit

We do not intend to look at the orders the court can make for financial provision on divorce at this stage. These require further research and consultation, and will be considered as a later module in our rolling review of family law. However, for consistency, we intend to amend the grounds on which maintenance pending suit can be obtained to need rather than failure to maintain, so that they continue to mirror the provisions of the Domestic Proceedings Order.

Religious marriage

It has been brought to our attention that a Jewish woman who is divorced in civil law cannot remarry in religious law unless her husband also grants her a religious divorce (called a *gett*). Only a man can obtain a *gett*.

Before considering bringing forward any legislation similar to that currently proposed in Scotland, England and Wales to deal with this difficulty, we intend to carry out a full consultation with faith communities in Northern Ireland. This will be carried out as a separate exercise and will not stand as part of this Bill.

Part Two – three anomalies of family property law

Presumption of advancement

The presumption of advancement applies when a man transfers property to his wife or child. The law will assume that the property is intended as a gift. Where a woman gives an asset to her husband or child, it is presumed not to be a gift, and the law will assume that she retains an interest in it (called a resulting trust). We intend to repeal the presumption. The courts will decide how the property is to be treated in the light of the evidence. Existing transactions relying on the presumption will not be affected.

Husband's common law duty of maintenance

At common law, a husband had a duty to maintain his wife, but a wife did not have a duty to maintain her husband. The duty has now been superseded by statutory duties of maintenance, which are reciprocal, but it has never been repealed. We intend to repeal the common law duty.

Common law rule in relation to housekeeping money

At common law, when a husband pays a housekeeping allowance to his wife and she makes savings from it, they, and their proceeds (like pools or lottery winnings) will belong to the husband. The same does not apply to housekeeping monies given to a husband by a wife. This rule dates back to a time when women could not actually own property (by some analyses they were their husband's property). It is now outdated. We propose to reform the rule so that any monies given by one spouse to the other by way of housekeeping allowance, and any proceeds of that money, will be jointly owned by the spouses.

Equality impacts of the three anomalies

The UK government wishes to ratify Protocol 7 of the European Convention on Human Rights as soon as possible. This requires the law to treat husband and wife equally. The presumption of advancement is clearly contrary to Protocol 7, as well as giving rise to concern under Article 75. It would also be possible to apply the presumption equally to transfers by men and women to their spouses and children. The question which would then arise would be as to the position of unmarried people or children (including adult children) who wished to make transfers to their partner or parent. The most equitable solution is to abolish the rule.

The common law duty of maintenance is clearly contrary to Protocol 7, as well as giving rise to concern under Article 75. It has been superseded by statute and is now obsolete. The most equitable solution is to abolish the rule.

The rule in relation to housekeeping money is clearly contrary to Protocol 7, as well as giving rise to concern under Article 75. Some reform is necessary, because although fewer couples use housekeeping allowances today, it is not a completely obsolete practice, and some provision in relation to savings is necessary. We will consider whether the rule should also apply to unmarried couples as part of our future programme examining other areas of family law. For the time being, in order to allow the ratification of Protocol 7, we intend only to apply the reforms to husband and wife.

Divorce – the new law

Equality Impact Assessment

Questionnaire for Consultees

Please use this questionnaire to give your views. If you need to, use additional sheets. A downloadable version is available for use with word processors, on www.olrni.gov.uk. Please return the form to Office of Law Reform, Lancashire House, 5 Linenhall Street, Belfast BT2 8AA, tel 028 9054 2900, fax 028 9054 2909, e-mail info@dfpni.gov.uk.

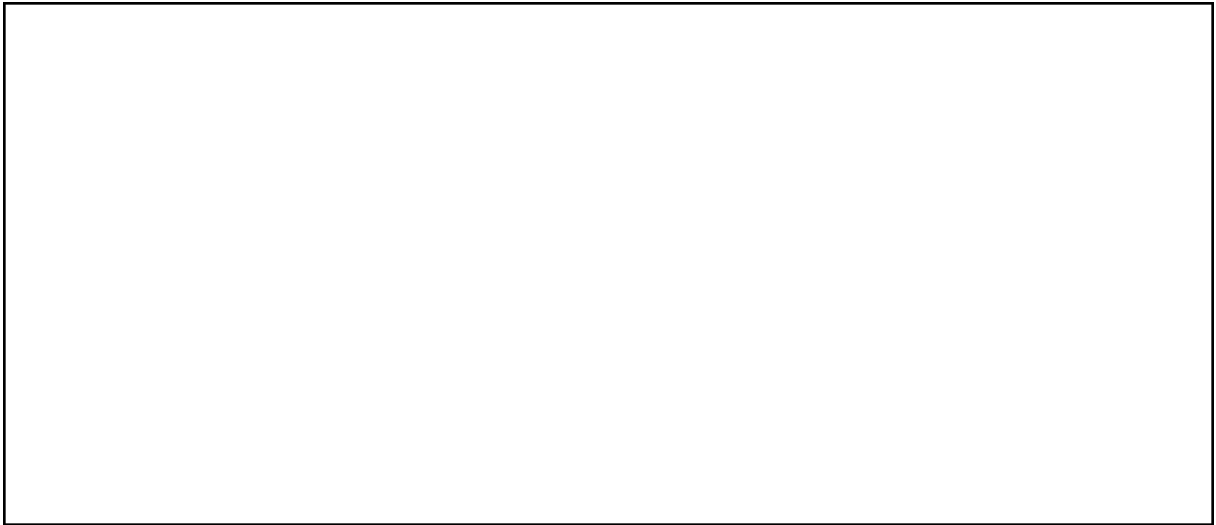
1. In your view, does the paper take account of all the relevant available evidence?

2. In your view, does the paper correctly identify the equality impacts of the existing law?

YES / NO

(a) Are there any further impacts which the paper does not mention?

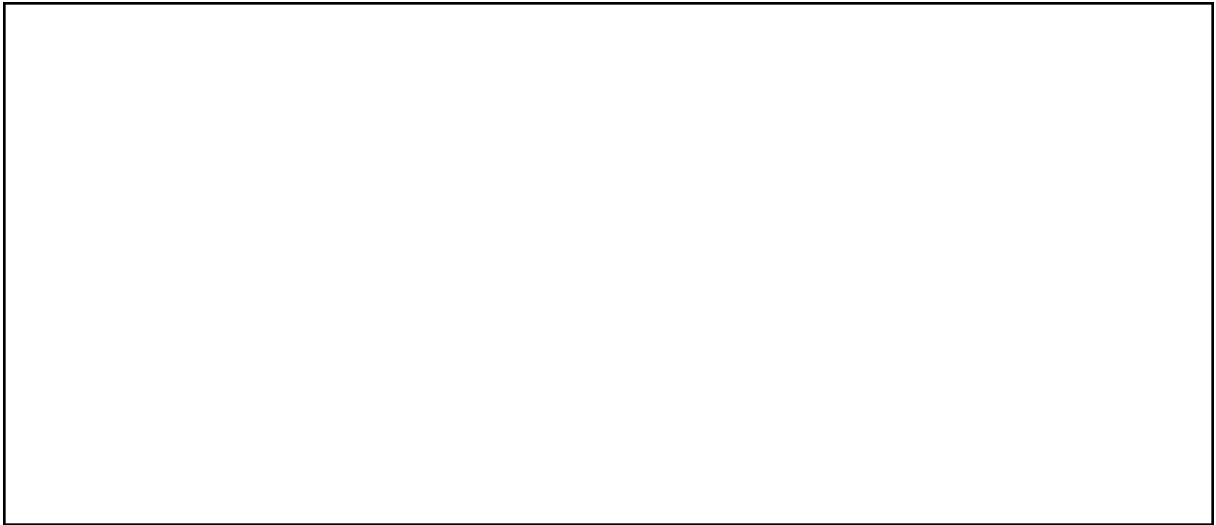
- (b) Are there any impacts which are incorrectly identified, or which would have effects other than those stated?



3. In your view, and bearing in mind that this Bill deals only with the ground for divorce and associated topics, do the reforms outlined in the paper represent the best way of mitigating those impacts?



4. Are the reforms outlined in the paper likely to have any unforeseen impacts on equality of opportunity?



5. Are there any other technical or practical issues about the reforms in the paper which we should take into account?

