



# Bill Digest

## Family Law Bill 2019 No. 78 of 2019

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### Abstract

The [Family Law Bill 2019](#) amends several pieces of legislation to reflect the reduction in time spouses will need to be living apart before they can seek a divorce. This legislation is designed to implement the results of the 2019 referendum on divorce. An L&RS Note on divorce and the 2019 Referendum is available [here](#). The Bill includes provisions that would apply in the event of the United Kingdom leaving the European Union without a withdrawal agreement. In that case, it provides for the recognition of certain divorces, legal separation and marriage annulments granted in the UK or Gibraltar. It also aims at providing the courts with greater certainty regarding the statutory interpretation of the term 'living apart', for spouses to better understand their eligibility to apply for a divorce or judicial separation.



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## Summary

The [Family Law Bill 2019](#) amends legislation to reflect the result of the 2019 referendum. The Bill will amend existing divorce legislation to lower the minimum 'living apart' period for spouses seeking a divorce to two years out of the previous three years, rather than the current four out of five years. Reductions will also be made for judicial separations. It will also clarify what the 'living apart' requirement means.

<b>Judicial separation</b>	<ul style="list-style-type: none"><li>• Reduces required time for living apart from 3 years to 1.</li><li>• Removes need for respondent consent to the decree of separation.</li><li>• Clarifies the meaning of 'living apart'</li></ul>
<b>Divorce</b>	<ul style="list-style-type: none"><li>• Reduces required time for living apart from 4 years to 2.</li><li>• Clarifies the meaning of 'living apart'</li></ul>
<b>Civil partnership</b>	<ul style="list-style-type: none"><li>• Clarifies the meaning of 'living apart'</li></ul>

The Bill includes a provision that will only come into force if the UK leaves the EU without a negotiated deal, providing for the recognition of foreign divorces.

The Digest uses much of the information provided in the L&RS Note [Divorce in Ireland – Referendum 2019](#) from April 2019.

## Background

The Minister for Justice and Equality, Charlie Flanagan TD, published the [General Scheme of the Family Law Bill 2019](#) on 11 July 2019. Introducing the General Scheme, the Minister stated:

*“At the referendum held on 24 May, the people voted by an overwhelming majority to amend the Constitution to remove from Article 41.3.2 of the Constitution the minimum living apart period for spouses seeking a divorce; and to replace the text of Article 41.3.3 on foreign divorces. I am delighted now to be in a position to progress legislation to reduce the minimum living apart period specified in the Family Law (Divorce) Act 1996 to two years during the previous three years. This proposal has widespread cross-party support in the Oireachtas.”<sup>1</sup>*

The Minister added:

*“At the heart of the Government’s proposals is a desire to ease the burden on people whose marriages have broken down. A shorter waiting period for divorce is needed in order to take people out of legal limbo and to lessen the human and financial costs of*

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<sup>1</sup> Department of Justice and Equality, '[Minister Flanagan publishes General Scheme of Family Law Bill 2019](#)', Press Release, 11 July 2019.

*marital breakdown. I hope to publish the Family Law Bill in the autumn and bring it through the Houses of the Oireachtas as soon as possible.*<sup>2</sup>

The [Thirty-eighth Amendment of the Constitution \(Dissolution of Marriage\) Act 2019](#) was signed into law by the President on 11 June 2019. The Act made the following amendments to the Constitution:

- It removed the minimum living apart period for spouses seeking a divorce from Article 41.3.2 of the Constitution; and,
- It replaced the text of Article 41.3.3 relating to foreign divorces.

The Act did not change the provisions in Article 41.3.2, that is:

- only a court may grant a divorce;
- divorce may only be granted if there is no reasonable prospect of a reconciliation between the spouses; and,
- a court will only grant a divorce after ensuring that proper provision is in place or put in place for the support of a spouse, any children of either or both spouse and any other person prescribed by law.

## Summary of the Bill's provisions

Table 1 below summarises the provisions of the *Family Law Bill 2019*. Further discussion of key provisions of the Bill can be found in the Principal Provisions section of this Bill Digest.

**Table 1: Provisions of the *Family Law Bill 2019***

Section	Title	Effect
<b>Part 1</b>		
1.	Short title and commencement	The short title of the Act will be the <i>Family Law Act 2019</i> . Different parts of the Bill can be commenced by the Minister for Justice and Equality and different dates can be appointed for different purposes.
<b>Part 2</b>		
2.	Amendment of <a href="#">section 2 of the Judicial Separation and Family Law Reform Act 1989</a>	This provision reduces the living apart period for granting judicial separations from three years to one year and no longer requires the respondent to agree to the decree being granted.
3.	Amendment of <a href="#">section 5 of the Family Law (Divorce) Act 1996</a> which deals with minimum length a couple must live apart for a divorce	The minimum length is reduced to 2 out of the previous 3 years, from 4 out of the previous 5 years.  It qualifies that the term 'living apart' would include sharing a home but not being in a committed intimate relationship.
4.	Amendment of section <a href="#">110 of the Civil Partnership and Certain Rights and Responsibilities of Cohabitants Act 2010</a>	Section 4 defines 'living apart' to include sharing a home but not living as a couple in a committed and intimate relationship (similar to Section 3 of the Bill).
<b>Part 3</b>		
5.	Definitions and application	Section 5 makes general provision for Part 3 of the Bill.

<sup>2</sup> [Ibid.](#)

		It defines 'Council Regulation' <sup>3</sup> and 'relevant jurisdiction' <sup>4</sup> . It also provides that <a href="#">section 5</a> of the <i>Domicile and Recognition of Foreign Divorces Act 1986</i> shall not apply to a divorce where sections 6 or 7 of the Bill apply.
6.	Recognition of divorces, marriage annulments and legal separations granted in the United Kingdom or Gibraltar <b>before</b> coming into operation of section.	The section provides that a divorce, legal separation or marriage annulment recognised under the Council Regulation shall continue to be recognised.
7.	Recognition of divorces, legal separations and marriage annulments granted in the United Kingdom or Gibraltar <b>after</b> coming into operation of section.	This section will only come into operation in the case of a no-deal Brexit. It provides that the recognition of divorces granted in the UK or Gibraltar will continue to be based on a habitual residence test, rather than changing to a domicile test (which is the norm for divorces granted in non-EU states). It also sets out the grounds for refusal of recognition of a divorce, legal separation of marriage annulment granted under the relevant jurisdiction.

<sup>3</sup> 'Council Regulation' refers to [EU Council Regulation 2201/2003](#). It sets out the current rules governing the jurisdiction, recognition and enforcement of matrimonial and parental responsibility orders in the EU. The scope of the Regulation is confined to matrimonial matters (divorce, legal separation, annulment) while parental responsibility includes rights of custody and rights of access, guardianship, the placement of a child in a foster family or in institutional care.

<sup>4</sup> 'Relevant jurisdiction' refers to England, Wales, Scotland, Northern Ireland or Gibraltar.

## Principal Provisions

### Part 2- Amendments to Acts relating to Family Law

#### Section 2: Amendment of section 2 of Judicial Separation and Family Law Reform Act 1989

**Section 2** of the Bill amends [section 2](#) of the [Judicial Separation and Family Law Reform Act 1989](#) by reducing the number of years spouses are required to have lived apart before they can apply for a judicial separation. Spouses who have lived apart continuously for one year immediately preceding the application can apply for a judicial separation. The requirement to have lived apart for three years is removed as is the requirement for the respondent to consent to the decree being granted. Section 3(a) of the 1989 Act which defines 'living apart' is substituted for a new paragraph that clarifies the definition of living apart to include scenarios where the spouses may be living in the same dwelling but not living as a couple in an intimate or committed relationship. It is highlighted that an 'intimate relationship' does not necessarily have to be sexual in nature.

Under section 2(2) of the Bill court proceedings for the grant of a judicial separation will apply to those applications that are either initiated on or after the date the section comes into operation, or proceedings which are initiated but not concluded before such date.

#### Section 3: Amendment of section 5 of Family Law (Divorce) Act 1996

**Section 3** of the Bill amends [section 5](#) of the [Family Law \(Divorce\) Act 1996](#) in two significant ways:

- The minimum length for a couple to live apart is reduced to 2 out of the previous 3 years, from 4 out of the previous 5 years;
- It provides a statutory qualification for the term 'living apart' to include situations where a couple are sharing a home but are not in a committed intimate relationship.

#### Insertion of definition of 'living apart'

The *Family Law (Divorce) Act 1996* does not define 'living apart'. The [Judicial Separation and Family Law Reform Act 1989](#) introduced 'living apart' as a ground for judicial separation and prescribed that "spouses shall be treated as living apart from each other unless they are living with each other in the same household, and references to spouses living with each other shall be construed as references to their living with each other in the same household" ([Section 2\(3\)\(a\)](#)). The use of the word 'household' does **not** preclude people living apart in the same dwelling.

During the Second Stage debate on the Bill to amend the Constitution (1995) Minister Mervyn Taylor TD interpreted the term 'living apart' as follows:

*"The term "living apart" is used in the Judicial Separation and Family Law Reform Act, 1989, and it is also a familiar term in many other jurisdictions where it has been held that*

*this phrase will clearly cover where the spouses have physically separated and are living in different places. The case law also states that where domestic life is not shared it is possible for there to be two households under the one roof. The term "living apart" has a clear and settled meaning in the law, and I am satisfied that the courts will follow this meaning in a divorce context.*

*The amendment also provides that the four-year period of separation can be cumulated over a five-year period. The reason for this is to allow a couple to make a reasonable attempt at reconciliation in the knowledge that, if it does not work out, they will not have lost their option to apply for divorce. The four-year period itself is a guarantee that spouses will not enter into divorce lightly, and that they will have the necessary time to reflect on the serious step which they are undertaking. It may also encourage spouses to attempt to reach agreement on the terms of their separation in a way which will ensure that, if the divorce application does come before a court, many of the key elements relating to children, finance and property may already have been settled between the spouses. In this way, the hearing itself may well be less acrimonious than it otherwise might be.”<sup>5</sup>*

Where a couple are living in separate homes for the required time there is little ambiguity regarding the ‘living apart’ provision and, writing in 2007, Geoffrey Shannon described this as the situation for the majority of divorce applicants.<sup>6</sup> It is more challenging for couples sharing the same house to provide evidence to satisfy the court that they have been living apart, although the courts do consider ‘mental attitude’ to the marriage as well as physical arrangements.<sup>7</sup>

Speaking during the [Second Stage](#) of the [Thirty-fifth Amendment of the Constitution \(Divorce\) Bill 2016](#), the then Deputy Josepha Madigan said of the ‘four-year rule’:

*“The severe burden forced upon separating couples seeking a divorce by the four-year rule is far from limited to financial costs. In my experience, prolonged matrimonial litigation serves only to increase hostilities and to prolong a process that will mark one of the most difficult periods in separating individuals’ lives. It is hard to overstate the extreme stress caused by such a long divorce process, not only on a couple but on all those around them, particularly their children.*

*There is an increased risk of assets being hidden and relocations the longer the interim period between separation and divorce with resulting difficulties in enforcing maintenance and access orders. In many cases, the time to reach a divorce settlement is so lengthy as to necessitate two separate sets of legal proceedings with many interim applications in the intervening time. For some people it is necessary to get a deed of separation or a judicial separation prior to seeking a divorce in order to obtain some legal clarity on issues relating to the family home, property, pension and other ancillary reliefs. Not only is this lengthy, but separation deeds and judicial separation decrees lack the finality and certainty of a divorce. As we know the chief distinction between separation and divorce is the right to remarry.”<sup>8</sup>*

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<sup>5</sup> [Dáil Éireann Debates, Wednesday, 27 September 1995.](#)

<sup>6</sup> Geoffrey Shannon (2007), *Divorce law and practice*, Dublin, Thompson Roundhall, p. 34.

<sup>7</sup> *Ibid* p. 34.

<sup>8</sup> [Dáil Éireann Debates](#), Thursday, 6 April 2017.



Section 3 of the bill specifies that the term ‘intimate relationship’ is not confined to one that is sexual in nature.

Under section 3(2) of the Bill court proceedings for a divorce will apply to those that are either initiated on or after the date the section comes into operation, or proceedings which were initiated but not concluded before such date.

### **Section 4: Amendment of section 110 of the *Civil Partnership and Certain Rights and Responsibilities of Cohabitants Act 2010***

**Section 4** of the Bill inserts a similar definition of ‘living apart’ into [section 110\(1\)](#) of the [Civil Partnership and Certain Rights and Responsibilities of Cohabitants Act 2010](#). This provision recognises that a couple may be forced to live together because of economic necessity but may still be considered to be ‘living apart’ as they are not living as a couple in an intimate and committed relationship. Civil partners who have lived apart for a period amounting to two years over the preceding three may apply for a dissolution of the civil partnership.

Section 4(2) of the Bill amends section 172(6) of the 2010 Act. Section 172(6) sets out the circumstances where an adult is not considered a qualified cohabitant<sup>9</sup> (cases where one or both of the cohabitants is, or was, married to another person during the relationship concerned). The Bill amends this section to only apply to relationships which have ended after the coming into operation of section 4 of the *Family Law Act 2019*.

Under section 4(2) of the Bill court proceedings for a decree of dissolution will apply to those that are either initiated on or after the date on which the section comes into operation, or proceedings which are initiated but not concluded before such date.

## **Part 3- Recognition of certain divorces, legal separations and marriage annulments**

### **Section 6: Recognition in the United Kingdom or Gibraltar before coming into operation**

**Section 6** provides that where a divorce, marriage annulment or legal separation granted in the UK or Gibraltar (‘relevant jurisdiction’) prior to the coming into operation of the section, shall be recognised in Ireland if it would be recognised under the Council Regulation.

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<sup>9</sup> Under [section 176\(5\)](#) of the 2010 Act a ‘qualified cohabitant’ means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period—

- (a) of 2 years or more, in the case where they are the parents of one or more dependent children, and
- (b) of 5 years or more, in any other case.



[EU Council Regulation 2201/2003](#) is a legal instrument to help international couples resolve disputes over their divorce and the custody of their children. It sets out:

- The rules determining which court is responsible for dealing with matrimonial matters and parental responsibility in disputes involving more than one country;
- Rules making it easier for EU countries to recognise and enforce judgments issued in another EU country; and
- The procedure for settling cases in which a parent abducts a child from one EU country and takes him or her to another.

## Section 7: Recognition in the United Kingdom or Gibraltar after coming into operation

**Section 7** provides for the recognition of divorces, legal separations and marriage annulments granted under the law of a relevant jurisdiction on or after the coming into operation of this section. This provision is to recognise foreign divorces in the circumstance of a no-deal Brexit.

The section sets out the jurisdictional criteria for recognition of divorces, separations and annulments at the date of the institution of proceedings. Any one of the following requirements is sufficient:

- 1) The spouses were habitually resident in a relevant jurisdiction;
- 2) The spouses were habitually resident in a relevant jurisdiction and at least one of them still resided there at the time proceedings were initiated;
- 3) The respondent was habitually resident in a relevant jurisdiction;
- 4) The applicant was habitually resident in a relevant jurisdiction and resided there for at least one year prior to the institution of proceedings;
- 5) Either of the spouses was domiciled in a relevant jurisdiction.

The statement accompanying the publication of the General Scheme of the Bill notes that this is:

*“A provision to ensure, in the event of a no-deal Brexit, that the recognition in Ireland of divorces granted in the UK after EU legislation in this area came into operation on 1 March 2001 will continue to be on the basis of habitual residence, rather than the domicile requirement which applies to divorces granted in non-EU states. This provision will be brought into operation only if and when the UK withdraws from the EU without an agreement.”<sup>10</sup>*

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<sup>10</sup> Department of Justice and Equality, ‘[Minister Flanagan publishes General Scheme of Family Law Bill 2019](#)’, Press Release, 11 July 2019.

**Murdoch and Hunt's Encyclopaedia of Irish Law****Domicile<sup>11</sup>**

The place in which a person has a fixed and permanent home, and to which, whenever he is absent, he has the intention of returning. It depends on the physical fact of residence in addition to the intention of remaining.

**Habitual resident<sup>12</sup>**

When adjudicating upon the habitual residence of a person, an official must consider all the circumstances of the case, including: (a) the length and continuity of residence in the State or any particular country; (b) the length and purpose of any absence from the State; (c) the nature and pattern of the person's employment; (d) the person's main centre of interest; and (e) the future intentions of the person concerned as they appear from all the circumstances. See [Social Welfare and Pensions Act 2007 s.30](#).

The issue of the recognition of foreign divorces<sup>13</sup> more generally is being considered by the Law Reform Commission (LRC) as part of their [Fifth Programme of Law Reform](#) and it is expected that the Government will introduce legislation when the LRC has given its recommendations.

**Section 7(3)** of the Bill sets out the grounds for refusal of recognition of a divorce, separation or annulment granted under the law of a relevant jurisdiction. It will not be recognised in the following circumstances:

- If recognition is contrary to public policy;
- Where the judgment in the relevant proceedings was given in default of appearance or the respondent had not been served the relevant documents with sufficient time to prepare a defence;
- If the relevant judgment is irreconcilable with a separate judgment given in proceedings between the same parties in the same State;
- If the judgment is irreconcilable with an earlier judgment given in a State other than the State, but affecting the same parties.

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<sup>11</sup> [Brian Hunt, 'Domicile', Murdoch and Hunt's Encyclopaedia of Irish Law.](#)

<sup>12</sup> [Brian Hunt, 'Habitual residence', Murdoch and Hunt's Encyclopaedia of Irish Law..](#)

<sup>13</sup> The LRC notes that "Several submissions to the Commission also raised concerns about the uncertainty surrounding the basis for the recognition of foreign divorces. In a case called *H v H* in 2015, the Supreme Court held that the current test was based on whether one of the spouses was domiciled in the foreign jurisdiction, as opposed to one of the spouses being habitually resident in that jurisdiction. The determination of "domicile" includes an assessment of the intention of the person to remain in the foreign jurisdiction, which has proved complex to determine in some instances, whereas a test of habitual residence can be determined by factual circumstances alone, which may be less complex. The Supreme Court considered that the test could be changed by legislation, and this project will therefore consider whether the current test should be reformed."

## Background to the Bill

The [Thirty-eighth Amendment of the Constitution \(Divorce\) Bill 2016](#), a Private Members' Bill introduced by then Deputy Josepha Madigan, proposed to amend Article 41.3.2(i) of the Constitution to reduce the minimum period that spouses must have lived apart before applying for a divorce, from four years over the previous five years, to two years over the previous three years.

At the Second Stage debate of the Bill Deputy Madigan described how, through her work as a family lawyer, she had observed the problems that the four-year rule had caused for couples who wished to divorce:

*“The current constitutional requirement for separating couples to live apart for four years out of the preceding five before initiating divorce proceedings is too long. It is cumbersome and restrictive, placing severe and unnecessary strain, both financial and emotional, on separating couples. My Bill simply seeks to halve the necessary waiting time before initiating divorce proceedings from four years of living separated and apart out of the previous five to two years out of the previous three. I believe this to be both fair and achievable and it will make a significant positive difference to the lives of separating couples in Ireland.”<sup>14</sup>*

The Private Members' Bill completed Committee Stage in the Dáil on 12 July 2017 with cross party support.

On 29 January 2019 Minister for Justice and Equality, Mr. Charlie Flanagan T.D., announced that the Government had approved the holding of a referendum to amend the constitutional provisions on divorce.

*“I am proposing a bill to reduce the living-apart period to two years, thereby allowing people to bring a divorce application at an earlier time. As it stands, the long separation period required under the Constitution frequently leads to couples seeking a judicial separation prior to obtaining a divorce, with attendant legal costs and additional stress.*

*The referendum will ask the people to amend Article 41.3.2 of the Constitution “to remove the minimum living apart period for spouses seeking a divorce; and replace the current outdated text of Article 41.3.3 with a provision to allow the Oireachtas to legislate for the recognition in the State of a divorce obtained in another State. If the referendum is passed, the Government will bring forward a Bill to amend section 5(1)(a) of the Family Law (Divorce) Act 1996 to reduce the minimum living apart period for spouses to two years during the previous three years.”<sup>15</sup>*

The referendum was held on the same day as the local and European parliament elections in May 2019. The referendum was passed by a majority, 82.1% in favour and 17.9% against.<sup>16</sup>

The current Bill did not form part of the [Programme for a Partnership Government](#), nor was it recommended by the Citizens' Assembly or the earlier Constitutional Convention. [Amendment of](#)

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<sup>14</sup> [Dáil Éireann Debates](#), Thursday, 6 April 2017.

<sup>15</sup> Department of Justice and Equality, '[Minister Flanagan announces Government approval for a referendum on divorce](#)', Press Release, 29 January 2019.

<sup>16</sup> RTE News '[Referendum on divorce passes with 82.1% voting 'Yes'](#)' (26 May 2019).

[\*the Constitution \(Dissolution of Marriage\) Bill 2016\*](#) to enable a referendum in May 2019 was placed on the Priority List of the [Government Legislation Programme](#), Spring session 2019. The Family Law Bill is currently on the Priority List on the [Government Legislation Programme](#), Autumn session 2019.

## Introduction of divorce in Ireland 1997

A constitutional ban on divorce was introduced through the 1937 Constitution which stated that “**no law shall be enacted providing for the grant of dissolution of marriage.**” The Constitution emphasises the importance of the family in Irish life<sup>17</sup> and pledged to protect the institution of marriage.<sup>18</sup>

In 1995 the [Fifteenth Amendment of the Constitution](#) amended Article 41.3.2 to replace the constitutional ban on divorce with the following text:

“A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –

- i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- ii. there is no reasonable prospect of a reconciliation between the spouses,
- iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iv. any further conditions prescribed by law are complied with.”

The Fifteenth Amendment was passed by a very narrow majority, 50.28% to 49.72% (a difference of only 9,114 votes), on 24 November 1995.<sup>19</sup> The result was challenged in both the High Court and the Supreme Court. Both courts dismissed the respective challenges.<sup>20</sup> The 1995 referendum was followed by the enactment of the [Family Law \(Divorce\) Act 1996](#).

An earlier attempt to repeal the prohibition on divorce had failed in 1986 when the *Tenth Amendment to the Constitution Bill 1986*<sup>21</sup> was rejected at a referendum held on 26 June 1986 by 935,843 votes (63%) to 538,279 votes (37%). See Box 1 for details of the failed proposal.

### Box 1. Text of the Tenth Amendment of the Constitution Bill 1986

**"THE TENTH AMENDMENT OF THE CONSTITUTION BILL, 1986**, proposes to delete subsection 2° of Article 41.3 of the Constitution, which states that no law shall be enacted providing for the grant of a dissolution of marriage, and to substitute the subsection here following:

<sup>17</sup> [Constitution of Ireland Art. 41.1.](#)

<sup>18</sup> [Constitution of Ireland Art. 41.3.](#)

<sup>19</sup> Government of Ireland, [Referendum Results 1937 - 2018 \(2018\) p. 52](#)

<sup>20</sup> *Hanafin v Minister for Environment* [1996] 2 I.R.321.

<sup>21</sup> [Tenth Amendment of the Constitution Bill 1986](#) (link to Oireachtas Debates as the Bill is not available electronically).

2° Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that:-

- (i) a marriage has failed,
- (ii) the failure has continued for a period of, or periods amounting to, at least five years,
- (iii) there is no reasonable possibility of reconciliation between the parties to the marriage, and
- (iv) any other condition prescribed by law has been complied with,

the court may in accordance with law grant a dissolution of the marriage provided that the court is satisfied that adequate and proper provision having regard to the circumstances will be made for any dependent spouse and for any child of or any child who is dependent on either spouse."

During Second Stage Debate on *Tenth Amendment to the Constitution Bill 1986* the then Minister for Justice, Mr Alan Dukes T.D. outlined the level of consultation that had preceded the introduction of the Bill. He noted that the Houses had debated the report of the Oireachtas Joint Committee on Marriage Breakdown which outlined that arguments for and against the introduction of divorce, concluding with a majority of the Committee finding in favour of holding a referendum.<sup>22</sup> There had been discussions with the main religious bodies, it was discussed at the New Ireland Forum and the opinion polls had indicated support for 'some sort of divorce'.<sup>23</sup> A bitter and divisive campaign followed, anti-divorce activists highlighted the risks to children and wives who may be abandoned by errant husbands<sup>24</sup> and the proposal was defeated.

Following the defeat of the 1986 referendum there was a lot of Government activity in the area of family law reform before the introduction of the *Fifteenth Amendment of the Constitution (No. 2) Bill 1995*. A raft of family law legislation had been passed, 18 pieces in total, with a particular focus on the protection and welfare of children. The Legal Aid Service and the Family Mediation Service were expanded and received additional funding. Speaking at the Second Stage debate on the *Fifteenth Amendment of the Constitution (No. 2) Bill 1995*, the then Minister for Equality and Law Reform, Mr Mervyn Taylor T.D. acknowledged the work of previous administrations in this area, in particular the 1992 Government White Paper.<sup>25</sup>

The White Paper, [Marital breakdown: a review and proposed changes](#), considered whether it was best to 'entrench' the grounds for divorce in the Constitution or to allow the Oireachtas to determine the grounds for divorce. The advantage of not including the grounds for divorce in the constitution (entrenchment) was that the legislature could respond to changing circumstances as necessary on the basis that "a Constitution is more properly concerned with statements of fundamental principles." The White paper also recognised that not including the grounds for divorce in the Constitution meant "there would be nothing to prevent the Oireachtas from providing for a very liberal divorce regime without direct reference to the people in a referendum."<sup>26</sup>

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<sup>22</sup> Oireachtas Joint Committee on Marriage Breakdown (1985) [Report](#) (This is a large file that will be slow to download).

<sup>23</sup> [Dáil Éireann Debates, Wednesday, 14 May 1986.](#)

<sup>24</sup> Tony Fahey "Small bang? The impact of divorce legislation on marital breakdown in Ireland" (2012) 262 *International Journal of Law, Policy and the Family* 242-258.

<sup>25</sup> [Dáil Éireann Debates, Wednesday, 27 September 1995..](#)

<sup>26</sup> Department of Justice (1992) [Marital breakdown: a review and proposed changes, p. 90.](#)

The White Paper set out five options to amend Article 41.3.2 of the Constitution:<sup>27</sup>

1. Grounds for divorce a matter for Oireachtas (i.e. legislation)
2. Absence of a normal marital relationship for five years
3. Separation for five years
4. Judicial separation plus two years
5. Irretrievable breakdown on proof of a specified 'fault' and 'no-fault' grounds (e.g. adultery, unreasonable behaviour, desertion, living apart for specified time).

The White Paper estimated there were between 37,000 and 47,000 people whose marriages had broken down, the report acknowledged that this was possibly an understatement of the number of people who might avail of divorce were it to become available as some people whose marriages had broken down may not be separated or who had remarried following a foreign divorce.<sup>28</sup>

Ultimately the grounds set out for divorce in the *Fifteenth Amendment of the Constitution (No. 2) Bill 1995* included no reasonable prospect of a reconciliation between the spouses, a living apart period of four out of the previous five years, and the proper provision for spouses and children. 'Faults', such as adultery, desertion and violence, were not included as grounds for divorce.<sup>29</sup>

The Government published [The Right to Remarry](#)<sup>30</sup> to accompany the 1995 Bill. This document set out the detailed legal and financial implications of divorce as well as a draft Bill which would be introduced should the referendum be passed.<sup>31</sup>

The most significant of the family law reforms introduced before the second divorce referendum was the [Judicial Separation and Family Law Reform Act 1989](#) which provided both 'fault' and 'no-fault' grounds for couples to legally separate, a framework for dealing with spouse and child maintenance, division of property and succession rights and provisions relating to access and custody of children. There are six grounds for a judicial separation set out in Section 2 of the [Judicial Separation and Family Law Reform Act 1989](#):

1. Adultery;
2. One person has behaved in such a way that it would be unreasonable to expect the other person to continue to live with them;
3. One person has deserted for a continuous period of at least one year at the time of the application;
4. The couple have lived apart from one another for a continuous period of at least one year up to the time of the application and both parties agree to the decree being granted;
5. The couple have lived apart from one another for at least three years at the time of the application for the decree (whether or not both parties agree to the decree being granted);
6. The court considers that a normal marital relationship has not existed between the spouses for at least one year before the date of the application for the decree.

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<sup>27</sup> [Ibid.](#)

<sup>28</sup> [Ibid.](#), p. 29.

<sup>29</sup> [Ibid.](#)

<sup>30</sup> Government of Ireland (1995) [The Right to Remarry: A Government Information Paper on the Divorce Referendum](#).

<sup>31</sup> [Dáil Éireann Debates. Wednesday, 27 September 1995.](#)



This legislation was similar to ‘no fault’ divorce found in other countries, except it did not allow for people to remarry. Then Deputy Alan Shatter described it as a “watershed in Irish family law.”<sup>32</sup> The legislation had unprecedented cross-party support in the Oireachtas.<sup>33</sup>

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<sup>32</sup> Alan Shatter (1997) *Shatter’s family law*. 4<sup>th</sup> edition, Dublin, Butterworths.

<sup>33</sup> Crowley, L. (2011) “[Irish divorce law in a social policy vacuum – from the unspoken to the unknown](#)”, *Journal of Social Welfare and Family Law*, vol. 33(3), pp.227-242.

## Divorce legislation – grounds for divorce

The 1995 referendum was followed by the enactment of the [Family Law \(Divorce\) Act 1996](#) which established the High and Circuit Courts as designated courts for divorce jurisdiction. [Section 5](#) of the Act provides that a court may grant a decree of divorce where the court is satisfied that:

- (a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, *at least four years during the previous five years*,
- (b) there is *no reasonable prospect of a reconciliation* between the spouses, and
- (c) such *provision* as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family. (emphasis added).

This is described as a ‘no fault’ approach to divorce, as the divorce is not granted on the basis of the behaviour of one of the spouses. In other countries, behaviour like adultery, desertion, violence or imprisonment may be grounds for divorce (see section 5 of this [L&RS Note](#)). In this sense, it is considered to be a ‘liberal’ divorce system, when compared to other systems. However, the time that a couple had to be living apart before a divorce application may be made was still restrictive on a separating couple. The behaviour of the parties can be taken into account when making ancillary orders.<sup>34</sup> [Section 20](#) of the Act prevents a ‘clean break’ divorce, as spouses can apply to the courts for ancillary relief at any time after the divorce has been granted.

## Proper provision clause

The legislation does not define ‘proper provision’. Geoffrey Shannon suggests that this stipulation was included to “quell fears of those who argued that the introduction of divorce would lead to the feminisation of poverty.”<sup>35</sup>

The ‘proper provision’ requirement in the legislation prevents a ‘clean break’ divorce as former spouses continue to have financial ties after a divorce order has been granted. Either spouse can apply for the various forms of ancillary reliefs, including:

- Periodic payment and lump sum orders;
- Property adjustment orders;
- Financial compensation orders;
- Pension adjustment orders;
- Provision from estate of deceased spouse; and,
- Orders for the sale of property available under the Divorce Act at the time of the divorce application or at any time in the future unless the applicant has re-married.

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<sup>34</sup> [Family Law \(Divorce\) Act 1996 s. 20\(2\)](#).

<sup>35</sup> Geoffrey Shannon (2007), *Divorce law and practice*, Dublin, Thompson Roundhall, p. 38.

While the absence of a clean break option has been criticised by commentators since the legislation was enacted, it has also been recognised as the appropriate approach in the Irish context at the time.<sup>36</sup>

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<sup>36</sup> Ibid Ch. 5. See also Martin, F. "[From prohibition to approval: The limitations of the 'no clean break' divorce regime in the Republic of Ireland](#)" (2002) 16 *International Journal of Law, Policy and the Family* 223-259.

## Rates of divorce and marital breakdown in Ireland

There are two key sources of information on the divorce and separation rates in Ireland, the annual reports of the Courts Service and the Census of population. Unlike the court reports, the Census records those living in Ireland who are currently divorced or separated, regardless of where that divorce/separation was obtained.

**Graph 1** below illustrates the number of divorces and judicial separations granted for the period 1997- 2017. Divorce was introduced in 1997 and the peak in the number of divorces granted to date was seen in 2007 (3684) reflecting marriages that had broken down in 2003 or before. Judicial separations were of course more popular in 1997, when 1,431 were granted – that figure has been falling ever since, with 753 judicial separations granted in 2017. Judicial separation remains a choice for many couples, sometimes as a precursor to divorce.

**Graph 2** shows Census data which illustrates the population aged 15+ who are either divorced or separated. Until the 1986 Census there were four categories covering marital status – single, married, widowed and other. In 1986 ‘other’ was replaced by six additional categories –

- Deserted;
- Legally separated;
- Other separated;
- Marriage annulled;
- Divorced in another country;
- Remarried following dissolution of a previous marriage; and,
- Remarried following widowhood.

In 1996 the separation/divorce options were reduced to three –

- Separated;
- Divorced; and,
- Remarried following a previous dissolution of marriage.

Another category ‘living together as married’ was added to reflect growing rates of cohabitation. A category was added to the 2016 Census to count registered same sex civil partnerships, a concept that had been introduced through the [Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010](#).

Following the introduction of divorce in 1997, there was an expectation that the courts would be flooded with divorce applications. This did not happen in the first five years<sup>37</sup> nor in the following 10 years.<sup>38</sup> The relatively low level of divorce in Ireland when compared to other countries is partially explained by the preference for legal or judicial separation, which can be obtained more quickly than divorce. The key difference between divorce and judicial separation is that the former permits parties to remarry. That said, as noted above, divorce in Ireland does not represent a

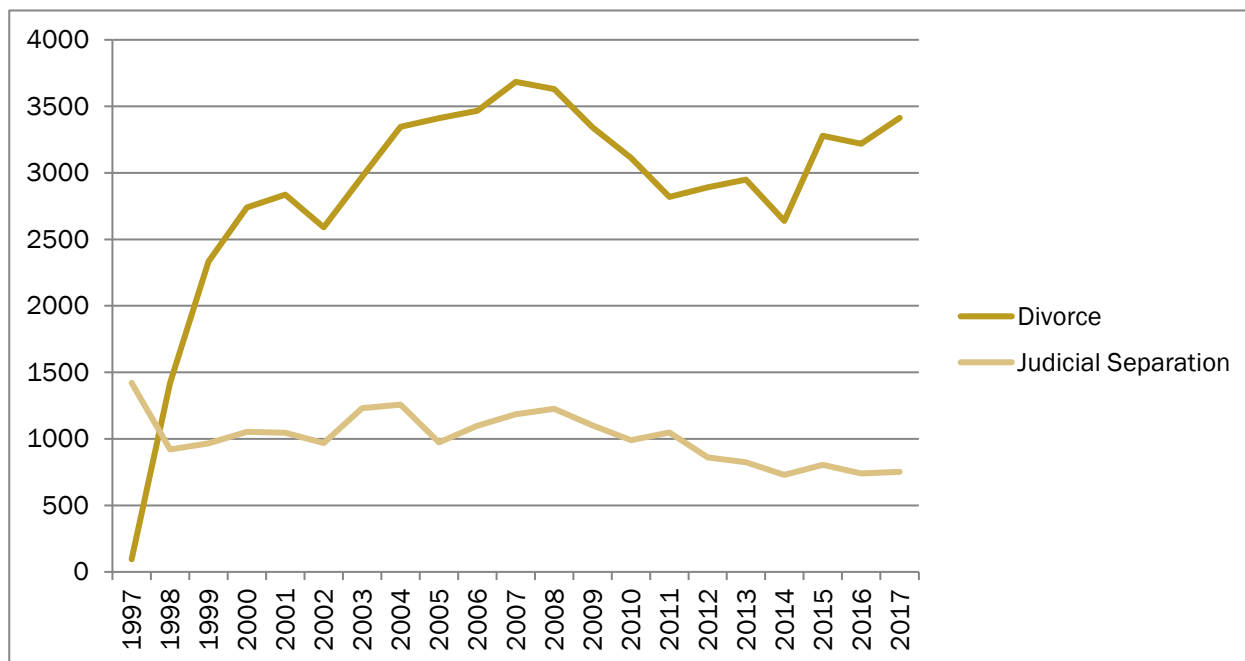
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<sup>37</sup> Burley, J. and Regan, F. “[Divorce in Ireland: the fear, the floodgates and the reality](#)”, (2002) 16(2) *International Journal of Law, Policy and the Family* 298-306.

<sup>38</sup> Tony Fahey “[Small bang? The impact of divorce legislation on marital breakdown in Ireland](#)” (2012) 262 *International Journal of Law, Policy and the Family* 242-258.

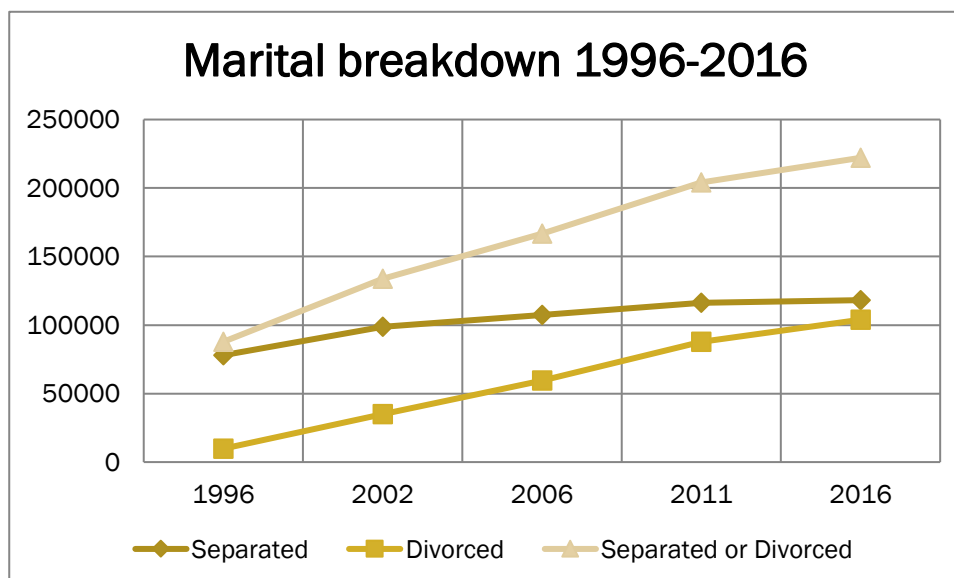
‘clean break’, as former spouses can remain tied financially even after a decree of divorce has been granted.

**Graph 1. Divorce and Judicial Separations 1997-2017**



**Source:** L&RS based on Courts Service data 2000-2017

**Graph 2. Census data on marital breakdown 1996-2016**



**Source:** Marital status data from Census 1996-2016

The anti-divorce campaign in 1986 and again in 1995 focused on issues of men leaving their wives and children, property rights and concern over easy access to divorce. This is well illustrated by the 1995 billboard posters “Hello Divorce, Bye-bye Daddy.” In fact, the majority of judicial

separation applications are made by wives, for example, in 2017, 78% of applications in the High Court and 67% in Circuit Court were made by the wife. Slightly more divorce applications are made by wives, for example, in 2017, there were 3,964 applications made by wives in the Circuit Court representing 56% of all applications, however, more husbands made applications for divorce in the High Court - of 31 applications 55% were made by husbands. The Courts Service website notes that the majority of applications for judicial separation are made on the grounds that the couple have not had a normal marital relationship for a year before applying for the separation.<sup>39</sup>

Tony Fahey (2012) used census data between 1986 to 2006 to study trends in marriage breakdown following the introduction of divorce, to test the hypothesis that the introduction of divorce caused an increase in marriage breakdown. He concluded that rates of marriage breakdown/family instability in Ireland had been increasing prior to 1997 due to the changes in family law in 1970s and 1980s and also family behaviour, especially the rate of non-marital child-bearing. He concluded that the introduction of divorce came too late in Ireland to affect those trends seen in other European countries. Legislation introduced prior to the [Judicial Separation Act 1989](#) dealt with other key elements of family law, particularly parent-child relationships, and led to what Fahey describes as 'de facto separations' dealing with custody, access and maintenance.<sup>40</sup> Some of the key pieces of legislation he refers to include:

- [Guardianship of Infants Act 1964](#) dealt with custody for married and non-married parents and parental rights of non-married fathers;
- [Family Law \(Maintenance of Children and Spouses\) Act 1976](#) dealt with maintenance claims;
- [Family Law \(Protection of Children and Spouses\) Act 1981](#) enabled the District Court to issue barring orders against violent spouses because of emotional or physical abuse of children and spouses. This was replaced by the [Domestic Violence Act 1996](#).

## Crude divorce rate

Internationally, the crude divorce rate is used to report on marriage breakdown.<sup>41</sup> The crude divorce rate measures divorces per 1,000 persons. According to Eurostat crude divorce rates, Ireland has one of the lowest crude divorce rates in the EU with a rate of 0.6%.<sup>42</sup> The EU average is 1.9%, the rate in France, Austria and UK is 1.9%, Poland is 1.8%, Spain 2.1%, Italy 1.4%, Belgium 2.2% and Portugal 2.2%. The Scandinavian countries have the highest rates: Denmark 2.9%, Sweden and Finland 2.5%, and Norway 1.9%.

However, the crude divorce rate is not an adequate measure of marriage breakdown in Ireland as separation remains an option for Irish couples, even temporarily, due to the four year 'living apart' provision for couples applying for divorce.

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<sup>39</sup> Courts Service [website](#).

<sup>40</sup> Tony Fahey "[Small bang? The impact of divorce legislation on marital breakdown in Ireland](#)" (2012) 262 *International Journal of Law, Policy and the Family* 242-258.

<sup>41</sup> Eurostat "[Crude marriage rate and crude divorce rate](#)".

<sup>42</sup> Eurostat "[Divorce Indicators](#)".

## Comparative Analysis

### Time living apart as grounds for divorce in EU Member States

Most European countries have several different grounds for divorce; see Table 2, including stated faults (adultery, violence, mental or other serious illness, imprisonment) and a specified time living apart. In Hungary and Poland there is no specific period of living apart required for couples seeking to divorce.

Generally, there is a shorter period of time living apart required for the granting of a divorce when the divorce application is by mutual consent of both parties. For example, in Belgium, divorce on the grounds of irretrievable breakdown may be granted on the basis of a de facto separation that lasts longer than six months, if it is a joint submission, or 1 year where it is a unilateral submission. In Germany one-year living apart is sufficient where both spouses consent to the divorce, whereas living apart for three years is grounds for divorce regardless of consent. In England, Wales and Northern Ireland divorce may be granted after a separation of two years with the consent of the other spouse, in the absence of consent a separation for five years prior to divorce application is required. In Scotland non-cohabitation for one year provides grounds for divorce with the consent of the other spouse, but, without consent, non-cohabitation for two years is necessary for a successful divorce application.

Malta has similar provisions to those currently in force in Ireland, with couples required to live apart for four out of the previous five years.<sup>43</sup>

**Table 2: Grounds for divorce in EU countries – living apart period highlighted where applicable**

Country	Grounds for divorce
Austria	Irretrievable breakdown, living apart from <b>three years</b> or 'serious marital fault' including of the marriage caused by marital faults (adultery, violence, mental illness, highly infectious disease)
Belgium	Two kinds of divorce: on grounds of irretrievable breakdown or divorce by mutual consent.  Irretrievable breakdown: <ul style="list-style-type: none"> <li>• Legal proof of irretrievable breakdown, or</li> <li>• De facto separation longer than <b>six months</b> (joint submission), or</li> <li>• De facto separation longer than <b>1 year</b> (unilateral application).</li> </ul>
Croatia	Three grounds for divorce <ul style="list-style-type: none"> <li>• By agreement,</li> </ul>

<sup>43</sup> Malta introduced divorce in 2011.



	<ul style="list-style-type: none"> <li>Relationship has broken down severely and permanently,</li> <li><b>One year</b> has passed since the 'termination of the marital union'.</li> </ul>
Czech Republic	A marriage is considered to have broken down where it lasted for at least one year, the spouses have not lived together for at least <b>six months</b> and the other spouse joins the petition for divorce.
Cyprus	<p>There are 12 possible grounds for divorce including separation for <b>five years</b>.</p> <p>In the case of a religious marriage proceedings can only be initiated after the notice is given to the Bishop in the district where the applicant resides</p>
Finland	<p>Divorce can be granted after a <b>six-month cooling off period</b>.</p> <p>No cooling off period is required where spouses have lived separately for at least <b>two years</b> before filing for divorce.</p>
France	<p>Four types of divorce:</p> <ul style="list-style-type: none"> <li>Mutual consent,</li> <li>Acceptance of principle of marital breakdown,</li> <li>Irretrievable breakdown of marriage – spouses not living together for <b>two years</b>,</li> <li>Divorce on grounds of fault.</li> </ul>
Germany	<p>Marriage considered to have broken down if the parties no longer cohabit and it is not expected that they will resume matrimonial cohabitation.</p> <ul style="list-style-type: none"> <li><b>One year</b> living apart with consent</li> <li><b>Three years</b> living apart regardless of consent.</li> </ul>
Greece	<p>Two types of divorce, by consent and a contested divorce.</p> <p>In a contested divorce the fact the couple have been separated for at least <b>two years</b> is considered irrebuttable presumption of breakdown.</p>
Hungary	Divorce may be granted on the grounds that the marriage has completely and irretrievably broken down with no specific timeframe.
Italy	One of the grounds for divorce is where the couple have legally separated for at least <b>three years</b> .
Lithuania	<p>By mutual consent if the spouses had been married for at least a year signed a divorce settlement agreement.</p> <p>Without consent on one of the following four grounds:</p>

	<ol style="list-style-type: none"> <li>1. Separation for <b>1 year</b>,</li> <li>2. One spouse declared legally incapacitated,</li> <li>3. Whereabouts of one spouse is unknown,</li> <li>4. One spouse in prison for more than a year for committing a non-premediated crime.</li> </ol>
Luxembourg	Divorce by mutual consent or divorce due to irretrievable breakdown of the marital relationship with a cooling off period of three months.
Malta	<p>Three conditions for divorce:</p> <ol style="list-style-type: none"> <li>1. The spouses must have lived apart for a period or periods totaling at least <b>four years during the five years</b> immediately preceding the petition, or at least four years must have elapsed from the date of legal separation,</li> <li>2. The court must also be satisfied that there is no reasonable prospect of reconciliation of the spouses,</li> <li>3. The spouses and all their children must receive adequate maintenance where it is due, but this right to maintenance can be renounced by the parties at any time.</li> </ol>
Poland	<p>The grounds for divorce are that a marriage has broken down completely and irretrievably.</p> <p>No specific timeframe.</p>
Portugal	<p>Divorce by mutual consent, the spouses do not have to give the reason for their application.</p> <p>Contested divorce (4 grounds):</p> <ol style="list-style-type: none"> <li>1. <i>De facto</i> separation for <b>one full year</b>,</li> <li>2. A change in the mental faculties of the other spouse which has lasted for more than one year and which, because of its seriousness, compromises the possibility of communal life,</li> <li>3. Absence, without any news from the absentee, for a period of not less than one year,</li> <li>4. Any other facts that, regardless of the fault attached to the spouses, prove the irretrievable breakdown of the marriage.</li> </ol>
Romania	<p>Mutual consent of the spouses where the relationship between the spouses has seriously deteriorated and continuation of the marriage is no longer possible;</p> <p>At the request of one spouse following a <i>de facto</i> separation that has lasted for at least <b>two years</b>;</p> <p>At the request of the spouse whose state of health makes the continuation of the marriage impossible.</p>
Sweden	Divorce must be preceded by a six-month period for reconsideration unless the couple have been living apart for <b>two years</b> .

England Wales and Northern Ireland	<p>Irretrievable breakdown is the sole ground for divorce, evidence of breakdown on one of five grounds:</p> <ul style="list-style-type: none"> <li>• Adultery,</li> <li>• Unreasonable behaviour,</li> <li>• Desertion (2 years),</li> <li>• Separation <b>two years</b> prior to divorce application (with consent of other spouse),</li> <li>• Separation for <b>five years</b> prior to divorce application (without consent of spouse).</li> </ul>
Scotland	<p>Irretrievable breakdown is the sole ground for divorce, evidence of breakdown:</p> <ul style="list-style-type: none"> <li>• Adultery,</li> <li>• Unreasonable behaviour,</li> <li>• Non-cohabitation for <b>one year</b> - with consent of other spouse.</li> </ul> <p>Non-cohabitation <b>two years</b></p>

Source: [EU website Divorce and legal separation](#)

## UK proposal for ‘no-fault’ divorce

Currently in England, Wales and Northern Ireland there are five possible ways in which applicants can demonstrate their marriage has broken down irretrievably; three are behaviour/fault based and two refer to the amount of time living apart, as set out in the Table above. There is a proposal to introduce a ‘no-fault’ divorce.<sup>44</sup> Calls for ‘no-fault’ divorce have also come from senior judges and family lawyers as well as politicians.

The UK [Family Law Act 1996](#) would have introduced “no-fault divorce” and required the parties to a divorce to attend “information meetings” with a view to encouraging reconciliation where possible. In 2001, following a series of information gathering pilot schemes, the then Government concluded that the provisions were “unworkable” and the relevant provisions relating to ‘no-fault divorce’ were repealed.

The House of Commons consultation paper on no-fault divorces described the objectives of the proposal:<sup>45</sup>

*To reform the legal requirements for divorce so that it is consistent with the approach taken in other areas of family law, and to shift the focus from blame and recrimination to support adults better to focus on making arrangements for their own futures and for their children's. The reformed law should have 2 objectives:*

<sup>44</sup> House of Commons Library (2018). Research Briefing “[No-fault divorce](#)”

<sup>45</sup> *Ibid.*

1. *To make sure that the decision to divorce continues to be a considered one, and that spouses have an opportunity to change course;*
2. *To make sure that divorcing couples are not put through legal requirements which do not serve their, or society's, interests and which can lead to conflict and accordingly poor outcomes for children.*

This consultation proposes adjusting what the law requires to bring a legal end to a marriage that has broken down irretrievably. This adjustment includes removing the ability to allege "fault".



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