

**THE STATES OF DELIBERATION**  
**of the**  
**ISLAND OF GUERNSEY**

**POLICY & RESOURCES COMMITTEE**

REFORM OF THE MATRIMONIAL CAUSES LAW

The States are asked to decide:-

Whether, after consideration of Policy Letter of the Policy & Resources Committee entitled 'Reform of the Matrimonial Causes Law', dated 23<sup>rd</sup> December 2019, they are of the opinion:-

1. To approve the proposals laid out in section 8 of the Policy Letter to reform the law relating to divorce, annulment and judicial separation of marriage.
2. To direct the Policy & Resources Committee working in partnership with the Committee *for* Home Affairs and in consultation with the Committees *for* Education Sport & Culture and Health & Social Care to investigate and take forward actions to improve access to information and support services relating to family law matters, as part of the work on Justice Policy to 'remove delay from systems and processes relating to the delivery of services to children and young people in need, and to ensure that such systems and processes are centred on the best interests of the child or young person concerned', before May 2020.
3. To direct the Committee *for* Home Affairs to consider and oversee the amendments required to the Domestic Proceedings legislation to align with the proposals in this policy letter to remove fault grounds.
4. To direct the preparation of such legislation as may be necessary to give effect to the above decisions.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

**THE STATES OF DELIBERATION**  
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**ISLAND OF GUERNSEY**

**POLICY & RESOURCES COMMITTEE**

REFORM OF THE MATRIMONIAL CAUSES LAW

The Presiding Officer  
States of Guernsey  
Royal Court House  
St Peter Port

23<sup>rd</sup> December, 2019

Dear Sir

**1. Executive Summary**

- 1.1 This policy letter sets out the proposals for changes to the Matrimonial Causes (Guernsey) Law, 1939, (“the Law”), to fulfil the Resolution of the States of Deliberation (“the States”) in December 2015, (Billet d’État XXIII of 2015<sup>1</sup>), which recognised that there was a need for the Law to be reformed to ensure that it was both inclusive and reflective of modern society.
- 1.2 Subsequently, on 27<sup>th</sup> June, 2017, (Billet d’État XII of 2017<sup>2</sup>) reform of the Law was prioritised in the Policy & Resource Plan, led by the Policy & Resources Committee, (“the Committee”). The Review’s terms of reference (Appendix A) set out to consider many areas that would inform the reforms needed to ensure that the legislation was simplified, modernised, inclusive, reduced conflict where possible, and aligned to comparable jurisdictions’ legislation.
- 1.3 It is widely thought that retaining fault as a basis on which to grant divorce does not assist parties in ending their marriage amicably and so there have been recent moves to reform legislation relating to matrimonial causes in other places such as Jersey and England & Wales<sup>3</sup>.

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<sup>1</sup> [Billet d’État XXIII, 2015 - Same-sex marriage](#)

<sup>2</sup> [Billet d’État XII, 2017 - The Policy & Resource Plan - Phase 2](#)

<sup>3</sup> [Divorce, Dissolution and Separation Bill 2019-20](#)

- 1.4 It is important to acknowledge that relationships do break down and that the purpose of the law is to ensure a fair separation is achieved, in a legally appropriate way, so that each party is able to move forward independently of the other, so far as possible, at the soonest opportunity. Equally should parties wish to attempt reconciliation that it is made possible and is not made more difficult by the Law.
- 1.5 It is important that any legislation should aim to avoid requirements that might make an already difficult situation worse and which are not in the public interest, such as by making parties justify their decision in Court.
- 1.6 The process of dissolving or annulling a marriage has been a Court process since 1857 and results in a change of legal status that can have implications for an individual and their family's rights and responsibilities. Therefore it should remain so to ensure that separation arrangements are legally binding.
- 1.7 The Review into the Law including the public consultation findings<sup>4</sup> found that in the main there was support for the reform proposals. In particular, of those who responded to the public consultation (158 responses) there was strong support for:
- removing fault grounds - 77% were very supportive;
  - removing the ability to contest a divorce - 73% were very supportive;
  - removing the requirement for the Court to consider reconciliation - 84% agreed with the proposal;
  - simplifying the procedure so that couples, so far as possible, could process the divorce themselves - 87% agreed with the proposal;
  - digitalisation of some or all parts of the process, at a later stage, following the legal changes - 90% agreed with the proposal; and
  - incorporating the principles to seek 'financial independence' and a 'clean break' within the law - 86% agreed with the proposal.
- 1.8 The proposals set out within this policy letter seek to amend, modernise and simplify the legislation to try to reduce conflict, whilst ensuring that the legislation is inclusive and fair, and is consistent and compliant with international standards. The proposals also seek to address the other issues and concerns raised through the initial stakeholder engagement, as detailed in section 6. Some of these matters are outwith the legislation but can equally contribute to, or exacerbate, conflict and be distressing to the parties involved. This is particularly the case where they do not support parties to reach agreement about their future and that of any children.
- 1.9 The proposals within this policy letter do not touch on how arrangements for any children are agreed, as this is covered under the Children (Guernsey and Alderney) Law, 2008.

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<sup>4</sup> [Gov.gg - Matrimonial Causes](#)

- 1.10 The updated Law will, as currently, cover the whole Bailiwick and will ensure continued consistency and clarity across the islands. The States of Alderney and Chief Pleas of Sark have been engaged throughout the Review and have confirmed their agreement with this approach and have welcomed the recommended proposals.
- 1.11 Similarly, the Committee has consulted with the Committee *for* Employment & Social Security in relation to the equality and inclusion related policy issues raised through the Review, such as legitimacy. The Committee *for* Employment & Social Security has agreed to capture this matter within its 2020 handover report to its successor Committee.
- 1.12 The Committee has also consulted with the Committee *for* Home Affairs in relation to several related matters. The first being the need for amendments to be made to the Domestic Proceedings and Magistrate’s Court (Guernsey) Law 1988 to align with these proposals, should they be agreed. The second is in relation to the need to improve information and support services relating to family law matters, which aligns to the work underway to fulfil the extant Resolution relating to Justice Policy (Resolution 1c) from the last Policy & Resource Plan Update, (Billet d’État IX of 2019<sup>5</sup>).
- 1.13 The States of Alderney have been advised that the Separation, Maintenance and Affiliation Proceedings (Alderney) Law, 1964 will require changes.
- 1.14 In September 2019, (Billet d’État XVIII of 2019<sup>6</sup>) the States approved the draft Projet to implement amendments to the Law to extend the powers of the Court in relation to the division of assets following divorce or judicial separation. This was to discharge the 2009 Resolution of the States (Billet d’État II of 2009<sup>7</sup>) to amend some aspects of the Law. It also directed the Committee, in discussion with other relevant Committees, to further consider matters relating to pension sharing that it was not possible to include within the amending legislation, for the reasons set out in the accompanying policy letter to those Propositions.
- 1.15 Any policy matters requiring further consideration by the next government raised through this Review, such as lack of protection for co-habiting couples, will be captured as appropriate within the respective Committee’s handover reports to be appended to the 2020 Policy & Resource Plan Update.
- 1.16 Reform of the Law aligns with the Public Service Reform<sup>8</sup> agenda by transforming services so that they meet customer expectations.

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<sup>5</sup> [Billet d’État IX of 2019 - The Policy & Resource Plan \(2018 Review & 2019 Update\)](#)

<sup>6</sup> [Billet d’État XVIII of 2019 - The Matrimonial Causes Law Guernsey 1939 Amendment](#)

<sup>7</sup> [Billet d’État II of January 2009 - The Matrimonial Causes Law \(Guernsey\), 1939, as amended](#)

<sup>8</sup> [Public Service Reform](#)

## 1.17 Recommendations:

The Propositions to which this policy letter is attached recommend the States to:

1. approve the proposals set out in section 8 of the policy letter to reform the law relating to divorce, annulment and judicial separation;
2. direct the Committee working in partnership with the Committee *for* Home Affairs and relevant other committees to work together to improve access to information and support services relating to family matters, as part of the existing work on Justice Policy;
3. direct the Committee *for* Home Affairs to consider and oversee the amendments required to the Domestic Proceedings legislation to align with the removal of fault grounds, if agreed; and
4. direct the preparation of such legislation as is necessary to reform the Law in line with any decisions agreed by the States.

## 2. Introduction

2.1 Divorce, annulment and judicial separation are means to end or change the legal status of a married couple's relationship and can have further legal implications, for example for any children of the marriage or when dividing the couple's assets. This requires the Court's involvement in the process as it has a role to play in ensuring that an aspect of fairness is achieved through the legal separation proceedings and to ensure that any arrangements are legally binding on the couple and on third parties.

2.2 These matters form part of family law that also covers aspects of law relating to family issues and domestic relations such as adoption and inheritance. While some areas of family law have been modernised and seek to operate in a non-confrontational manner, it is a widely held view that the attribution of fault can exacerbate conflict, cause unnecessary distress and lead to poorer outcomes for those involved, including any children of the marriage. This view is held by other jurisdictions who have already or who are proceeding with reforming their legislation such as England & Wales and Jersey.

## 3. Policy and Legislation background

3.1 Initially and up until 1936, jurisdiction in matrimonial causes lay with the Ecclesiastical Court. The Loi Sur les Empêchements au Mariage à Cause de Parenté et sur l'Établissement de la Jurisdiction Civile dans les Causes Matrimoniales 1936 transferred that jurisdiction to the Royal Court.

- 3.2 The 1939 Law saw the establishment of the Matrimonial Causes Division of the Royal Court of Guernsey ("the Court"), which has jurisdiction in relation to matrimonial causes, suits and matters for divorce, judicial separation (Decree of Judicial Separation<sup>9</sup> and Judicial Separation by Consent<sup>10</sup>), nullity and decrees relating to presumption of death of a spouse.
- 3.3 It is also the responsibility of the Court to set out the procedures for matrimonial proceedings in Rules of Court and Practice Directions<sup>11</sup>, for example how applications are dealt with by the Court and what safeguards should be in place for unrepresented parties.
- 3.4 Any of these proceedings can be issued in Guernsey if either party to the marriage is domiciled in the Bailiwick of Guernsey when the Petition is filed; or has been habitually resident in the Bailiwick for at least one year before the Petition is filed. Although in nullity cases the Court's jurisdiction is slightly different in that it can be sought after the death of a spouse, so requiring the deceased to have been domiciled in the Bailiwick or habitually resident for a year up to their death.
- 3.5 The Law has been amended on several occasions but never substantially reformed. Most recently, in January 2009 (Billet d'État II of 2009<sup>12</sup>), the States resolved to amend the Law to extend the powers of the Court in relation to the division of assets following divorce or judicial separation. In September 2019, (Billet d'État XVIII of 2019<sup>13</sup>) the States approved the draft Projet to implement some of these amendments and directed the Committee, in discussion with other relevant Committees, to further consider matters relating to pension sharing that it was not possible to include within the amending legislation, for the reasons set out in the accompanying policy letter.

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<sup>9</sup> A decree of judicial separation may be sought using the same facts as are available for divorce, and the Court is able to make orders dealing with the assets, but the parties will remain married. Pension rights will not be affected.

<sup>10</sup> Judicial separation by consent is unique to Guernsey and enables a couple who do not wish to divorce, or who wish to wait until they can obtain a divorce on the basis of a period of separation, to consent to arrangements for financial matters and any children, which arrangements will then be legally binding.

<sup>11</sup> [Guernsey Royal Court - Matrimonial Causes](#)

<sup>12</sup> [Billet d'État II of January 2009 - The Matrimonial Causes Law \(Guernsey\), 1939, as amended](#)

<sup>13</sup> [Billet d'État XVIII of 2019 - The Matrimonial Causes Law Guernsey 1939 Amendment](#)

- 3.6 In December 2015, the States agreed (Billet d'État XXIII of 2015<sup>14</sup>) -'To direct the Policy Council to bring forward, in a timely manner, separate policy letters to address the issues raised by the work on Union Civile including those relating to the dissolution of legal partnerships, as set out in section 6 of that policy letter.'
- 3.7 The complex issues specified were adultery<sup>15</sup> as a ground for divorce, and non-consummation as a ground for nullity, as well as other options for dissolution of a marriage. At this time, adultery with a same-sex partner is not a ground for divorce nor is non-consummation a ground for the annulment of a same-sex marriage, which mirrors the UK legal position. This raises a concern over the equality of the Law when applied to same-sex married couples.
- 3.8 The necessity to prove fault before divorce can take place has been widely questioned and there are often misunderstandings around the actual legal steps required and their relationship with one another. Equally, it may be considered that the other options specified as reasons to dissolve a marriage do not reflect the needs of modern society, such as citing impotency or epilepsy as reasons for annulment of a marriage.
- 3.9 In June 2017<sup>16</sup> reform of the Law was prioritised in the Policy & Resource Plan, in support of achieving the "One Community: inclusive and committed to social justice" outcome. During late 2017, a working group was established to carry out the Review that included representation from the Law Officers, Family Bar and officers from the Office of the Committee for Employment & Social Security.
- 3.10 The provisions in law relating to the arrangements for any children of a marriage are covered by the Children (Guernsey and Alderney) Law, 2008, which was not part of this Review into the Law.

#### **4. Recent legislative reform in other jurisdictions**

##### **England & Wales**

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<sup>14</sup> [Billet d'État XXIII, 2015 - Same-sex marriage](#)

<sup>15</sup> Adultery is defined in law as sexual intercourse between a consenting man and woman when at least one partner is married to someone else.

<sup>16</sup> [Billet d'État XII, 2017 - The Policy & Resource Plan - Phase 2](#)

- 4.1 The current law governing divorce and dissolution of marriage in England and Wales, the Matrimonial Causes Act 1973, has remained largely unchanged for fifty years and was in the main a re-enactment of the provisions in the Divorce Reform Act 1969.
- 4.2 The legal process is very similar to the present process in Guernsey, (Appendix B) and requires that the marriage has broken down irretrievably and either that fault is attributed to one of the parties or they have to spend at least two years living separately while remaining married, if both parties consent, or five years if one party does not consent. It also maintains the ability for a divorce to be contested.
- 4.3 In a recent case, *Owens v Owens*<sup>17</sup>, the Supreme Court, in upholding the lower Court's refusal to grant a divorce based on an unreasonable behaviour petition, commented adversely on the law which denied the petitioner a divorce because she had failed to prove the fact alleged even though it was clear that the marriage had irretrievably broken down. The Supreme Court went further and invited Parliament to consider replacing the law.
- 4.4 In September 2018, the Ministry of Justice (MoJ) set out its case for reform of the divorce aspects of the 1973 legislation in its consultation on proposals for divorce reform<sup>18</sup>, where it sought 'to ensure that the decision to divorce is a considered one, with sufficient opportunity for reconciliation, and to reduce family conflict where divorce is inevitable.' In its response to the consultation findings<sup>19</sup> the MoJ set out the proposals for reform, which had progressed as a Bill with its first reading in the House of Lords (15<sup>th</sup> October 2019)<sup>20</sup> before Parliament dissolved for the general election.
- 4.5 The reform proposals included:
- retaining irretrievable breakdown of marriage as the sole ground for divorce but removing the requirement to provide evidence of conduct or separation facts;
  - providing for the option of a joint application;
  - removing the ability to contest;
  - Introducing a minimum timeframe of six months from Petition to decree absolute ("Final Order");
  - retaining the two-stage decree process;
  - retaining the bar on divorce and dissolution applications in the first year; and
  - modernising language used within the divorce process.
- 4.6 Where relevant the above changes would be equally applicable to legal separation order applications and some minor changes to powers in nullity cases, in particular to allow the minimum time period before finalising the nullity order to be amended.

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<sup>17</sup> [Owens vs Owens 2017 Supreme Court judgment](#), paras. 45, 49

<sup>18</sup> [Reducing Family Conflict: Reform of the Legal Requirements for Divorce](#)

<sup>19</sup> [Ministry of Justice - Reducing Family Conflict consultation response](#)

<sup>20</sup> [Divorce, Dissolution and Separation Bill 2017-19](#)

4.7 Reference was made within the MoJ's response that consideration of wider reform on related aspects of the law, such as how the Court makes financial orders on divorce, along with arrangements for annulment, would be reviewed once the proposals above had been implemented and the potential for conflict had been minimised.

## **Jersey**

4.8 The States of Jersey agreed, in principle, in September 2015 to introduce new divorce legislation to modernise, remove causes of unnecessary conflict, prioritise the best interests of children and support struggling couples who may wish to reconcile. The proposals being considered were:

- removing the three year bar on divorce - at the moment a person has to be married for three years before filing for divorce;
- moving to 'no fault divorce' – allowing a person to file for divorce without having to claim that their spouse was at fault;
- introducing joint filing for divorce; and
- removing the ability to contest a divorce.

4.9 Following public consultation on the potential changes to the law in early 2019, which supported the reform proposals above, work has started on progressing these changes<sup>21</sup>.

## **5. Other jurisdictions – current practice**

5.1 In the main, the legislation relating to jurisdictions within the British Isles is very similar, which is most likely because they have all originated from the 1857 Matrimonial Causes Act. There are some nuances from more recent reforms in some areas, such as Scotland has shortened the periods for divorce by separation to one year if with consent, and two years without consent, and has the option for a simplified divorce in some circumstances that can be filed online. A summary comparison of the existing legal processes in other jurisdictions in relation to matrimonial causes is captured in Appendix C.

5.2 In most jurisdictions considered (including Guernsey) 'irretrievable breakdown of the marriage' is the sole ground for divorce and this has to be proved in one of two ways: evidencing fault, with adultery and behaviour being the two facts that are consistent across several pieces of legislation; or by a period of separation i.e. divorce without fault.

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<sup>21</sup> <https://www.gov.je/news/2019/pages/responsesdivorceconsultation.aspx>

- 5.3 Generally, to divorce without having to prove fault requires parties to live separately for a significant amount of time before petitioning for divorce, which results in parties being unable to move on with their lives quickly after a decision to legally separate has been made. In some jurisdictions, where couples consent, the time required to live separately can range from just over one year up to almost two and a half years. Whereas, if one party does not consent this period can be extended to over five years in some jurisdictions.
- 5.4 The average time it takes to complete the legal process from Petition to Final Order appears to be very similar across jurisdictions and is in the main between two to six months.
- 5.5 Similarly, most jurisdictions allow and give some consideration to marital agreements such as pre-nuptial agreements, but they are not necessarily legally binding in all places. In France and Germany the agreements around legal separation arrangements can be agreed in advance of the marriage, which includes the split of marital assets and arrangements for any children of the marriage.
- 5.6 There are however, several differences in approach in terms of: the use of judicial separation; attendance at Court; or the requirements for legal representation. For example judicial separation by consent is unique to Guernsey, while decrees of judicial separation are possible in some countries but not in others for example Germany or Australia.
- 5.7 Civil partnerships and same-sex marriage also form part of the matrimonial causes legislation and their presence differs across jurisdictions, for example in Guernsey same-sex marriage is possible, but civil partnerships are not, whereas both are possible in England & Wales and Jersey. Where civil partnerships are available the legal process to dissolve or legally separate tends to be similar to those for marriage.

## **6. The Guernsey context and the case for change**

- 6.1 Through the work that resulted in the introduction of the Same-Sex Marriage Law<sup>22</sup> it was recognised that there was a need to revisit and reform the matrimonial causes legislation to ensure that it was inclusive and modernised to best serve the society it is in place to support.
- 6.2 During 2018, various stakeholders representing different interest groups involved with family law were engaged and consulted. Those consulted included: related public service areas; professionals; and members of the public, including those who had been or who were going through the legal separation process.

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<sup>22</sup> [Billet d'États XXIII, 2015 - Same-sex marriage](#)

6.3 Through engaging with those directly involved with the process in some way or who had personally experienced the process, it was established that there were other issues to be considered including that:

- the law is overly complex;
- some aspects of the law could be used to discriminate against parties with health conditions such as epilepsy;
- some aspects of the process cause unnecessary conflict between parties, which can negatively impact all those involved including children;
- the effectiveness of and access to impartial mediation and other forms of Alternative Dispute Resolution (ADR)<sup>23</sup> could be improved;
- there was a need to raise awareness and provide better information about what the law is intending to achieve to manage people's expectations and enable them to make informed decisions about their futures; and
- the length and costs (financial, time and emotional) of the whole process could have significant, negative long-term effects on the parties involved.

#### Requirement to prove facts

6.4 The requirement to prove one of five facts to dissolve a marriage has been widely criticised as most of the facts are fault-based and encourage blame for the failure of the marriage to be allocated to one of the couple<sup>24,25</sup>. The five facts are:

- adultery - the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent;
- behaviour - the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent ("unreasonable behaviour");
- desertion - the Respondent has deserted the Petitioner for at least two years;
- two years' separation with consent - the parties to the marriage have lived apart for at least two years and both parties consent to divorce; or

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<sup>23</sup> [In the UK, ADR is generally understood to describe all dispute resolution methods other than court proceedings and arbitration, or just non-adjudicative dispute resolution methods such as mediation, executive tribunal \(in essence a more formal type of mediation, known in the US as a "mini-trial"\) and early neutral evaluation, for example.](#)

<sup>24</sup> [House of Commons - Research Briefings - No-fault divorce](#)

<sup>25</sup> [The Nuffield Foundation - Finding Fault full report](#)

- five years' separation without consent - the parties to the marriage have lived apart for at least five years.

6.5 Where a fault fact is claimed, sufficient details must be provided to support the claim, even if undefended, whereas in some cases it is merely that the two consenting adults no longer wish to be married. When claims of unreasonable behaviour are made these may be exaggerated to meet the threshold for the behaviour ground in order to avoid the delay involved in a divorce on the basis of separation only (the current no fault option). The process of having to evidence behaviour is viewed by some as being extremely hurtful, stressful and unnecessary, which can lead to increased conflict as parties may feel the need to defend themselves against the claims. Although defended cases are rare (less than 1% of Petitions<sup>26</sup>), the most common defended Petition in England & Wales is where behaviour is the fact claimed.

6.6 Arguably the current need to evidence fault, for those who do not wish to separate for at least two years before divorcing, can have long lasting negative implications for healthy relationships<sup>27</sup>, which, given that many couples have children and need to maintain an ongoing relationship with their ex-partner, can be detrimental to achieving this.

6.7 Divorce can be obtained without any period of separation if the facts claimed are adultery or behaviour. Anecdotal evidence suggests that this is often used to obtain a 'quickie' divorce as it removes the need to live separately for two or five years.

6.8 There have been no recorded cases of divorce due to desertion in Guernsey's recent history.

6.9 In the results of the recent Guernsey public consultation 77% of the public were very supportive of the proposal to remove fault, whereas 11% were very unsupportive. Those who were unsupportive were in the main concerned with oversimplification of divorce and the potential therefore for marriage to be undermined.

#### The process of divorce and decree of judicial separation

6.10 Currently the legal process for divorce in Guernsey requires one party to Petition the other providing sufficient evidence to meet one of the five facts. A Petition for divorce can be filed at any time by one of the parties to the marriage (known as the Petitioner, the other being described as the Respondent).

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<sup>26</sup> [The Nuffield Foundation - No Contest report](#)

<sup>27</sup> [http://www.resolution.org.uk/news-list.asp?page\\_id=228&page=1&n\\_id=373](http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=373)

- 6.11 The Petition can only be initiated by one person, when in reality both parties to the marriage can together reach the decision to divorce. The Respondent to the Petition must acknowledge that they have been served with the Petition and state whether they agree with the contents or if they wish to contest the divorce.
- 6.12 In adultery cases, the Co-Respondent is also served and must confirm receipt of the papers formally served on them within 14 days. This requirement is seen as outdated and no longer a reasonable or necessary step.
- 6.13 The process for a decree of judicial separation is similar to that of divorce and the facts to be proved are the same as for divorce although there is no need to prove irretrievable breakdown. The Court needs to be satisfied that one or more of the ‘facts’ are present. As for divorce, the Petition can be defended and the contents are the same as for a divorce Petition, other than the prayer wording that states a decree of judicial separation is sought, instead of a dissolution of marriage.

#### Separation periods for divorce without blame

- 6.14 In instances where no fault facts are claimed there has to be a period of separation of two years if the Respondent consents to divorce, or a period of five years’ separation after which no consent is required. These periods are viewed by many as being far too long and restrict a couple’s ability to effectively move on with their lives following a separation. In other jurisdictions, such as Jersey and Scotland, the periods for divorce by separation are one year (with consent) and two years (without consent). 58% of those recently consulted were very supportive and 19% were somewhat supportive of removing separation periods completely.

#### Lack of inclusivity of the adultery fact

- 6.15 At this time, adultery is defined legally as intercourse between a man and a woman and, therefore, could not be used as a fact for divorce in cases where extra-marital relationships are between parties of the same-sex. This is the same as the current legal position in England & Wales and arises from the difficulty of formulating a definition of adultery in relation to same-sex relationships (the definition of adultery is not set out in the legislation but has evolved over many decades in case law in England & Wales in relation to intercourse between a man and a woman).

#### Lack of inclusivity and clarity of the grounds to annul a marriage

- 6.16 Annulment is a way of legally declaring that a marriage is void. It may be void because it was never properly formed due to lack of capacity or for some other reason. Likewise, it may have been properly formed but it is regarded as “voidable” because a ground exists which gives one of the parties the right to petition for nullity. Although, cases of annulment are very rare there will always be a need to enable a marriage to be annulled if necessary.

- 6.17 The present grounds for annulment are not inclusive of all marriages, for example non-consummation or impotency cannot be used as grounds for annulment of a same-sex marriage. Non-consummation of a marriage means a married couple has not had sex with each other since their wedding, which as defined in law (sex) cannot apply to same-sex couples. The same applies to impotency as a ground, as it cannot similarly be applied equally to all married couples, as it relates to a male condition that would affect the ability to consummate a marriage.
- 6.18 The current annulment grounds also include epilepsy, being of unsound mind and venereal disease, which discriminate against those with physical and mental health related concerns. In several comparative jurisdictions grounds for annulment such as non-consummation and health conditions are not available including in Scotland, France, Australia, Germany, and Canada.
- 6.19 At this time, unlike in England & Wales, the Law does not specify which grounds render a marriage void and which make it voidable. The two terms refer to two different reasons for annulling a marriage and have different implications for the parties involved. Ancillary relief is available following a decree of nullity.
- 6.20 Within the Legitimacy (Guernsey) Law, 1966 provision is made for children of a void marriage, but not a voidable marriage, so it is unclear how the Law would be applied to children of a voidable marriage which has been annulled. Clarity of the terms in the new Law would also ensure that children born of a voidable marriage would be regarded as legitimate should such an instance occur.

#### Defended divorces

- 6.21 At this time, the Respondent may contest or defend a divorce application where they do not agree that the marriage has broken down or they dispute the evidence used in the Petition. Defended divorce cases are very rare and in England & Wales an average of 2% of cases show an indication to contest, but even fewer proceed to a final Court hearing in front of a judge<sup>28</sup>. There is a view that the cost of defending a divorce dissuades many people from making use of this option.
- 6.22 There are opposing views on retaining the ability to defend divorce in general, with the suggestion being it would be unfair to remove the ability of one of the parties to defend themselves against any claims made; that it removes the ability to fight for the marriage; and that it would make divorce too easy.

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<sup>28</sup> [Ministry of Justice - Reducing Family Conflict consultation response](#)

6.23 Those who are supportive of removing this option are frequently of the view that ‘if one person believes the marriage has broken down then the marriage has irretrievably broken down’. This mirrors the views expressed through the responses to the public consultation, where 73% agreed with removing the ability to defend a divorce completely, while 14% disagreed with the proposal.

#### Safeguards for vulnerable parties

6.24 In domestic abuse cases evidence suggests that the need for consent for divorce by separation can be used as a means for the perpetrator to continue to exert control over a victim by refusing to consent to divorce. Therefore, the victim has to wait for five years before divorce can be granted, as opposed to two years using separation by consent.

6.25 Many victims of domestic abuse do not wish to claim fault as the reason for divorce, as this could result in having to explain in detail their personal circumstances and they would find it difficult to articulate the reasons for divorce or might be afraid of the consequences of setting them out in a Petition. Equally any claims using one of the fault facts can be defended by the perpetrator (of domestic abuse).

#### Requirement to consider reconciliation

6.26 Within the current law there is a requirement for the Court to be satisfied that an attempt has been made to reconcile the parties or that such an attempt is impracticable or undesirable. There is no evidence to suggest that this requirement has supported those wishing to reconcile. It is widely viewed that once a Petition for divorce or decree of judicial separation has been issued the likelihood of couples wanting to consider reconciliation has passed and support for attempts at reconciliation should not in any event be a matter for the Court.

#### The effectiveness of and access to impartial mediation and other forms of Alternative Dispute Resolution (ADR)

6.27 Through the initial consultation and research phase of the Review it was apparent that generally where couples do not agree is in relation to arrangements for the children and/or the finances (ancillary matters), and that this is where the majority of conflict arises.

6.28 When attempting to reach an agreement on ancillary matters, following a Petition being filed, some legal practitioners offer round table meetings (where all the parties get together to attempt to settle the matter or as many of the issues in dispute as possible); or shuttle meetings (where the parties do not sit in the same room but the person leading the negotiations moves between the two rooms).

- 6.29 The Court maintains a list of authorised mediators who come under the banner of Mediate Guernsey<sup>29</sup> and the Family Proceedings Advisory Service (“FPAS”) are also able to offer mediation to couples with children as an alternative to a contested Court hearing where both parties agree to this. There are also private counsellors and mediators practising in the Island.
- 6.30 However, the use of ADR methods as a means to reduce conflict and reach an agreement on ancillary matters does not seem to be widely accessed. Overall, it was felt that there was a need for greater awareness and clarity of the support services available to couples before the marriage has irretrievably broken down or to assist them reach the necessary agreements following the filing of a Petition.

#### Simplification of the process and procedures

- 6.31 It has been suggested that several procedural matters that equally apply to divorce, annulment and decree of judicial separation, including ancillary matters, could be simplified and made more transparent so that they are more easily understood and navigated. This in turn would modernise the process, assisting in the reduction of time, conflict and associated costs in line with the aims of reform.
- 6.32 In England and other jurisdictions the process of filing for divorce has been made simpler through digitalisation of the petitioning process. Likewise in Scotland it is possible for couples to manage the divorce themselves through a simplified, ‘do it yourself’ (DIY) process<sup>30</sup>, where there is no requirement to have legal representation; the costs are significantly less than a regular divorce; and there is no need to attend Court. This is only available to couples who have no children (of the marriage) under the age of 16 and where the parties will not make any lump sum or maintenance payment claims.
- 6.33 In Guernsey, petitions for divorce need to be filed through an Advocate and therefore legal representation is required. The costs for obtaining a divorce (not including ancillary matters) are generally fixed but these may still prove costly to some couples even in straightforward cases where couples agree that the marriage has irretrievably broken down. The estimated costs of the divorce aspect only are below £2,000, however, this could be financially out of reach of some couples and they may also not be eligible for support through legal aid.
- 6.34 Simplifying the process and the procedures for divorce, such as by introducing DIY methods or by application only (for no-fault), would remove the requirement for the Court to be satisfied as to the factual basis for divorce, so enabling the Court's time to be used for much more complex cases.

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<sup>29</sup> [Mediate Guernsey](#)

<sup>30</sup> [Scottish simplified-do-it-yourself-procedure](#)

- 6.35 Information on the current process is available online, but not in one location and it is not easily accessible to the whole community. Greater visibility of the steps and decisions to be made within the process would support parties in understanding what the process entails and enable them to make informed decisions about how they wish to proceed. It may mean that some couples will try to reconcile, perhaps with some professional support, instead of progressing with a divorce or judicial separation.
- 6.36 The simplification of the process brought about by the reforms provides a good opportunity to revise and update the information and guidance, and ensure that it is accessible to all.

### Financial orders

- 6.37 The Court has the power to deal with financial matters, such as vesting of property, division of assets and maintenance, following divorce, nullity or decree of judicial separation. A party can issue an application for financial relief once a Petition has been filed but the Court can only make an order once the decree has been granted. However, the Court can make orders for interim relief if needed. Interim relief is the term applied to the short term solution relating to finances, such as child maintenance or spousal maintenance, while the divorce is being finalised.
- 6.38 The resolution of financial relief is discretionary and it is difficult to predict the outcome as there are many considerations that impact on the Court's decision. Although there is no statutory requirement for the Court to consider a 'clean break'<sup>31</sup>, as there is in English law, the Court typically abides by this presumption. A 'clean break' means that the parties will have no further financial claim against each other's income or assets in the future, although this will not operate to affect a party's responsibilities for any children of the marriage. That being said English courts often decide not to use clean break orders where there are dependent children and where the carer may need spousal maintenance to be able to continue to care for the children.

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<sup>31</sup> 'A 'clean break' means that the parties will have no further financial claim against each other's income or assets in the future, although this will not operate to affect a party's responsibilities for any children of the marriage.'

- 6.39 Some concerns were raised through the initial consultation that the expectation to become financially independent after divorce, particularly after potentially a long period of not working, i.e. where one of the couple has stayed at home to be the main carer of any children of the marriage, was not always feasible or achievable due to a lack of sufficient assets or income of the marriage to support two households.
- 6.40 There is an identified need to raise awareness and provide better information about what the law is intending to achieve to manage people's expectations and enable them to make informed decisions. In England & Wales, one way this is achieved is by the principles being set out in law under section 25<sup>32</sup> of the Matrimonial Causes Act 1973, which governs financial settlements and assist courts in determining what is 'fair' in financial arrangements on divorce through consideration of all factors of the marriage and the available assets. Factors include for example: income, earning capacity, conduct of each party, the standard of living enjoyed by the family before the marriage broke down and financial need. In Guernsey, these matters are effectively taken into account and are adopted in practice, however, they are not specified in law and so their existence and application is not readily accessible to all parties.
- 6.41 Another way to support parties is through the provision of straightforward and accessible guidance, similar to that provided in England & Wales, for example through the Family Justice Council's 'Sorting out Finances on Divorce'<sup>33</sup>. The Family Justice Council 'is an advisory non-departmental public body, sponsored by the Ministry of Justice'<sup>34</sup>
- 6.42 In September 2019, the States resolved<sup>35</sup> to amend the Law to extend the powers of the Court in relation to the division of assets following divorce or judicial separation to enable the Court to try to help to reduce some of the conflict and challenge that occurs during this aspect of the process. The proposed amendments included power to make provision by Ordinance prescribing what matters should be taken into account when exercising these powers but stopped short of including them in the Law itself.

## 7. Options considered

- 7.1 The options were appraised using the desired changes as criteria:
- fits the needs of a modern society;
  - is simpler;
  - is more inclusive;

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<sup>32</sup> [Matrimonial Causes Act 1973 - Section 25 factors](#)

<sup>33</sup> [Family Justice Council - Sorting out finances on divorce - April 16](#)

<sup>34</sup> [Gov.uk - Family Justice Council](#)

<sup>35</sup> [Resolutions of the Billet d'État XVIII of 2019](#)

- seeks to minimise distress, conflict and be supportive of reconciliation where there is a willingness to do so;
- offers sufficient safeguards for any vulnerable parties including children; and
- aligns to comparable jurisdictions.

7.2 Appendix D contains a summary of the options appraised including those that were discounted. The options the Committee is proposing are in section 8.

7.3 The main options considered for changes to divorce included:

- The time for divorce by separation with and without consent be shortened to one and two years respectively. Adultery and desertion are included under a single fact of unreasonable behaviour i.e. three facts instead of five;
- Removal of any period of separation and enable parties to divorce by agreement without proving separation or fault i.e. no fault. Retain, for those who cannot agree, the ability to allege fault i.e. unreasonable behaviour, including desertion and adultery i.e. two facts instead of five; and
- No fault as the only ground for divorce, but with consideration given to a bar to filing for divorce for a specified period after marriage and/or a cooling off period once petitioned for divorce.

7.4 The above options were all discounted after careful consideration as it was concluded that they did not meet the criteria of reform to the same extent as the Committee's preferred option of a complete removal of fault.

## **8. Proposals for change and rationale**

8.1 Based on the overall findings of the Review from discussions with several stakeholders' groups, including the responses from the targeted engagements and public consultations, and informed by the reforms made or planned in other jurisdictions, the following proposals for change are suggested:

### **Divorce facts and no-fault**

#### Proposal 1 - Remove the fault and separation based divorce facts i.e. establish no fault divorce

8.2 The evidence suggests that the requirement to prove one of five facts to dissolve a marriage often results in increased conflict and distress, and does not support couples with children to have ongoing healthy relationships, as part of co-parenting. Equally, because of how it is defined legally, sexual infidelity with a same-sex partner does not constitute adultery and therefore cannot be used as a fact for divorce except as part of a behaviour petition. This means that the Law as it stands cannot be applied equally to all married couples and is therefore not fully inclusive.

- 8.3 It is widely recognised that having a non-confrontational approach to divorce by removing fault based facts and the necessity for a lengthy period of separation can reduce conflict in these situations and could be in the best interests of all involved, especially children. This view is supported by the findings of the Review. Therefore, it is recommended that fault and separation based facts are removed and a form of no-fault divorce is introduced.
- 8.4 Although there are arguments against introducing no-fault divorce which include: ‘the institution of marriage should be supported; the risk of the divorce rate increasing if it is perceived to be easier to get a divorce; and the negative impact of family breakdown’<sup>36</sup>, these arguments are not fully supported by the findings of the Review.
- 8.5 The global evidence is also inconclusive as to the negative impacts of no fault divorce because there are many variables that influence why parties decide to divorce. In Canada, where a form of no fault was introduced in 1986, for example, the main contributing factors to marital breakdown were seen as being ‘the ages of the bride and groom, the length of the marriage and the strength of an individual's commitment to marriage’<sup>37</sup>.

#### Proposal 2a) Simplify the process of divorce by introducing no-fault by application

- 8.5 It is recommended that a simple system of application is used to facilitate the introduction of no-fault divorce. The Court would receive an application (rather than a Petition) for a divorce order, the ground for which would be that the marriage had irretrievably broken down and there would be no requirement to prove any facts. This would require one or both parties (if Proposal 2b progresses) to provide a statement of irretrievable break down, which would be sufficient evidence to the Court that the marriage had irretrievably broken down. Evidence checks would still need to be made to ensure that the notice is valid, for example that there is a marriage to dissolve, that there are no fraudulent or procedural concerns and that the Court has jurisdiction. The parties’ identity would also need to be appropriately verified.

#### Proposal 2b) Enable parties to jointly apply to the Court

- 8.7 Where parties are in mutual agreement that the marriage has irretrievably broken down there should be the ability for them to jointly apply. This would support those parties who wish to proceed on a mutual agreement basis, while retaining the ability for only one of the parties to make an application for divorce on the basis of the irretrievable breakdown of the marriage.

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<sup>36</sup> [House of Commons - No fault divorce research briefing](#)

<sup>37</sup> [The Canadian Encyclopedia - Divorce in Canada](#)

- 8.8 This could result in joint applications proceeding more quickly than sole applications, as there are fewer steps required i.e. in sole applications the other party (Respondent) once served would need to acknowledge that they have received the application and these documents would need to be filed with the Court prior to the case being heard.
- 8.9 Provision would be needed to enable one party to proceed where a joint application had been made but one party then changed their mind and wished for the application to continue as a sole application.
- 8.10 Proposals 2a) – b) to simplify the process for both divorce and judicial separation, similar to that proposed by England and Wales<sup>38</sup>, would remove the need for petitions to be filed through an Advocate, as currently required<sup>39</sup>, and supports those who wish to process the divorce themselves. It also removes the requirement for the Court to be satisfied as to the facts upon which divorce is sought, so freeing up some of the Court's time.
- 8.11 There may be circumstances where the Court has concerns with the application that may require one or both parties to attend Court, such as when there are issues with jurisdiction of the Court or of the proof of identity of one or both of the parties.
- 8.12 The couples can, and it would be advised should, still seek legal advice on any agreements or arrangements suggested relating to ancillary matters to make sure that they are in their and their children's best interests. Similarly, where parties are unrepresented they may be required to attend Court to finalise their financial arrangements (see Proposal 12).

## **Defending a divorce**

### Proposal 3 Remove the ability to defend a divorce

- 8.13 There is strong public support (73% of responses) for the view that, if one party has decided that the marriage has irretrievably broken down, and applies to the Court for an order for divorce (without needing to prove any fault), there is no point in retaining the ability for the other party to defend the divorce. It will however be important that safeguards remain in place to protect the children of the marriage and any vulnerable parties, such as the requirement for arrangements for any children to be in place before the Final Order is finalised and for consideration to be given to the position of the other party in certain circumstances, such as where the granting of a divorce order will cause serious financial hardship.

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<sup>38</sup> [Gov.uk - Reducing family conflict consultation response](#)

<sup>39</sup> [Guernsey Royal Court - Matrimonial Causes](#)

8.14 By removing the ability to defend a divorce those who try to continue to exert control over another are prevented from doing so, such as in domestic abuse cases. Therefore, by removing this ability there is greater protection for some vulnerable parties.

8.15 The application for divorce will still be able to be challenged on the basis of jurisdiction or validity of the marriage for example.

### **Cooling off period**

#### Proposal 4 Retain a cooling off period of a minimum of 60 days from application to Provisional Order

8.16 It is suggested that maintaining a minimum period for cooling off from the date of making an application for divorce to the date when a Provisional Order can be made enables both parties to make any necessary arrangements, while allowing those couples who may wish to do so to attempt reconciliation. The 60 days will not increase the current average length of divorce (3-6 months), but it will act as a safeguard to those parties who may not have been informed in advance that their partner is seeking a divorce. It will give parties time to reflect and digest the situation and prepare for the change. Post-application it will still be possible to stop proceedings, at any point, should they both agree up until the Final Order. For example, if the couple wishes to try and reconcile.

### **Two stage decree process**

#### Proposal 6 Retain the two stage decree process of Provisional Order and then Final Order

8.17 Consideration was given to removing the need for the Provisional Order to simplify the process. However, by retaining the two stage decree process the ability for the Court to investigate any matters of irregularity remains and it provides couples with another opportunity to consider and reflect before making the decision to proceed.

#### Proposal 6 It is proposed that either party can continue to apply for a Final Order once the period for making an appeal has passed (one month).

8.18 Currently, either party can formally apply for the Provisional Order to be made final following a period of one month from the Provisional Order being made. The one month period is a procedural aspect that is in place to enable the Provisional Order to be appealed. This applies equally to Final Orders of Divorce (which terminates the marriage) and Decrees of Judicial Separation (legal separation).

### **Powers of the Court**

#### Proposal 7 Retain the Court's powers to reduce the 60 day period in order to finalise the divorce more quickly in some circumstances

8.19 It is suggested that the provision enabling the Court to abridge the 60 day period between the application and the granting of the Provisional Order remains. This maintains the Court's discretion to expedite a divorce Order in certain circumstances, such as where one party is pregnant by another and wishes to marry the parent, or where one party is terminally ill.

#### Proposal 8 Remove the requirement for the Court to consider reconciliation

8.20 The requirement for the Court to be satisfied that an attempt has been made to reconcile the parties or that such an attempt is impracticable or undesirable is included in the Petition and supplemented by a statement by the Advocate acting for the Petitioner. This may be seen as a tick box exercise and there is no evidence to suggest that this requirement has supported those wishing to reconcile. By removing this requirement it will support the simplification of the process.

8.21 It is suggested that to provide for couples who may wish to consider reconciliation, support should be accessed much earlier in the process before the marriage has irretrievably broken down and before an application is made (see Proposal 18a).

#### Proposal 9 Retain the ability to apply for a decree of presumption of death and dissolution of marriage

8.22 A decree of presumption of death and dissolution of marriage applies where one spouse has evidence of reasonable grounds that the other party to the marriage is dead and wishes for the marriage to be dissolved. There is a presumption of death if the person has been absent for a period of at least seven years without any evidence that the person has been alive during that time.

8.23 The Court will assess whether to grant the Order based on the facts and evidence presented within the application, for example duration of disappearance and the efforts made to find the missing person. Following the Order being made a sufficient period should be retained for an appeal to be lodged. If no appeal is lodged then the party can remarry. Currently, that period is set at six months, but that is considered to be too long. A period of one month would be sufficient.

8.24 Although these types of cases are very rare it is recommended that the provision is retained and modernised where applicable to accommodate these circumstances should they occur and align with any changes made in comparable jurisdictions.

### **Judicial Separation by Consent**

#### Proposal 10 Retain judicial separation by consent

8.25 A judicial separation by consent is unique to the Island and is often (34% of 2016 cases) used as a means to quickly and cost effectively secure a legally binding agreement on children, property and finances without the need to prove that the marriage has irretrievably broken down.

- 8.26 Couples remain married, but often subsequently divorce after two years' separation where there is consent. It is expected that the number of cases will reduce if no-fault divorce progresses. However, there are no identified reasons to change or remove the provision of Judicial Separation by Consent at this time.

### **Decree of judicial separation**

Proposal 11 Retain the decree of judicial separation, but remove the facts and simplify the process in line with the changes proposed to divorce, where applicable, including removing the ability to defend a judicial separation.

- 8.27 Instances of a decree of judicial separation are very rare, but at this time, there are no identified reasons to remove this provision. By retaining provision the law is inclusive of those who no longer wish to cohabit, but, possibly for religious or financial reasons, do not wish to divorce.
- 8.28 It is recommended that to align with the proposed changes for divorce that one or both parties to the marriage may apply for a decree of judicial separation based on the fact simply that one or both parties wish to be judicially separated. There would be no requirement to prove any facts and a similar application process could be used as suggested in Proposal 2a and 2b for divorce.
- 8.29 It is also recommended that, as in Proposal 3 for divorce, the ability to defend a decree of judicial separation is removed. The application for a decree of judicial separation will still be able to be challenged on the same basis as divorce, such as in relation to jurisdiction or validity of the marriage.

### **Annulment**

Proposal 12 Change and update annulment grounds to remove some grounds to make the grounds more inclusive and to distinguish between void and voidable grounds.

- 8.30 Although cases of annulment are very rare there will always be a need to enable a marriage to be annulled if necessary, for example in cases of duress, fraud or bigamy, so it is recommended that the ability to apply for a marriage to be annulled should be retained.
- 8.31 From an individual's perspective it is important to distinguish between marriages which are deemed never to have existed (void) and marriages which may be avoided because of certain grounds, but which continues to be regarded as having existed until a decree of nullity is granted upon the application of one of the parties (voidable). Voidable marriages are regarded as having existed until annulled on the basis of certain grounds such as: non-consummation; lack of consent due to duress, mistake or unsoundness of mind; or venereal disease.

- 8.32 It is recommended that the grounds for obtaining a decree of nullity should be updated to remove the grounds which are no longer appropriate for today's society. Therefore, the current grounds relating to non-consummation, impotence, pregnancy by another person, venereal disease, mental disorder and epilepsy will no longer apply.
- 8.33 It is also proposed that there should be a clear distinction between those grounds which render a marriage void and those which merely enable a party to apply for annulment if the party so wishes. Where a decree of nullity is made in the case of a voidable marriage, the marriage will be treated as void as from the date of the decree only.
- 8.34 The grounds on which a marriage is void will be captured within the Marriage Law which is presently being drafted and will include (in addition to any other grounds on which a marriage is by law void) –
- parties are closely related to each other such that they are within the prohibited degrees for marriage;
  - where either party is under the minimum age for marriage;
  - where certain formalities required by Law to be observed have not been complied with such as where a marriage was not legally concluded or where incorrect or false material information is used to obtain a marriage licence;
  - where a marriage is bigamous; or
  - either party is in a civil partnership.
- 8.35 A marriage will be voidable, and may be declared void on the application of one of the parties if, in addition to any other grounds on which a marriage is by law voidable –
- if either party did not validly consent to the marriage, for some reason, for example due to duress, mistake or unsoundness of mind.
- 8.36 It is also recommended that the Court retains the authority to amend the grounds in line with best practice.

### **Financial matters**

Proposal 13 Incorporate the principle to seek 'financial independence', based on the section 25 factors of the law in England & Wales, including a 'clean break', within the law.

- 8.37 There is an identified need to raise awareness and provide better information about what the Law is intending to achieve as the determination of financial relief is discretionary and it is difficult to predict the outcome as there are many considerations that impact the Court's decision.

- 8.38 By providing further clarity on how the Court interprets the Law and reaches its decisions parties will better understand what the law aims to achieve, while enabling individuals to make better informed decisions about their futures (as they will know in advance what informs the decisions reached by the Court with regards to financial matters and so can plan accordingly). This could result in agreements being reached quicker with far less conflict.
- 8.39 To achieve this it is recommended that the section 25 factors<sup>40</sup> (of the Matrimonial Causes Act 1973) that the Court takes into account when making financial orders, are set out in law. This proposal would be supported by Proposal 14 to provide better information and guidance, including on financial matters to couples considering or going through a divorce or judicial separation.
- 8.40 It is also proposed that the principle that the Court should consider a clean break should be included as part of the Court's considerations of the matters between the two parties. This means that so far as possible neither party to the marriage will have any future financial claim on the other. This would exclude any orders between parents and their children as parents will always be liable for maintaining any dependent children. It may also not be appropriate where one of the parties is unable to work, for example, due to responsibilities for young children, in which case spousal maintenance might be considered to be appropriate.

#### **Other related matters of procedure**

##### Proposal 14 Request that the Court gives consideration to removing the requirement for unrepresented parties to attend Court for consent orders relating to financial settlements.

- 8.41 Currently, couples who have legal representation do not normally need to attend Court where matters are agreed, however, those who are unrepresented do. This step acts as a safeguard to confirm that both parties understand and freely give consent to the proposed arrangements as they can have life changing effects.
- 8.42 The requirement aims to ensure that one party is not being coerced in any way to accept an arrangement and understands the significance of any consent order. However, where physical attendance is not possible the Court may accept an alternative such as a signed and witnessed certificate or the person 'attending' Court via video conferencing.

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<sup>40</sup> [Matrimonial Causes Act 1973 - Section 25 factors](#)

- 8.43 Of those consulted many were concerned about the distress of having to attend Court, some suggested this requirement increased conflict between parties and therefore, resulted in additional costs in terms of time, emotion and money. Some were of the view that it was unfair as those who could afford representation did not need to attend. Some other suggestions for change were considered such as that a signed and witnessed certificate should be sufficient.
- 8.44 It is understood that the approach in England & Wales does not require all unrepresented parties to attend Court if written consent has been given, but the Court retains the power to request the parties' attendance where it is felt that the arrangements are unfair or unclear. Given that this matter relates to procedural aspects of how the Court operates in this regard there is no requirement to legislate for this aspect of the process. The concerns raised through consultation have been shared with the Court, which will give them further consideration when revising the Rules of Court to be made under the new legislation and which has agreed to seek to accommodate alternative approaches that are similarly robust, where possible.

Proposal 15 Request that the Court gives consideration to streamlining the ancillary relief process

- 8.45 The Court have been advised of the Review's findings and has agreed to give consideration to how it might streamline the ancillary relief process as part of implementing the reforms, but also as part of the work updating the relevant Rules of Court. By streamlining the process the Court would seek to ensure that it has all the necessary information as soon as possible, such as by having automatic directions, so that they may be able to make some financial orders more quickly. This in turn may benefit those parties who are able to reach an agreement on the financial matters to move forward with their lives sooner. However, it is important to recognise that this is not always the case for a variety of complex reasons that are unlikely to be influenced by court procedures.

Proposal 16 To consider the digitalisation of the application for divorce, annulment or judicial separation, alongside the whole process, once the legal changes have been made

- 8.46 By progressing with legal changes first before introducing a digitalised process, it enables the new processes to be fully embedded before moving to a technological approach. This also allows time for other technological changes at the Court to be fully considered. The recently trialled applications in England and Wales<sup>4142</sup> will also be further tested and developed.

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<sup>41</sup> [Gov.uk - Apply for divorce](https://www.gov.uk/guidance/how-to-apply-for-divorce)

<sup>42</sup> <https://www.theguardian.com/lifeandstyle/2018/may/06/easy-divorce-online-couples-avoid-stress-of-court>

Proposal 17 To publish clear, simple guidance in one accessible place, such as on the Royal Court website that other agencies can signpost people to or share, to include guidance on determining 'financial needs' and 'independence'.

8.47 Through providing transparent and accessible information and guidance to parties this would enable them to both make informed decisions relating to their circumstances and could potentially reduce conflict. It may mean that some couples will try to reconcile, perhaps with some professional support, instead of progressing with a divorce or judicial separation. The simplification of the processes within the Law provides a good opportunity for all information online to be revised, refreshed and placed in one accessible location.

8.48 Introducing more information and guidance supports several of the above proposals, such as no-fault, DIY divorce and digitalisation

### **Matters relating to other support services**

Proposals 18a) Raise awareness of other support services, such as private counsellors, which are available to couples who are experiencing relationship difficulties or who wish to try to reconcile.

8.49 Relationship counselling is available currently to couples for a fee through private counsellors at any point, including before the marriage has irretrievably broken down. Although available, it appears few couples are aware of or access the support available to support their relationship and that these services are not consistently signposted. This proposal seeks to improve signposting to existing support services to assist parties who may wish to make use of these services, perhaps before the marriage breaks down irretrievably.

Proposal 18b) - Raise awareness of the support available to couples who have decided that their marriage has irretrievably broken-down, through Alternative Dispute Resolution (ADR) including mediation, at the earliest possible stage in the process.

8.50 The Review identified that there is a need for better and more information on impartial ADR services, such as mediation, arbitration and collaborative law, to support separating couples who have decided that their marriage has irretrievably broken down, but who need support to finalise and agree the ancillary matters. This is with a view to reduce conflict, as parties are aware and can access these services much earlier in the divorce process. Through raising awareness of these services, at the earliest possible stage, conflict, time and costs could be reduced<sup>4344</sup>, which has long term benefits for all parties involved including children.

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<sup>43</sup> [Cafcass - Family mediation](#)

<sup>44</sup> [Ministry of Justice - Family Mediation](#)

Proposal 18c) Raise awareness of other forms of support to legally separating couples with children, such as the Children First course

- 8.51 It is suggested that there is a need to also raise awareness of the wider support services on offer and to join these services up, so that appropriate support can be accessed at a time when parties could most benefit from that support.
- 8.52 Given the relationship with existing work streams already underway relating to the Justice Policy (Resolution 1c, Billet d'État IX of 2019<sup>45</sup>) from the last Policy & Resource Plan Update, it is recommended that the Committee works alongside the Committee *for Home Affairs (CfHA)* and others to incorporate these proposals within the Justice Policy work.

**Benefits of the proposed changes**

- 8.53 By introducing the above changes to how couples can legally separate it is anticipated that it will result in the several benefits to the various parties involved that could include -

Parties to marriage:

- Removes the need to attribute fault, to justify irretrievable breakdown, and the ability to defend a Petition, reducing time, costs and conflict;
- Evidence checks will still be made to ensure the application is valid, for example that there is a marriage to dissolve and that the Court has jurisdiction;
- Enables unilateral decisions by one party;
- Reduces the likelihood of the legal process being used by the perpetrators of domestic abuse to continue to exercise coercive control over the victim;
- Improved outcomes for all those involved are achieved through better supporting parties to reach agreements on future arrangements sooner, with less conflict;
- The associated costs are reduced, whether in time, emotionally or financially, as the process has been simplified, steps that cause unnecessary conflict removed, the process is easier to navigate and parties are better informed about the decisions they need to make to legally separate; and
- Couples who wish to consider reconciliation are enabled to do so by retaining the ability to stop proceedings and withdraw the Petition, should couples wish to reconsider or to try to reconcile.

Children whose parents are legally separating:

- Should experience less conflict between their parents who are divorcing or judicially separating (by Decree); and

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<sup>45</sup> [Billet d'État IX of 2019 - The Policy & Resource Plan \(2018 Review & 2019 Update\)](#)

- Will have parents who are more able to cooperate and effectively co-parent in the future.

#### Courts and judiciary:

- Greater alignment with the confirmed proposals for change in England & Wales and changes already made in some other comparable jurisdictions. By aligning our reforms in this way it removes any complexity in cases where there are cross-jurisdictional matters. It also ensure in the case of England & Wales, as at present, that there is a wider body of case law to consider to inform the courts. This is particularly relevant to Guernsey's context given our size and therefore body of case law to draw on; and
- Frees up some of the Court's time allocated to considering matrimonial causes applications, which could be diverted to more complex and higher risk family law cases.

#### Legal practitioners:

- Will be able to support clients with the more complex arrangements and issues, as opposed to having to support them in evidencing the facts or processing the Petition; and
- They will have clients who are more informed and better supported to make these difficult decisions, with far less acrimony.

#### Support services including private and third sector organisations:

- Will be able to support parties in constructively moving forwards with their lives, as opposed to having to advise them on complex processes and procedures; and
- The legal aid service may see a reduction in applications for support with divorce or judicial separation cases.

### **9. Matters not recommended for progression or already underway**

#### To give greater legal recognition to pre or post-nuptial agreements (PNAs)

- 9.1 Although, there was some support (21 (53%) of responses to the public consultation were supportive of greater legal recognition of nuptial agreements) the Review also found that there are significant challenges with introducing statutory recognition of PNAs.
- 9.2 This is a complex area of law and as there is not one best practice approach across comparable jurisdictions, it suggested that this matter is considered at a later date in light of any strengthening of consensus in this area, in line with the reform aim to ensure alignment with international standards and legislation.
- 9.3 The Court will continue to have the power to cancel, amend or terminate a nuptial agreement established in any jurisdiction, with regards to the parties' means, their conduct and the impact on any children of the marriage in line with relevant case law.

- 9.4 The agreements will continue to not be legally binding, but the Court will continue to be able to take the contents of nuptial agreements into consideration, so long as they are entered into by consenting adults and that the provisions within the PNA are fair and reasonable. The extent to which the Court takes PNAs into consideration is subject to certain conditions being evidence including whether: both parties had independent legal advice; there had been full disclosure of assets; and there is evidence to support that the agreement was not signed under duress or undue influence.
- 9.5 Proposal 12 will improve awareness and understanding of how the Court determines what is 'fair' in financial settlements and will enable those who wish to draw up a PNA to do so in line with the prescribed principles within the Law.

#### Greater clarity of legal costs

- 9.6 The intention behind this proposal was to ensure that all parties had a better understanding of what the process would cost in advance of the costs being incurred. Two options were considered by the working group to give greater clarity to the legal costs of divorce or legal separation:
1. Practitioners to be encouraged to publish fees online; and
  2. Encourage practitioners to set a fixed fee that they will charge for divorce, excluding ancillary matters, (similar to the approach taken for legal aid divorce cases where Advocates charge a fixed rate).
- 9.7 There already exists a requirement for legal practitioners to advise their clients on charges in advance and many already fix fees for divorce if at different levels. The public will have a greater awareness of and a better understanding of the potential costs involved i.e. up to £2,000 through this work. It would be expected that the proposals relating to improved information and awareness of the process would facilitate a better understanding of what is required and where legal advice might be necessary. This information will include indicative costs and guidance on how to minimise the associated costs throughout the process.
- 9.8 Similarly, other reforms such as introducing no-fault divorce by simple application are likely to reduce legal costs associated with the divorce aspect of the law, as the requirement for an Advocate to submit a Petition will be removed.
- 9.9 Overall, it is suggested that progressing the above two options may not be necessary once the wider reaching reforms are in place. It is also expected that practitioners will take on board the findings of the Review and seek to fully ensure their clients are better informed, in advance, of the likely costs that will be incurred.

#### Introduce a bar to divorce following marriage before divorce can be filed

- 9.10 Currently, there is no set period and couples could if they so wished, and had grounds, file for divorce the day after getting married. The Review did not identify any reasons to introduce a bar and therefore this proposal was not progressed.

### Remove the requirement to publish the notice

- 9.11 The need to remove publication of the notice is already being explored by the Royal Court. It is expected that this procedural requirement will be removed shortly.

### Strengthening of the requirement to consider reconciliation

- 9.12 Concerns were raised by stakeholders about the appropriateness and risks associated with any strengthening of the current requirement to consider reconciliation where domestic abuse was a factor, such as being required to attend some form of reconciliation session. This option was discounted on this basis and given that the requirement to consider reconciliation was also not going to be retained (Proposal 8).

### Update any forms to ensure they are inclusive

- 9.13 Through the Review concerns were raised around the requirement for only female parties of a couple petitioning for divorce needing to provide previous last names, while male parties do not. It is expected that through the implementation of the reforms all documentation and evidence required will be updated and non-discriminatory.

## **10. Other policy matters for consideration**

### Legitimacy and illegitimacy

- 10.1 In the course of consideration of the effects of void marriages on the parties, and in particular on any children of such "marriages", it was noted that there is no legislation in the Bailiwick equivalent to the UK Family Law Reform Act 1987, which removed the concept and significance of legitimacy (or illegitimacy) of an individual for all purposes. The Legitimacy (Guernsey) Law, 1966 provides that the children of void marriages are regarded as legitimate if the parties reasonably believed, at the time of conception, that the marriage was valid, and the disadvantageous effects of illegitimacy have been removed from several significant areas of legislation, such as inheritance. However, there is a general issue as to whether the distinction between persons who are legitimate and those who are illegitimate should be retained at all in modern society and is therefore a policy matter for future consideration.
- 10.2 In consultation with the Committee *for* Employment & Social Security it has been agreed that this matter sits within its mandate and that it will be captured within its 2020 handover report, (in line with Rule 23 of the States of Deliberations Rules of Procedure) to inform its successor committee of policy matters needing further consideration.

## Legal protection for co-habiting couples

- 10.3 On several occasions from various different stakeholder groups concerns were raised about the lack of legal protection for couples who are co-habiting but not married. Although outside of the scope of this Review it is prudent that wider concerns or matters that need further consideration are appropriately flagged as with the matter of legitimacy noted above.
- 10.4 To ensure that this matter is brought to the attention of the next States of Deliberation the Committee will capture this in its 2020 handover report, (in line with Rule 23 of the States of Deliberations Rules of Procedure). This will be alongside other matters raised through the course of this term to inform the next States of Deliberation on potential future policy areas needing consideration, so that they can be effectively prioritised and suitably resourced.

## Establishing a Family Court

- 10.5 The matter of exploring the establishment of a Family Court was equally raised through the consultation and engagement work. This could be similar in approach to the Single Family Court (“Family Court”) established in England and Wales in 2014. At this time different aspects of family proceedings can be heard in both the Royal and the Magistrates Court. The majority of domestic family proceedings are heard in the Magistrates Court. The Committee is of the view that this suggestion requires further exploration.

## Pension sharing arrangements

- 10.6 In September 2019 (Billet d'État XVIII of 2019<sup>46</sup>), the States directed the Committee, in discussion with other relevant Committees, to further consider matters relating to pension sharing that it was not possible to include within the amending legislation, for the reasons set out in the accompanying policy letter.
- 10.7 The Committee intends to take the same approach as described in paragraph 10.4, for co-habiting couples policy, to ensure that the establishment of a Family Court and the matters relating to pension sharing are suitably assessed by the next government as part of its policy prioritisation.

## **11. Consultation**

- 11.1 Both Alderney and Sark were consulted at an early stage and in March 2018 the Bailiwick Council agreed that Bailiwick-wide legislation would be preferable as it would provide more consistency. Alderney and Sark have confirmed that they are in agreement with the proposals as set out in this policy letter.

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<sup>46</sup> [Billet d'État XVIII of 2019 - The Matrimonial Causes Law Guernsey 1939 Amendment](#)

**11.2** Consultation with other committees whose mandates these proposals relate to have been advised and their views have been captured within the respective areas of the policy letter. The committees engaged with include the Committees for Home Affairs and Employment & Social Security.

**11.3** The other interest groups and individuals engaged and consulted throughout the Review included: the Royal Court and judiciary; the Family Bar; religious groups; related public service areas; private and charitable support services such as Safer and the Citizens Advice Bureau; States Deputies and members of the public, including those who had been or who were going through the legal separation process.

## **12. Operational implications**

**12.1** To implement the proposed changes the Court will incorporate any procedural changes required to matrimonial proceedings into the Rules of Court and related Practice Directions.

**12.2** The HM Greffier will produce supporting guidance and documentation to supplement the Rules of Court and ensure that any necessary changes to processes are aligned with the legislation drafting work.

**12.3** Future consideration of digitalisation of the process is within the scope of SMART Guernsey, in respect of the work relating to digitalising the functions of the Royal Court. Although this may mean that the work to digitalise aspects of the divorce process does not progress in the near future, there are benefits to embedding the reforms in advance of any digitalisation of a process.

## **13. Legislative implications**

**13.1** New primary legislation will be required to implement the recommendations in this policy letter requiring the repeal and re-enactment of the current Law with necessary modifications to reflect current legal practices and requirements. In addition to implementing the new proposals set out in this policy letter the opportunity will be taken to update the legislation and incorporate minor amendments where legally necessary to ensure that the Law and subordinate legislation are consistent with modern standards. By way of an illustration, the provisions relating to jurisdiction and composition of the Court and the appeals provisions are outdated and will require further consideration and consultation with the Court during the drafting process to ensure that they are consistent with modern practice.

**13.2** The Law Officers have advised that there may be some consequential amendments needed to other enactments relating to family or marriage law and which would be affected by the recommended changes to the Law, should the proposals in this policy letter be approved.

- 13.3 The Domestic Proceedings and Magistrate's Court (Guernsey) Law, 1988 enables a party to a marriage to apply to the Magistrate's Court for a separation order and financial provision. Such an application may be based on behaviour, desertion or adultery, or the respondent's failure to provide maintenance for the applicant or the children. If fault is removed from divorce, consideration should be given to the removal of the necessity to prove fault from applications under the 1988 Law. The Committee *for* Home Affairs are aware of this matter and have advised that it is in agreement with the related Proposition 3.
- 13.4 Similarly, the States of Alderney have been advised that the Separation, Maintenance and Affiliation Proceedings (Alderney) Law, 1964 will require changes.
- 13.5 There will be a need to align minor aspects of the Law with changes made in comparable jurisdictions such as England & Wales.
- 13.6 Provision will be made for matters of detail to be included in subordinate legislation, including Rules of Court for procedural matters, such as reporting restrictions, fees and the form of applications.
- 13.7 Transitional provisions will make provision for proceedings which have already been instituted at the date of commencement.

#### **14. Resource implications**

- 14.1 Law Officer resource will be required to draft the Projet de Loi and subordinate legislation, subject to legislation drafting prioritisation.
- 14.2 The transition arrangements to the new procedures and formalities including training for Court staff and judges will be one-off costs and will be managed through existing Royal Court resources.
- 14.3 No ongoing costs are expected, but in due course if the process is to be digitalised then it would be expected that there would be additional costs associated with introducing an online divorce system. Given the ongoing work of SMART Guernsey in scoping the States of Guernsey's requirements, it is feasible to assume that it would be possible for this requirement to be incorporated into any future digitalisation of the Royal Court.
- 14.4 The relevant changes will be made to the Court's charges to reflect the proposals agreed. It is anticipated that any reduction in income from court fees will be more than off-set by freeing up of the Court's and its officers' time in managing and supporting divorce cases.

14.5 It is to be expected that there will be a peak in applications in the short term<sup>47</sup>, once the new legislation is in force, as some couples may wait to progress a divorce until the reforms are in place. This, alongside additional enquiries on the new process, will inevitably result in more staff time being required to manage any initial increase in demand. However it is not expected that this will be an ongoing need. It is expected that any short-term peak in demand can be managed by existing resources.

## **15. Timeframe**

15.1 The date when the new legislation would come into force is dependent on the prioritisation of the drafting of the legislation, available drafting resources and the required approvals for primary legislation that includes approval by the Privy Council. Therefore, it is difficult to specify an enactment date. It would be anticipated that the legislation would be drafted in 2020 with a view to being enacted during 2021 at the earliest (set out in Appendix E).

## **16. Conclusions and recommendations**

16.1 The premise that couples can divorce without the necessity to prove fault has been in place in many jurisdictions for some time and other jurisdictions similar to ours are considering or are already seeking changes to their legislation to progress no-fault divorce, alongside other reforms to reduce conflict and simplify the process.

16.2 The public were consulted on the suggested proposals for reform and the majority were supportive of the Committee's main proposals.

16.3 The resource and financial costs of each option were essentially the same and it is expected that the proposals recommended can be managed within existing resources.

16.4 The Committee is of the view that the proposals set out in this policy letter to reform the matrimonial causes legislation will deliver the most benefit to all parties involved of all the options and combinations of options considered, thereby delivering to the greatest extent the intended outcomes of reform.

16.5 The Committee recommends that the States approve the Propositions to which this policy letter is attached.

## **17. Compliance with Rule 4**

17.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.

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<sup>47</sup> [The Nuffield Foundation - Finding Fault full report](#)

- 17.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not to be put into effect.
- 17.3 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.
- 17.4 In accordance with Rule 4(5), the Propositions relate to the duties of the Committee as set out in section (a) of its mandate.
- 17.5 Also in accordance with Rule 4(5), the Policy & Resources Committee consulted with the Committee *for* Employment & Social Security, the Committee *for* Home Affairs, the Chief Pleas of Sark and the States of Alderney.

Yours faithfully

G A St Pier  
President

L S Trott  
Vice-President

J P Le Tocq  
T J Stephens  
A H Brouard

## **APPENDIX A – TERMS OF REFERENCE**

The Review will consider:

- What changes are needed to make the Law more equal and inclusive in application to all married couples, including the feasibility of introducing no-fault divorce;
- How best to support and encourage parties to reconcile, where there is a willingness to do so;
- When a marriage has irretrievably broken down, what is the most appropriate mechanism to end the marriage which causes the least amount of distress and detriment to all parties, especially when children are involved, such as alternative dispute resolution methods;
- What changes might be needed to simplify the procedures when applying the legislation and any changes proposed, to ensure that any unnecessary barriers or avoidable delays are removed;
- The current terms for divorce, annulment and judicial separation and the Court's powers in these matters;
- The use and enforceability of pre-nuptial agreements;
- The impact of any proposed changes on policy, legislation and stakeholders;
- The legislation changes required to support the policies proposed; and
- The management and implementation of the recommended changes.

The following are out of scope of the Review:

- Same-sex marriage as this has recently been legislated upon;
- The marriage procedures and formalities as this is being reviewed separately under the Marriage Law Reform;
- Legislation relating to cohabiting couples as this would require a separate piece of legislation to that which covers how to dissolve a marriage;
- Inheritance laws, as this is already covered by a separate legislation under the Inheritance Laws, 2011;
- How to recognise civil partnerships conducted elsewhere would need a standalone piece of legislation owing to the complexity of recognising different forms of civil partnerships across different jurisdictions;
- Who can be married including the age of consent or the restrictions on marrying within prohibited degrees of kinship, as consideration is being given to this within the Marriage Law Reform Review; and
- Recognising a change of gender while married in relation to the validity of marriage and the introduction of gender recognition legislation, which should form part of any gender recognition legislation. The Committee for Employment & Social Security is considering this work stream under its work on equality and inclusion.

Where the out of scope items above are not yet under way or part of an existing work stream it is expected that these would need to be addressed at some point in the future.

## **APPENDIX B - OVERVIEW OF THE CURRENT PROCESSES**

### **Divorce**

A Petition for divorce can be filed at any time following a marriage. To file for divorce, one party Petitions the other party and the 'Petition' has to be filed at the Greffe. The partner who files the Petition is known as the Petitioner and the other is the Respondent. The Petition is a standard, legal form that provides the relevant details of the marriage and includes the reasons for divorce. A Petition is valid for one year and can be extended. Irretrievable breakdown of marriage is the only ground for divorce, which has to be proven to the Court by one of five 'facts', which are –

1. Adultery - The Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent;
2. Behaviour - The Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent ("unreasonable behaviour");
3. Desertion - The Respondent has deserted the Petitioner for at least two years;
4. Two years' separation with consent - The parties to the marriage have lived apart for at least two years and both parties consent to divorce;
5. Five years' separation without consent - The parties to the marriage have lived apart for at least five years.

In all cases, the Respondent and any Co-Respondent (adultery cases only) must confirm receipt of the papers within 14 days. The papers are issued by post and, if not acknowledged, formally served. In adultery cases only, the Respondent is also required to confirm that they admit to the adultery. In cases where 2 years' separation is the fact, the Respondent must file a Form of Consent. A Memorandum of Appearance ("MoA") is filed by a Respondent or Co-Respondent wishing to defend a Petition or any claim in it for costs or (Respondent only) any claim or to be heard on other related matters such as arrangements for children and finances. In addition, in the case of a defended divorce, where the Respondent does not agree with the Petition, the Respondent may wish to file an Answer. A Divorce Petition will usually include general applications for orders re any children and financial relief.

A minimum of 60 days after the Petition has been filed at the Greffe, if the Respondent does not wish to defend the divorce then the Petitioner can apply for a Provisional Order (decree nisi), a temporary Court order put in place until the final outcome is agreed and a Final Order is made. The application for Provisional Order is listed before the Court, which sits every two weeks. Paperwork must be lodged seven days prior to the hearing.

At the Provisional Order hearing, only the Petitioner's advocate need attend. The judge will consider the paperwork and the evidence and if satisfied the grounds for divorce have been met then a Provisional Order will be granted. The judge will also state whether the arrangements for the children are satisfactory. In the event that the arrangements are not satisfactory then a Provisional Order cannot be granted.

The Final Order (decree absolute) cannot be granted until the time limit (one month) for appealing the Provisional Order has expired. Either party can apply for the Provisional Order to be made final. A formal application for the Final Order is required. A Final Order of Divorce terminates the marriage.

Where cases are undefended there is no need for either party to attend Court. Most undefended cases take between three to six months from Petition to Final Order. If the Respondent does not accept that the marriage has broken down irretrievably or wants to dispute any of the facts alleged in the Petition they can choose to defend the divorce. Defended divorces are rare and require the Respondent to file a memorandum of appearance form, within 14 days of receipt of the Petition, stating a wish to defend the Petition, followed by a document setting out their defence (called an 'Answer'), within another 14 days. The matter then proceeds to trial at which the Court grants the Provisional Order or dismisses the Petition.

### **Judicial separation by consent**

Judicial separation by Consent is unique to the island and which is often (34% of cases, 2016) used as a means to quickly and cost effectively secure an agreement on children and finances. Whether represented or not, both parties must attend Court for a hearing to confirm: that the marriage has broken down; that there is no prospect of reconciliation; and that they both understand and consent to the terms presented in the order. Couples remain married, but can divorce: after two years of separation where there is consent; after five years if there is no consent; or Petition for divorce immediately after the Judicial Separation by Consent using one of the other facts, such as adultery, should they wish to.

### **Decree of judicial separation**

A similar approach to petitioning for divorce is taken for a decree of judicial separation and the facts to be proved are the same as for divorce. The Court needs to confirm that one or more of the 'facts' are present. Likewise, the Petition can be defended and the contents are the same as for a divorce Petition, other than the prayer wording that states a decree of judicial separation is sought, as opposed to a dissolution of marriage.

When the Court is satisfied that the Petition stands has granted a decree of judicial separation it has the same power to grant financial relief that it would have following a divorce. The Petition for decree of judicial separation will normally include an application for ancillary relief.

Parties remain married and so may retain some rights, such as to a spouse's pension, but the duty on couples to cohabit is removed. This option is used for couples who wish to separate but remain legally married perhaps for religious reasons. There are very few instances where this option has been used.

### **Annulment**

A decree of nullity can be obtained if the marriage is by law void (deemed as not legally valid) or voidable (defective), for different reasons some of which are noted below:

- If either party is under the age of sixteen;

- If parental consent for a party under the age of eighteen was not given;
- Between certain individuals who are related by blood or affinity; or

By proving one of the following nine grounds:

- Impotency of one party or both since the celebration of the marriage;
- The marriage was fraudulent or that one party was threatened or forced into the marriage;
- Non-consummation of the marriage due to wilful refusal;
- The Respondent was at the time of the marriage pregnant by a person other than the Petitioner (unless the pregnancy occurred when still married to a former husband);
- Sexually transmitted disease at the time of the marriage;
- Either party was of unsound mind or suffering a mental defect at the time of the marriage;
- Either party was subject to recurrent fits of insanity or epilepsy at the time of the marriage;
- Bigamy; or
- The marriage has been annulled by another Court of competent jurisdiction.

The 1939 Law also refers to "any other ground on which a marriage is by law void or voidable", which could include grounds that are covered in customary law or other legislation, but which are not being considered as part of this Review.

Similar to divorce, a Petition must be filed at the Greffe, citing one of the above grounds and the Court may grant financial relief. Nullity can provide a way forward for some couples who have a religious or other objection to divorce.

**APPENDIX C – OTHER JURISDICTION COMPARISON - 2019**

	<b>Guernsey</b>	<b>Jersey</b>	<b>England &amp; Wales</b>	<b>Scotland</b>	<b>France</b>	<b>Australia</b>	<b>Germany</b>	<b>Canada</b>
<b>Grounds for divorce</b>	As the UK	Adultery Unreasonable behaviour Desertion Unsound mind In prison for 15 years or more Separation- 1 year consent 2 yrs without – both continuously lived apart  3 yr ban on filing for divorce	Adultery Unreasonable behaviour Desertion Separation with consent (2 yrs) (stopped and restarted) Separation without consent (5 yrs)	Adultery Unreasonable behaviour Separation with consent (1 yrs) Separation without consent (2 yrs)  Another ground – one partner has an interim GRC	Accepte – no consent on ancillary matters Fault – unilateral Mutual consent – via Notary Separation for 2 years – without consent	No fault – 1 year & 1 day separation  Via sole or joint application  Married less than 2 years encouraged to attend counselling or see Court’s approval to file for divorce	No fault – 1 year separation with consent or 3 years without consent	No fault – 1 year separation Adultery Domestic abuse
<b>Judicial separation – legally separate but not divorce</b>	Y – plus habitual drunkenness and others	Y – plus habitual drunkenness	Y	Y – very rare	Y – separation de corps, after 2yrs either can file for divorce, without an audience	N	N	Y

	Guernsey	Jersey	England & Wales	Scotland	France	Australia	Germany	Canada
					with the judge			
<b>Is legal representation required?</b>	Optional	Optional	Optional	Optional – DIY Y - Ordinary	Y – both and for the paperwork	Optional. Free legal advice service	Y - both, sometimes just the petitioner	Optional
<b>Is No fault possible?</b>	Y – through ‘divorce by separation’	Y – mutual consent	Y (1975) separation 1 year and 1 day	Y (1977) separation 1 year	Y (1986) – separation 1 year			
<b>Marital agreements</b>	Allowed, not binding	Allowed, not binding	Allowed, not binding	Allowed, not binding	Matrimonial regimes – agreement in advance of marriage on split of assets – 3 types	Legally binding – if independent legal advice. Can incl. agreements on child	Similar to France – by Notary Incl. foreign	Known as a marriage contract, exc. children
<b>Ave. time - Filing to Final Order</b>	3-6 months		3-6 months	2-3 months (DIY) 9mths – 1yr (contested)	3-6 months <sup>48</sup>	4 months <sup>49</sup>	10 weeks to six months <sup>50</sup>	2 – 6 months

<sup>48</sup> [https://www.expatica.com/fr/family-essentials/Divorce-in-France\\_106688.html](https://www.expatica.com/fr/family-essentials/Divorce-in-France_106688.html)

<sup>49</sup> <https://www.diyfamilylawaustralia.com/pages/divorce/how-long-does-a-divorce-take/#.W18B7Y2WY00>

<sup>50</sup> <https://www.lawyersgermany.com/divorce-in-germany>

	<b>Guernsey</b>	<b>Jersey</b>	<b>England &amp; Wales</b>	<b>Scotland</b>	<b>France</b>	<b>Australia</b>	<b>Germany</b>	<b>Canada</b>
<b>Min. time no fault incl. separation</b>	2 yrs, 3 months	1 yr plus process time	2 yrs, 3 months	1 yr 2 months	1 month – mutual consent	1 yr 4 months	1 yr 10 weeks	1 yr 2 months
<b>Attend Court</b>	Y – in most cases	Not unless there is a dispute	Varies – generally not if uncontested and settlement agreed	Generally not unless defended.	Y – for most grounds, not if mutual consent	Only if sole application and children under 18 or choose to attend.  If lived under same roof or married less 2 yrs.  Can use telephone / video link		Not if uncontested

## APPENDIX D – A SUMMARY OF OTHER JURISDICTIONS LEGAL PROCESSES

### Scotland<sup>51</sup>

In Scotland there are currently two forms of divorce: simplified (DIY divorce) or regular divorce. A simplified divorce is based on either one year separation with consent or two years separation i.e. no fault. The cost of a simplified divorce is significantly less than a regular divorce and is available only to those whose meet certain criteria such as those who do not have children over the age of 16 or who do not have children of the marriage<sup>52</sup>. To apply for a simplified divorce a form is completed depending on which fact is being used and submitted to the local Court for review. There can be no other Court proceedings underway to use this method of divorce.

If there are children under 16 years of age, the ordinary procedure must be used. If in agreement about grounds and ancillary matters the divorce can go to Court undefended. If contested, then this is a defended case. In an undefended divorce, an agreement is lodged with the Court. Any disputes need to be resolved before the case can go to Court undefended, so mediation is encouraged. In defended cases, the divorce is normally heard by the sheriff Court, with complex cases sometimes being transferred to the Court of Session. In defended cases, generally, both parties have solicitors.

There are other differences in the Scottish approach to that of Guernsey, Jersey and England and Wales that are worth noting in that:

- Ancillary matters are part of the divorce process including arrangements for any children and assets;
- The Courts can rule against an agreement if it is not felt to be in the best interests of the child;
- The assets that can be divided are limited mainly to those acquired during the marriage and do not include gifts or inheritance;
- Spousal maintenance is avoided in Scotland and if awarded, limited to a short time span. In England and Wales, it can be awarded indefinitely; and
- A claim for financial provision cannot be considered after decree for divorce has been granted.

### France<sup>53</sup>

To summarise the process, except for the *divorce par consentement mutuel*, i.e. no-fault divorce, the final process of divorce can be highlighted in two stages.

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<sup>51</sup> <https://www.unlockthelaw.co.uk/divorce-and-dissolution-in-scotland.html>

<sup>52</sup> [Scottish Courts - simplified do it yourself divorce procedure](#)

<sup>53</sup> <http://lethier-avocat.co.uk/en/the-divorce/divorcing-in-france/>

Stage one:

The judge will order the divorce, determine who has custody of the children and what financial support should be paid for the children and for the spouse if there is an income disparity. The spouse who does not have custody of the children will be ordered to pay financial support for the children, even if their income is less than their former spouse's income, known as *contribution à l'éducation et à l'entretien des enfants* (contribution for the education and support of the children). The judge assesses the amount due by calculating the needs and expenses of both parties. The judge determines whether the divorce will create a disparity in the financial situation of the parties.

Stage two:

It is not the judge's duty to split assets, this is done by the notary after the divorce. The assets should be split in accordance with the matrimonial regime of the parties. It should be noted that the notary does not have judicial power. They can suggest the way the assets should be split, but if the parties do not reach agreement then the case will return to Court and only a judge can impose the division of assets.

### **Australia<sup>54</sup>**

Since 1975, the only ground for divorce has been irretrievable breakdown of marriage, evidenced by a twelve-month separation. If there are children aged under 18, a Court can only grant a divorce if it is satisfied that proper arrangements have been made for them. Petitions can only be opposed when there has not been 12 months separation as alleged in the application, or the Court does not have jurisdiction. It is likely that attendance in Court would be required, especially if there are children of the marriage under 18 and it is a sole application. The facts stated in the application can be disagreed with and changed through a form, without attending the hearing.

Couples can be separated but continue living in the same home during the 12 months before applying for divorce. This is known as 'separation under the one roof'. In these cases, there is a need to prove to the Court that the couples were separated during this time, usually through an affidavit to evidence that arrangements have changed for sleeping, activities as a family, performing household duties for each other, division of finances and other matters that show the marriage has broken down.

### **Germany**

A marriage may be dissolved upon request of one or both spouses if such a marriage has broken down, without the need to cite fault. Divorce is solely based on whether the marriage has irretrievably broken a decision that is made by the Court via submission of a petition. Generally, both parties need to be legally represented, but in cases of consent, the petition is sometimes allowed with just the petitioner having representation.

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<sup>54</sup> [Family Court of Australia - Divorce](#)

When the parties have been separated for at least one year (Trennungsjahr) and both agree to a divorce it is presumed that the marriage is irreconcilably broken and an application can be made for a divorce. Where one party is opposed however, the period of separation increases to three years. After a separation of at least three years, it is presumed that the marriage is irreconcilably broken, even if a spouse opposes the divorce. In rare cases it is possible to get a divorce within 12 months. These so-called hardship divorces apply in cases where violence or other unreasonable behaviour is involved.<sup>55</sup>

Once brought before the Court, the judge will consider issues like child custody and support, spousal maintenance and division of common property, called the 'community of accrued gains'. The community of accrued gains is where after marriage, each party remains the owner of his or her assets and it is only the increase in value of the assets accrued during the marriage that are divided.

If the divorce is conducted according to German law, the supply balance needs to be regulated; meaning pension rights earned during the marriage must be equally divided between spouses. In this case, the divorce procedure may take at least six months. If there is no need to calculate the supply balance the divorce can take ten weeks. The supply balance is not calculated if:

- The marriage has lasted at most three years,
- Both spouses have waived the supply balance,
- Both spouses agree the divorce procedure is tired under a foreign law, which is possible if one of the spouses lives abroad.

### **Canada**

No-fault divorce can be petitioned for once couples have lived separately for one year and should include the details of any arrangements for any children of the marriage<sup>56</sup>. A couple is able to live together for up to 90 days (either before or after the application has been filed) to try to reconcile. If this reconciliation period does not work, the divorce can be continued as if the couple had not spent the 90 days together<sup>57</sup>.

Divorces can be contested (both spouses do not agree) or uncontested, (both spouses agree). Uncontested divorces need only one application, whereas for contested divorces both parties file a separate application. Once filed the respondent has 30 days to respond and then the divorce proceeds to Court. Once reviewed the judge will issue a Divorce Order if satisfied. Following which, after 30 days a Certificate of Divorce will be granted.

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<sup>55</sup> [https://www.expatica.com/de/family-essentials/Getting-a-divorce-in-Germany\\_107818.html](https://www.expatica.com/de/family-essentials/Getting-a-divorce-in-Germany_107818.html)

<sup>56</sup> <http://divorce-canada.ca/divorce-process-in-canada>

<sup>57</sup> [Department of Justice Canada - Divorce](#)

**APPENDIX D – OPTIONS CONSIDERED**

The below table sets out the refined short list of proposals considered and appraised against the outcomes to be achieved by reform i.e. to be more inclusive; simplify; modernise; reduce conflict; and align with other legislation, following the initial consultation.

<b>Proposals</b>	<b>Outcomes I – inclusive M – modernise S – simplify R – reduce conflict A - aligned</b>	<b>Initial consultation - summary view</b>	<b>Decision – carry forward, discount (with reasons)</b>
<i>Status quo – do nothing</i>	<i>None</i>	<i>Not supported</i>	<i>CFWD – for comparison, but is not seen as fit for purpose</i>
<b>Divorce</b>			
Change the legal definition of adultery	I, M	Some support	D - unlikely to be accepted, complex and would take time to implement, doesn't align
Change adultery – not required to routinely cite the other party as a co-respondent (who could be named within the evidence instead)	M, R	Some support	D – as CFWD under UR combined option below
Unreasonable behaviour, 'UR' – some changes to threshold	M, A	Some support	D – UR applied differently already. Doesn't address all the objectives of reform
<b>Unreasonable behaviour to include adultery without the need to routinely cite the Co-Respondent and desertion, not listed but by interpretation by the Court</b>	<b>I, M, S, A,</b>	<b>Supported</b>	<b>CFWD – addresses most of the objectives Simplifies the grounds by incorporating other fault grounds into one ground. Removes the need to name the other party as co-respondent. Party can be named within the evidence instead should the case be defended</b>
Lower threshold for meeting unreasonable behaviour than currently.	M, R	Some support	D - Does not take into account those who do not really have grounds for divorce.

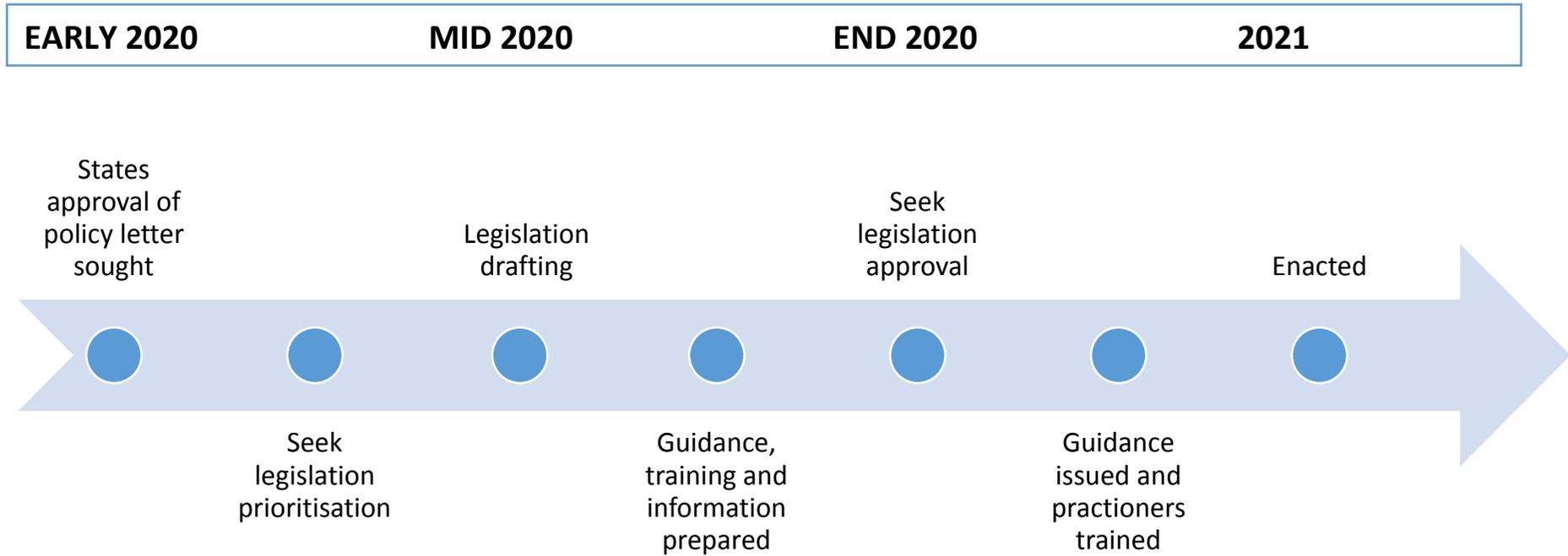
Separation with consent of one year	I, M, S, R	Supported	CFWD – linked to other proposals Shorter time supported for the current no-fault divorce option, as two years is felt to be too long. Aligns to the Scottish model.
Separation without consent shorter than five years.	M, S, A	Supported	CFWD - linked to other proposals. Could be merged into separation only. Aligns to the Scottish model.
Remove separation without consent	M, S, R	Supported	CFWD - to be further considered under shortlist
Add no fault divorce as an additional ground for divorce	I, M, S, R	Supported	CFWD - addresses the aims of the review, in part and most of the issues.
Remove fault - no-fault divorce only	I, M, S, R	Supported	CFWD – removes fault completely, addresses aims and issues of reform. Most likely to have the greatest benefits; saving time and costs, parties and Courts, reduced conflict
<b>Annulment</b>			
Change the grounds for annulment – void and voidable	I, M, S,	Supported	CFWD – to ensure inclusive and to modernise
Introduce separate categories of void and voidable marriages as in England & Wales	I, M, S, A	Not consulted	CFWD – as above and to improve clarity and alignment
Remove the need for annulment	S, I, A	Not supported	D – needed as a means to address sham or forced marriages and enable some marriages to be regarded as never having happened
<b>Judicial separation by consent</b>			
Retain as is – no change	I, A	Supported	CFWD – enables couples to address ancillary matters in advance of divorce
Some changes to simplify / modernise current e.g. to the requirement to attend Court, to state reconciliation attempts, to title for clarity	M, S,	Not consulted	CFWD – what changes are made is dependent on other changes being proposed for divorce such as digitalisation, DIY, removal of reconciliation and any safeguards
Amend law to raise the thresholds for changing a Judicial Separation Order once Court has ruled	S, R	Limited support	D – not seen as necessary

<b>Decree of judicial separation</b>			
<b>Retain as is – some change</b>	<b>I, S, R,</b>	<b>Supported</b>	<b>CFWD – inclusive of those who do not want to divorce for religious/belief reasons</b>
<b>Financial matters</b>			
<b>Incorporate the principle to seek financial independence as soon as reasonable within the law</b>	<b>R, M</b>	<b>Not consulted</b>	<b>CFWD – currently in practice not law</b>
<b>Publish a simple, accessible means to estimate ‘financial needs’ – non-statutory, similar to child maintenance that includes guiding principles</b>	<b>I, M, S, R</b>	<b>Not consulted</b>	<b>CFWD – combine with below</b>
<b>Publish guidance on determining ‘financial needs’ and ‘independence’ – non statutory</b>	<b>I, M, S, R</b>	<b>Supported in principle</b>	<b>CFWD – combine with above</b>
<b>Greater legal recognition for pre-nuptial agreements excl. children’s needs, but including marital property agreements</b>	<b>S</b>	<b>Some support</b>	<b>CFWD – other jurisdictions considering</b>
Compulsory PNAs	S	Some support	D – as removes the choice from couples to decide and would not simplifying the law
Change Final Order ‘subject to’ requirement for finances to be agreed before Petition	S	Not consulted	D – as potential risks in relation to vulnerable partners
<b>Use of Financial Dispute Resolutions and protocols earlier in the process – after mediation</b>	<b>S, M, R</b>	<b>Supported</b>	<b>CFWD – as a potential means to reduce time and conflict</b>
Capped fee e.g. % of assets	M	Supported	D – state intervention in market, makes the system more complex
<b>Facilitate a more visible fixed fee approach</b>	<b>S, M</b>	<b>Supported</b>	<b>CFWD – explore further with the Bar</b>
<b>Procedures and process</b>			
<b>Simplify current procedures incl. remove the need to publish notice</b>	<b>All</b>	<b>Supported</b>	<b>CFWD – essential for most intended outcomes</b>
<b>Do it yourself divorce – no legal representation – only if combined with greater information and guidance</b>	<b>I, S, M</b>	<b>Supported</b>	<b>CFWD - explore as an option if no-fault progresses</b>

Digitalisation – file for divorce	S, M	Some support	CFWD – although not as a priority until the reforms are embedded
Digitalisation – whole process	S, M	Some support	CFWD – although not as a priority as above
Application only – requires no fault to being place	S, M,	Supported	CFWD – explore under no-fault
Strengthen reconciliation requirements	A	Not supported	D – statutory approaches are no longer seen to be effective or appropriate / risks in cases of abuse.
Retain the requirement to consider reconciliation	A	Supported	D – not seen as adding value
Increase access to impartial, mediation earlier in the process	I, M, R	Supported	CFWD - recognised as a successful means to reach agreement and have healthier relationships
Continue with provision enabling Separate Households – living separate lives, in the same house	I, M, S	Not consulted	CFWD – as currently, with exact requirements to be considered
Establish a bar to filing for divorce following marriage	A	Not consulted	CFWD - consider alongside no fault proposals
Establish a cooling off period once filed for divorce	S, R, A	Not consulted	CFWD – as above
Dissolution agreement before / part of marriage e.g. the French approach	I, R, M	Some support	D – due to the complexity and scale of change required and as it only meets some of the outcomes of reform
Enforcement of Court orders through Courts, not private, including financial	I, R, M,	Some support - concerns raised	CFWD - as a means to reduce risks, ongoing legal costs and conflict associated with non-compliance of orders
Remove the need to attend Court in some cases	S, M, R, A	Some support	CFWD – consideration alongside simple cases, no-fault, digitalisation
Enable unilateral decisions – safeguard vulnerable parties	All	Some support	CFWD – needs further consideration across shortlist options, to safeguard vulnerable parties
Presumption of death reduce timeframe (less 7 years)	N/a	Not consulted	D - not merely related to dissolution of marriage – wider implications CFWD – retention of provision
Use of Investigating Officer	R	Not consulted	D – no longer required
Retain relief for CoE clergy	I	CoE supported	D - included in the Marriage Law instead

Agree arrangements for children before Petition (same as finance proposal)	S, M	Not consulted	D – outside of scope as covered under Children Law
<b>Information and guidance</b>			
<b>Publish clear, simple guidance in one accessible place – all matters</b>	<b>All</b>	<b>Supported</b>	<b>CFWD – seen as essential to achieve aims and for transparency</b>
<b>Better co-ordination and signposting to existing services e.g. Children First</b>	<b>All</b>	<b>Supported</b>	<b>CFWD – seen as essential to achieve aims and for transparency</b>
Pre-marriage course / requirement – optional	R	Limited support	D – no appetite or rationale for proposal

**APPENDIX E – MATRIMONIAL CAUSES REFORM TIMEFRAME**



**Image 1. Matrimonial Causes Law Reform timeline**