

## **BRIEFING ON DIVORCE LAW REFORM**

### **About Rights of Women**

Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BME women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

### **OVERVIEW**

**Divorce law reform is long overdue.** The current law dates to 1973 and society has changed since then. It is not just that current divorce law is not fit for purpose, it is that it is not functioning at all. When a spouse does not want to, or is unable to separate and wait 2 or 5 years to apply for divorce, they apply based on the "unreasonable behaviour" of the other spouse. This is the "fault-based" fact that has to set out behaviour of the other spouse. In practice, the courts do not scrutinise the behaviour and discourage respondents from contesting divorces even where they indicate they do not agree with the behaviour. They will accept applications for divorce based on very weak behaviour because the drive is to deal with the paperwork with as little delay as possible. Spouses are encouraged to use this 'workaround'. Legally, it doesn't matter whether the unreasonable behaviour is actually the cause of the marital breakdown. But for some of the most vulnerable in our society, this approach leaves them at greater risk. For those who have access to legal advice and support, they will be 'let in on the secret of the workaround' and are able to obtain a divorce reasonably quickly. For the increasing number of women who are unable to access legal advice, they are left trying to navigate a legal system where what they expect the law to do is largely ignored.

**The idea that divorce law in England and Wales is not fit for purpose is not new.** In 1988 and 1990, the Law Commission, recommended changes to divorce law. In 1994, parliament passed reform of divorce law in the Family Law Act 1996 that was never brought into force and was eventually repealed in 2014. Reform of this area of law is long overdue.

**We do not believe it is helpful to refer to divorce law reform as a call for “no fault” divorce.** This term is misleading because it links the cause of the breakdown of the marriage to the facts stated in the divorce. In reality, there are many reasons why marriages breakdown. Sometimes one spouse is at fault. Sometimes neither can realistically be said to be at fault. The purpose of reform should be to remove the requirement to prove the breakdown of the marriage to the state with what the law refers to as “facts”. As such, a more appropriate term would be divorce “on notice” or “no fact” divorce.

**Divorce laws should not grant overly extended or intrusive powers to the state** and instead should serve to enable freedom of choice and respect people’s autonomy in such personal matters. As a starting principle in relation to the rights of women in society, we believe it is retrogressive that the current law enables the state to refuse an application for divorce, effectively overriding an individual’s decision on whether they wish to remain married to another person.

## **EVIDENCE BASE**

The findings in this briefing are based on:

- A detailed review of 167 advice line files [April-September 2017] where women callers to our advice line had contacted us for advice related to divorce proceedings and two thirds (101) of these callers stated that they had experienced domestic violence.
- A survey of women lawyers who volunteer for our advice line [January 2018]
- A survey of women callers, responded to by 54 callers seeking advice on divorce of which 53 were survivors of abuse [January 2018]

## **OUR KEY FINDINGS**

We believe the current divorce law is discriminatory against women and has a disproportionately negative effect on women who have experienced domestic abuse and/or are of a low income. In particular the evidence highlights that the fault-based system:

1. Keeps women in abusive relationships longer than they would stay otherwise
2. Forces reliance on ‘unreasonable behaviour’, unnecessarily raising temperatures and the risk of abuse
3. Provides opportunities for perpetrators to continue their abuse by prolonging proceedings and abusing the court process

In the following pages we discuss the experiences women have shared with us of the divorce process, including the difficult choices it forces on them.

### *Experiences of women on a low income*

In our experience, women on a low income are discriminated against by the current divorce law. It is often not financially possible for a couple to live separately for 2 or 5 years before applying for divorce; therefore women in this situation effectively have no option but to rely on a fault-based fact. They simply do not have the ability to fund two separate homes. Where a couple's financial settlement on divorce will be based on the competing needs of each spouse and the children, it may be not be advisable for either (in terms of protecting their own separate interests) to leave the family home.

The family courts have, over time, developed a way around this by accepting that a couple can apply for divorce based on 2 or 5 years separation where they have lived in the same household but lived "separately". In our experience, particularly if the couple have children, such an enforced state of affairs imposes needless strain. They, therefore, either resort to reliance on a fault-based fact or spend what is likely to be a very unhappy 2 or 5 years living in the same household but living separate lives.

The effect is that couples often rely on unreasonable behaviour because they wish to end the marriage sooner, enabling them each to move on with their lives. The negative effect of having to do this in relation to heightening tensions in other proceedings and adding "needlessly to the human misery involved"<sup>1</sup> is well documented.

We are not alone in noticing the discriminatory effect of the current law on women on low incomes; the Law Commission recognised this in their 1990 report:

*It is unjust and discriminatory of the law to provide for a civilised "no-fault" ground for divorce which, in practice, is denied to a large section of the population. A young mother with children living in a council house is obliged to rely on fault whether or not she wants to do so and irrespective of the damage it may do.<sup>2</sup>*

### *Survivors of abuse on low income*

The options for women on low incomes who have suffered domestic abuse are particularly stark. The support available to exit an abusive relationship is diminishing as funding is being cut to support services and refuges. In our experience, many women who have been subject to abuse are often reluctant to rely on allegations of unreasonable behaviour for fear of reprisal. However, the fact is that for some of the most vulnerable in our society, the option of waiting 2 or 5 years to get divorced is, in some cases, impossible.

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<sup>1</sup> The Law Commission (1990) *The Ground for Divorce*, London: HMSO, para 2.16

<sup>2</sup> The Law Commission (1990) *The Ground for Divorce*, London: HMSO, para 2.12

Some women will be able to obtain a non-molestation order and occupation order (which could include a requirement for the spouse to continue to pay the rent or mortgage on the property) or find a place in a refuge. It is highly unlikely that protective orders will last for the full 2 or 5 year period required to rely on separation. In any event, women who have left an abusive relationship should not have to wait 2 years (with the perpetrator's consent) or 5 years to finally sever their legal ties to their abusive spouse. This means women in this situation are left having to rely on a fault-based fact to apply for divorce.

We speak to many women on the advice line who are still in abusive marriages and are attempting to go through the divorce process. They may have a non-molestation order but remain living with the perpetrator. Our experience is that family court judges are reticent to make occupation orders where the family home may play a part in the divorce process forcing women to choose between living with their abusive spouse while divorcing or leaving the home themselves. This is something which many cannot afford to do, especially if they have children.

#### *Survivor experiences of navigating the fault-based process*

Some survivors of domestic abuse do not want to have to rely on domestic abuse in their application. This is largely due to a desire not to anger the respondent. The fear of raising and/or pursuing allegations of domestic violence within an application for divorce results in some women declining to do so, forcing them instead to remain in abusive marriages, at least for longer than they would otherwise have done.

After the application has been issued, survivors then struggle with the fault-based system because so much of it relies on co-operation from the perpetrator of abuse and/or is so complicated that survivors find the process incredibly difficult to navigate their way through. When this is put together with the heightened risks of retaliation from the perpetrator by relying on unreasonable behaviour, the situation becomes intolerable.

The other side of this is when survivors of domestic abuse are the respondent in divorce proceedings. The "hypocrisy and lack of intellectual honesty"<sup>3</sup> is galling to all respondents but our callers find this position particularly outrageous where they feel the reason for the relationship breakdown was their spouse's abusive behaviour but they end up accepting facts based on their own unreasonable behaviour.

If a woman is unaware of the "intellectual dishonesty" of the system, they are often scared to accept their spouse's facts in case it has an effect on other proceedings and it is, at times, raised by the perpetrator in other court proceedings. In reality, the family court would rarely find the contents of an application for divorce relevant to any other proceedings. It is also completely unacceptable that a survivor, who cannot defend the

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<sup>3</sup> Munby P in *Owens v Owens* [2017] EWCA Civ 182, para 95

application or cross apply because of her means or fear, should have to agree to a divorce based on the fact of her own unreasonable behaviour.

There is a final, perhaps less obvious problem with the fault-based system which relates to women's experiences of feeling dismissed and unsupported by the system in the context of contested divorces. The process of leaving an abusive marriage is an incredibly difficult one and there are many barriers women face along the way both from the perpetrator and the system itself.

There are some survivors who will have decided that they do wish to set out the abusive behaviour of their spouses as there may be a catharsis to this process. If the abusive spouse defends the divorce, there is an impression that the courts support the abusive spouse's position. This is because the case will be listed for directions and pressure may be put on both the woman and her solicitor, if they have one, to remove the abuse from the particulars so that the perpetrator will agree to it. Undoubtedly, this stems from a desire to progress the case, not to use court time unnecessarily and to keep tensions down. However, symbolically, for the victim involved, it appears as if the court is siding with their perpetrator and dismissing their experiences of abuse. As with the discussion above about 'workaround', this is yet another example of how the current law has the capacity to undermine public faith in the family justice system as a whole.

### *Post separation abuse*

For women in abusive relationships who wish to divorce their spouses but are unable to live separately they have no choice but to rely on fault in the application for divorce and are left with no other option but to do so while living with an abusive spouse. This increases the risk of abuse as the perpetrator will receive the application and read the facts set out by the victim while they are living together.

Women who are able to exit the abusive relationship before applying for divorce are not safe from repercussions post-separation. Research shows that post-separation abuse is common, in *Finding The Costs of Freedom*<sup>4</sup>, 88% of the women that took part in the study continued to experience post-separation abuse of some kind. The most common type of post separation abuse was physical, sexual or verbal abuse (including threats) which was experienced by 74% of the women that took part.

As shown in *Finding Fault?*<sup>5</sup>, the use of fault-based facts does raise tensions during the divorce process. As set out above, the majority of survivors of domestic abuse are subjected to ongoing abuse following separation. The use of unreasonable behaviour

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<sup>4</sup> Kelly, L., Sharp, N., Klein, R. (2014) *Finding the Costs of Freedom*. Solace Women's Aid and Child and Woman Abuse Studies Unit, London Metropolitan University, London

<sup>5</sup> Trinder, L., et al. 2017 *Finding Fault? Divorce Law and Practice in England and Wales*, Nuffield Foundation.

will, therefore, place survivors at greater risk of retaliation from the perpetrator. If they remain living in the same household, this risk is even higher.

This knowledge can have a significant effect on the ease with which survivors can navigate their way through the system. It is well understood by professionals working in this area and shown in *Finding Fault?* that being able to keep tensions as low as possible will make the whole process easier. It is obvious that a perpetrator receiving an application on which the survivor has listed “incidents” of domestic abuse will raise tensions and therefore place the survivor at greater risk of ongoing abuse.

This is a risk even when a watered-down application is issued. Women who do not have legal advice are more likely to set out the domestic abuse if it is the actual reason for the relationship breakdown and, therefore, are at greater risk of further abuse.

#### *Access to legal advice*

Women who can afford to instruct a solicitor will be advised that they do not have to rely on domestic abuse if they do not wish to because an application based on unreasonable behaviour with mild particulars can be issued in order to keep tensions as low as possible.

However, if women are not able to come across this information because they are on a low income and cannot afford legal advice or have particular vulnerabilities, it is easy to see why they would believe they have to set out the domestic abuse as the reason for divorce. There are a number of reasons for this. These include the public understanding that unreasonable behaviour means something serious and the belief that the facts relied on for divorce should be the actual reason for the relationship breakdown. It is really a legal technicality that there does not have to be a link between the reason the marriage has broken down and the fact relied on in the application for divorce. Any layperson would expect one to be the cause of the other.

It is completely unacceptable that the current system puts survivors in a position where their experiences of abuse are undermined by the expectation that they “water down” the behaviour of the perpetrator. This is particularly damaging in the context of controlling and coercive behaviour where a survivor may have spent years being told that their experiences and feelings are not legitimate. The impact that this has on the survivor is rarely (perhaps even never) considered.

#### *Perpetrator abuse of the system*

A further factor that has a disproportionate impact on survivors of domestic abuse is the way in which tensions that are raised in the divorce process can bleed into other proceedings such as children and financial proceedings.

Research has shown that perpetrators of domestic abuse use the court system as a way of continuing their abuse. Sometimes through direct intimidation in the court

building but more often by exerting power and control through the use of delaying tactics. In *Finding the Costs of Freedom*, the use of the divorce process was experienced by 33% of women as post-separation abuse through the delay or holding up of divorce proceedings<sup>6</sup>. This may be as a result of failing to respond to correspondence or acknowledge service, failing to comply with directions, making unnecessary applications or threatening to defend the divorce. This whole process is particularly distressing for survivors of domestic abuse. If the application is made based on 2 years separation, the abusive spouse's consent is required to progress the case.

We acknowledge that the ability of a perpetrator to use the court system in this way would not be entirely removed by a reformed divorce system. There are likely to be other legal issues that need to be addressed through the courts. However, a combination of simplifying the divorce process and removing the requirement to set out the perpetrator's fault would remove some of the avenues through which the perpetrator can abuse the system and potentially reduce the risk of perpetrators pursuing those avenues that remain.

#### *Contested divorces*

Given what is known about the lack of importance placed upon the contents of the application in other proceedings, where there has been domestic abuse in a marriage, it is not unreasonable to conclude that defending a divorce is often used as a method to perpetuate further abuse. This is borne out by research in relation to children proceedings which supports the argument that perpetrators of abuse frequently use the Family Court as a method of perpetuating their abuse and, unfortunately, the Family Court is not always equipped to deal with it. It was confirmed by recent research which found that, "the ability to defend can also be misused. There were cases where it appeared respondents were defending the divorce as a means to exercise control, to be obstructive or as a bargaining tactic."<sup>7</sup>

The effect on survivors of domestic abuse is significant and is present from when the intention of the respondent to defend the divorce is known, through to the final hearing. Women will continue to experience emotional and psychological harm throughout the process and perpetrators are able to use it as a method of continuing to intimidate and harass their spouse. The prospect of defending a divorce opens up additional reasons to correspond with each other, additional pressures of preparing court documents and opportunities for the perpetrator to undermine the victim in writing. Then, of course, there are the additional court hearings. Women's experiences of attending court hearings where there has been domestic abuse in the relationship are largely very negative. Issues relating to the lack of special measures and cross-examination in the family court have been widely discussed by Rights of Women and other organisations

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<sup>6</sup> *Finding the Costs of Freedom*, page 49

<sup>7</sup> Trinder, L., et al. 2018 *No Contest: Defended Divorce in England and Wales*, Nuffield Foundation, page 80

supporting survivors of domestic abuse. Any reform to divorce law should remove the ability to defend a divorce. This would remove this avenue of abuse for perpetrators.

Introducing “no fact” divorce would not completely overcome all the problems experienced by women on low incomes and/or facing abuse but would certainly make the process easier and potentially safer.

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## **JULY 2018**

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