



L&RS Note

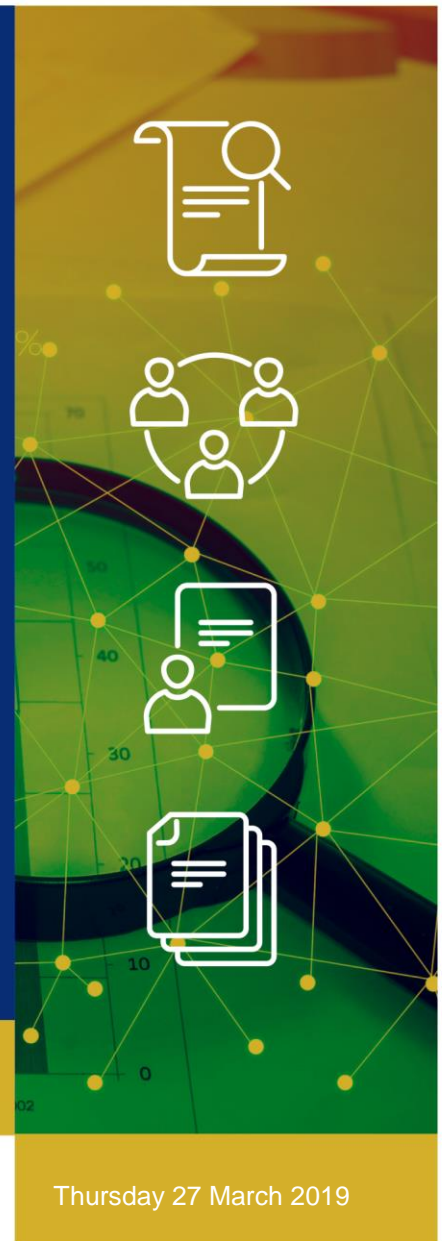
Divorce in Ireland – Referendum 2019

Charlotte Cousins, Senior Parliamentary Researcher,
Parliamentary Affairs

Abstract

This L&RS Note is written as a briefing for Members of the Oireachtas to aid their consideration of the [Thirty-fifth Amendment of the Constitution \(Divorce\) Bill 2016](#) [PMB], and specifically the amendments to the Bill that the Government will introduce at Report stage.

The legislation paves the way for a Referendum in May to amend the Constitutional provisions for divorce in relation to the 'living apart' requirement and the recognition of foreign divorces.



Thursday 27 March 2019

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Introduction

This *L&RS Note* is written for Members preparing to debate the *Thirty-fifth Amendment of the Constitution (Divorce) Bill 2016* [PMB], and specifically the amendments to the Bill that the Government will introduce at Report stage in the Dáil.

The Government supports the Bill and will introduce amendments to the Bill which will involve further amendments to the Constitution than those proposed in the original Bill. The original Bill proposed a Constitutional amendment to reduce from four to two years the time a couple had to be ‘living apart’ before they could apply for a divorce. The Government intends to remove the ‘living apart’ provision from the Constitution entirely and to deal with a reduced ‘living apart’ requirement through legislation. The Government also intends to remove the current provision regarding the recognition of foreign divorces from the Constitution and replace it with a provision which states that such recognition will be dealt with by law.

There are six sections to this Note. The first section sets out the background to the current legislation and the Government’s planned amendments. Section 2 describes the introduction of divorce in Ireland in 1997 following a successful referendum in 1995 and an unsuccessful referendum in 1986. Section 3 considers the ‘living apart’ provision in the Constitution and the *Family Law (Divorce) Act 1996*. In Section 4, the data on divorce and marital breakdown is outlined and discussed. Section 5 outlines the grounds for divorce in other EU countries with particular reference to requirements regarding time ‘living apart’. Section 6 sets out the situation regarding the recognition of foreign divorces in Ireland and highlights some of the issues arising.

1. Background to this legislation

The [Thirty-fifth Amendment of the Constitution \(Divorce\) Bill 2016](#), a Private Members' Bill introduced by Minister for State (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 divorce from four years during the previous five years to two years during the previous three years.

At Second Stage Deputy Madigan described how through her work as a family lawyer she observed the problems the four year rule caused 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.”¹

¹ [Dáil Debates 6 April 2017](#)

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 the Government had approved holding a referendum to amend the constitutional provisions on divorce.²

The wording for the Constitutional Amendments was agreed by the Government on March 26 2019. The wording is set out in Box 1.³ The [Draft General Scheme Family Law \(Divorce\) \(Amendment\) Bill 2019](#) was published on the same day.

Box 1. Proposed working for constitutional amendments

The Government proposes, subject to the approval of the Dáil and Seanad, that the amendments of the Constitution to be proposed in the referendum will be as follows:

(a) to delete the following paragraph from Article 41.3.2° of the Constitution:

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,” and

(b) to delete the following subsection from Article 41.3 of the Constitution:

3 No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.”,

and to substitute that subsection with the following:

“3 Provision may be made by law for the recognition under the law of the State of a dissolution of marriage granted under the civil law of another state.”

An Amendment of the Divorce Constitution Bill to enable a referendum in May 2019 is on the Priority List of the Government Legislation Programme, Spring session 2019. This legislation was not part of the Programme for a Partnership Government, neither was it recommended by the Citizens' Assembly nor the earlier Constitutional Convention.

It is intended that the referendum will be held on the same day as the local and European Parliament elections in May 2019 and the Referendum Commission has been established.

² Department of Justice [Press Release 29 January 2019, Minister Flanagan announces Government approval for a referendum on divorce](#)

³ Department of Justice and Equality (26 March 2019) [Minister Flanagan announces publication of text of amendments to be proposed for the referendum on divorce](#)

Referendum Commission⁴

The Referendum Commission was established on the 26 February 2019, the Chief Justice has nominated the Hon. Ms. Justice Tara Burns to act as Chairperson to the Commission, and the other members of the Commission are:

- Comptroller and Auditor General (Seamus McCarthy),
- Ombudsman (Peter Tyndall),
- Clerk of the Dáil (Peter Finnegan), and
- Clerk of the Seanad (Martin Groves).

The principal function of the Commission is to prepare, publish and distribute to the electorate statements containing a general explanation of the subject matter of the referendum proposal, to promote awareness of the referendum, and to encourage the electorate to vote.

The Commission will, in addition, consider and rule on applications from bodies or groups for declaration as approved bodies who may appoint agents at the referendum to be present at polling stations and at the counting of votes.

⁴ [Referendum Commission website](#)

2. Introduction of divorce in Ireland 1997

A constitutional ban on divorce was introduced in the 1937 Constitution, which stated that “no law shall be enacted providing for the grant of dissolution of marriage.” Article 41.1 of the Constitution emphasises the importance of the family in Irish life and Article 41.3 pledges to protect the institution of marriage.

The first attempt to repeal the prohibition on divorce failed in 1986 when the *Tenth Amendment to the Constitution Bill 1986*⁵ was rejected at a referendum held on 26 June 1986 by 935,843 votes (63%) to 538,279 votes (37%). See Box 2 for details of the failed proposal.

Box 2. 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:

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."

At the 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 Breakdown⁶ which outlined that arguments for and against the introduction of divorce, with a majority of the committee in favour of holding a referendum. Additionally, there had been discussion with the main churches, divorce was discussed at the New Ireland Forum, and opinion polls indicated support for ‘some sort of divorce’.⁷ A bitter and divisive campaign followed, anti-divorce activists highlighted the perceived risks to children and wives abandoned by errant husbands⁸ and the proposal was defeated (67% to 37%). The L&RS [Note Explaining the outcome of rejected referendums](#) (2018) provides detail about the reversal of public opinion in this referendum - support for divorce dropped from a peak of 77% in February 1986.

⁵ [Tenth Amendment of the Constitution Bill 1986](#) link to Oireachtas Debates Note the Bill is not available electronically.

⁶ Oireachtas Joint Committee on Marriage Breakdown (1985) [Report](#) This is a large file that will be slow to download.

⁷ [Dáil Debates 14 May 1986](#)

⁸ Tony Fahey (2012) Small bang? The impact of divorce legislation on marital breakdown in Ireland. *International Journal of Law, Policy and the Family*

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 was passed, eighteen 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. 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 on marital breakdown.

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 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 providing for a more liberal divorce regime without direct reference to the people in a referendum.

The White Paper set out five options to amend Article 41.3.2 of the Constitution:⁹

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 (Chapter 4).

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.

The Government published a policy document entitled *The Right to Remarry*¹⁰ to accompany the *Fifteenth Amendment of the Constitution (No. 2) Bill 1995*. This document set out the detailed legal and financial implications of divorce as well as a draft Bill which would be introduced following a yes vote.¹¹

⁹ Department of Justice (1992) [Marital breakdown: a review and proposed changes](#).

¹⁰ Government of Ireland (1995) [The Right to Remarry](#)

¹¹ Oireachtas *Fifteenth Amendment of the Constitution (No. 2) Bill 1995*, Second [Stage Debate 27 September 1995](#)

The most significant of the family law reforms introduced before the second divorce referendum was the [Judicial Separation and Family Law Reform Act 1989](#)¹² 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, succession right and access to 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.

This legislation was like no fault divorce found in other countries except that it did not allow for people to remarry. Alan Shatter described it as a “watershed in Irish family law.”¹³ The legislation had cross party support in the Oireachtas.¹⁴

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% (9,114 votes), on 24 November 1995.¹⁵ The result was challenged in both the High Court and the Supreme Court, both courts dismissed the challenges.¹⁶ The 1995 referendum was followed by the enactment of the [Family Law \(Divorce\) Act 1996](#).

¹² The Bill was introduced by Deputy Alan Shatter as a Private Members Bill.

¹³ Shatter, A (1997) *Shatter’s family law*. 4th edition, Dublin, Butterworths.

¹⁴ 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 No. 3

¹⁵ Government of Ireland (2018) [REFERENDUM RESULTS 1937 - 2018](#)

¹⁶ *Hanafin v Minister for Environment* [1996] 2 I.R.321.

3. 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,

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 can be grounds for divorce (see section 5 of this L&RS Note). In this sense it is considered to be a liberal divorce system which compared to other systems; however, the time living apart before a divorce application can be made is restrictive. Behaviour can be taken into account by the Courts when it comes to making ancillary orders under the legislation, see [Section 20.2 of the Family Law \(Divorce\) Act 1996](#). Section 20 of the Act prevents a ‘clean break’ divorce as spouses can apply to the courts for ancillary relief after the divorce is granted.¹⁷

Living apart clause

The four year living apart provision had a number of objectives including the avoidance of quickie divorces, ensuring adequate scope for reconciliation by a couple as well as time to consider and settle matters regarding children, property and finance.

The 1996 Act does not define ‘living apart’. The [Judicial Separation and Family Law Reform Act 1989](#) introduced ‘living apart’ as a ground for judicial separation, it states that “spouses shall be treated as living apart from each other unless they are 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 house.

In the Second Stage debate on *Fifteenth Amendment of the Constitution (No. 2) Bill 1995* the then Minister for Equality and Law Reform, Mr. Mervyn Taylor TD, interpreted the term ‘living part’ and explained the rationale for the four year time period:

“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

¹⁷ Shannon (2007) and Martin (2002)

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.”¹⁸

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 Shannon, a leading authority on family law, described this as the situation for the majority of divorce applicants.¹⁹ It is more challenging for couples sharing the same house to provide evidence to satisfy the court that they are living apart, although the courts do consider ‘mental attitude’ to the marriage as well as physical arrangements.²⁰ An Irish Times article by Kate Holmquist in 2010 described the recession as a factor in the decrease in judicial separation and divorce seen over the previous year, couples couldn’t afford to separate. The article also highlighted the trend for separating couples to continue living in the same house.²¹

Speaking on the Second Stage of the [Thirty-fifth Amendment of the Constitution \(Divorce\) Bill 2016 \[PMB\]](#), 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.”

¹⁸ <https://www.oireachtas.ie/en/debates/debate/dail/1995-09-27/10/>

¹⁹ Geoffrey Shannon (2007) *Divorce law and practice*, Dublin, Thompson Roundhall

²⁰ Shannon (2007) page 34

²¹ Kate Holmquist, Irish Times 4 October 2010 [Separation in a recession: Living together when a marriage ends](#)

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.”²²

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, at the time of the divorce application or afterwards. These reliefs include: 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. 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 given the concerns expressed around the financial impact of divorce on women and children.²³

4. Rates of divorce and marital breakdown in Ireland

After divorce was introduced in 1997 there was an expectation that the courts would be flooded with divorce applications. The Government’s *Right to Remarry* paper (1995) had estimated that there were 75,400 separated people in Ireland. It didn’t happen, legal and sociological experts have suggested that this is because of the restrictive and complex nature of the divorce law, the lack of a ‘clean break’ divorce, as well as the existence of alternative remedies, particularly judicial separation.²⁴ The key difference between divorce and judicial separation is that the former permits parties to remarry.

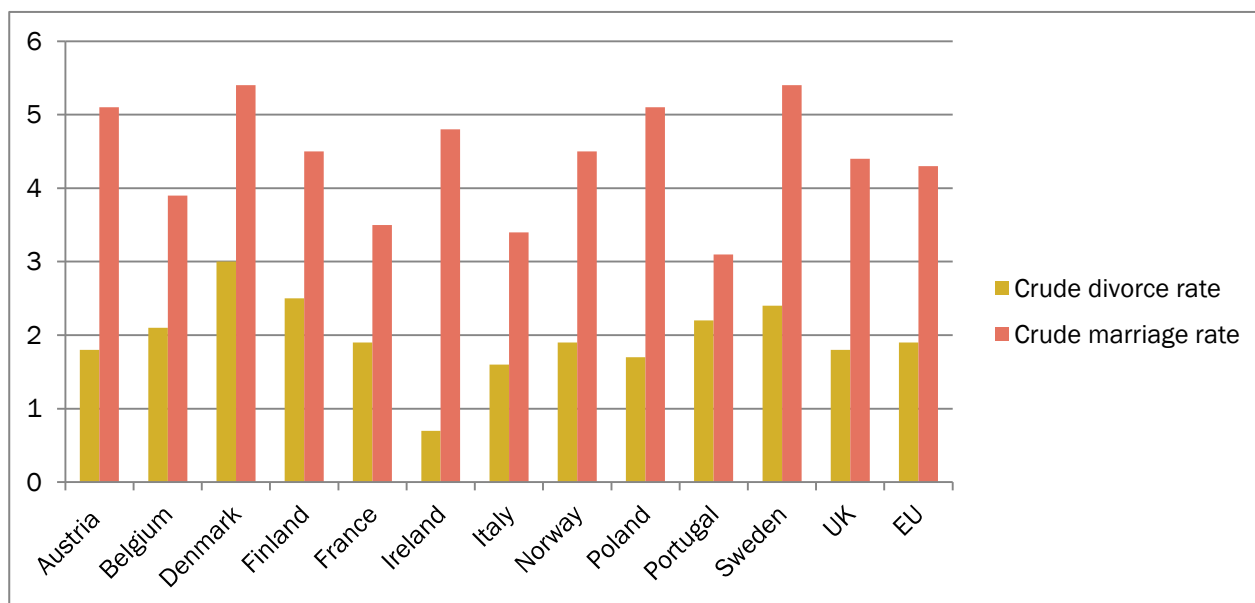
Crude divorce rates

Internationally the crude divorce rate is used to report on marriage breakdown.²⁵ The crude divorce rate measures divorces per 1,000 persons. According to Eurostat in 2016, Ireland had one of the lowest crude divorce rates in the EU with a rate of 0.7%.²⁶ The EU average is 1.9%, the Scandinavian countries have the highest rates. Figure 3 illustrates the crude divorce and marriage rates for a selection of EU countries. The crude marriage rate is the number of marriages per 1,000 persons in the year.

²² Shannon (2007) page 38

²³ Frank Martin (2002) From prohibition to approval: The limitations of the ‘no clean break’ divorce regime in the Republic of Ireland, *International Journal of Law, Policy and the Family*, 16, and Chapter 5 of Geoffrey Shannon (2007) *Divorce law and practice*.

²⁴ Burley and Regan (2002), Fahey (2012)

Figure 3: Crude marriage and divorce rates in some EU countries 2017

Source: [Eurostat Crude marriage and drive rates 2016](#)

Across Europe the rates of marriage have decreased steadily and the rate of divorces has increased. See Table 1. While marriage is considered the formation of a family unit, alternatives to marriage which confer rights on couples and children have contributed to the reduction in marriages across the EU.

Table 1: Crude marriage and divorce rates EU 28 1980 and 2015

	1980	2015
Crude marriage rate	6.8	4.3
Crude divorce rate	1.5	1.9

Source: [Eurostat crude marriage and divorce rates EU 28 1965-2015](#)

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.

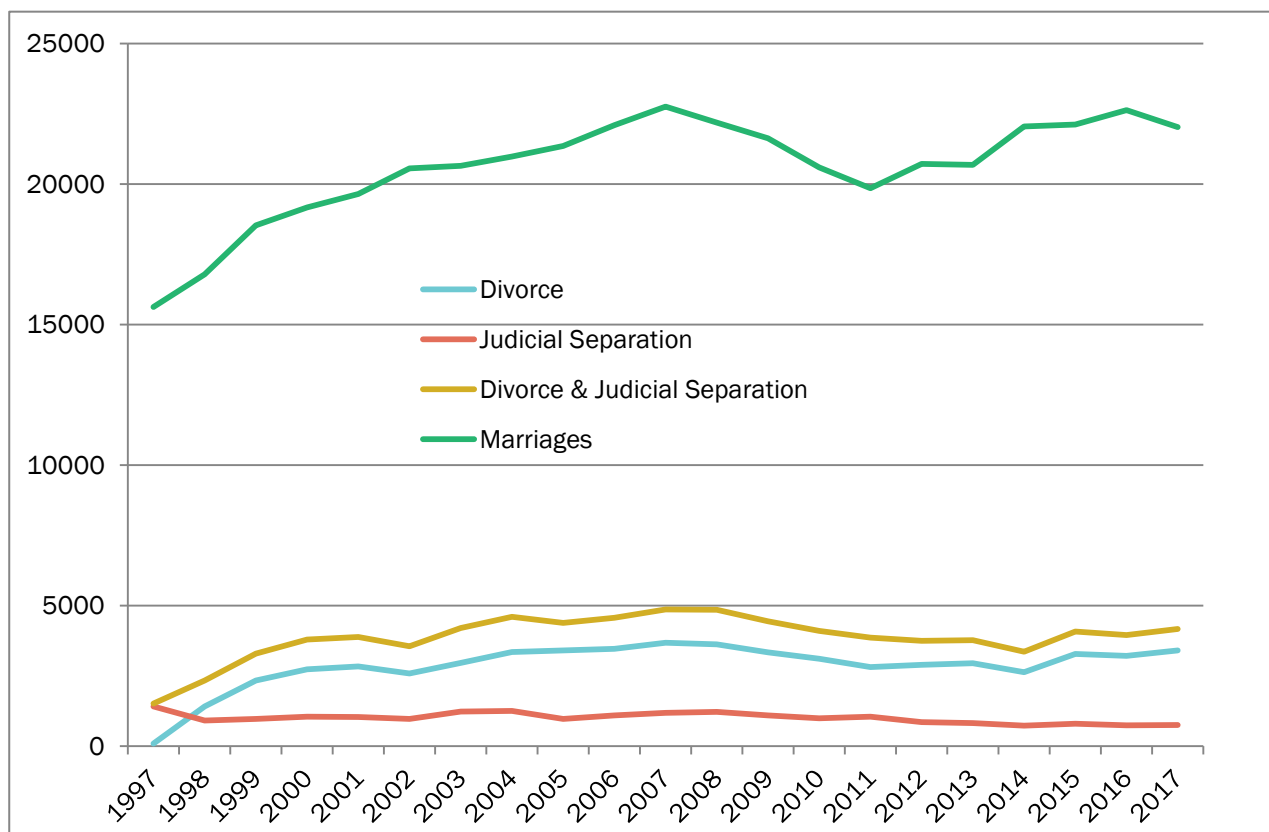
Census and court statistics - Ireland

There are two key sources of information on the marriage, divorce and separation rates in Ireland, the annual reports of the Courts Service and the Census of population. The Courts report on divorces and judicial separations granted in Ireland, whereas the Census records those living in Ireland who are currently divorced or separated regardless of where or when that divorce/separation was obtained.

Figure 2 illustrates the number of marriages registered and the number of divorces and judicial separations granted for the period 1997- 2017. The peak number of marriages in this period occurred in 2007 (22,756) with a dip during the recession until 2011. Divorce was introduced in 1997 and the peak in the number of divorces granted to date was seen in 2007 (3,684) reflecting

marriages that broke 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 2017.²⁷ Judicial separation remains a choice for some couples, sometimes are a precursor to divorce.

Figure 2: Marriages, divorces and judicial separations in Ireland 1997-2017



Source: LRS using CSO data for marriages²⁸ and Courts Service data for divorces and judicial separations²⁹

Throughout this period the population of Ireland was growing steadily from 3.7 millions in 1997 to 4.4 millions in 2007 and 4.8 millions in 2017³⁰ and the proportion of the population married has remained steady at 37%. Using Census data Table 2³¹ details the total population for Ireland and those who are either married or, divorced or separated for the period 1996-2016. This includes people married, separated or divorced both in Ireland and elsewhere. Clearly there is a steady increase in the number of marriages formally ending since 1996, though as we have seen Irish divorce rates are low by EU standards.

²⁷ [Courts Service Statistics for judicial separations](#)

²⁹ Courts Service divorce statistics for Circuit and High Courts see [website](#)

³⁰ [CSO Population estimates](#)

³¹ [CSO Census of Population 2016 Marital Status](#)

Table 2 Census data on marital status population 1996-2016

Year	Population married	Total Population	Married % of Population	Population divorced/separated	Divorced/separated % of total population
1996	1,356,613	3,626,087	37.4%	87792	2.4%
2002	1,454,413	3,917,203	37.1%	133838	3.4%
2006	1,565,016	4,239,848	36.9%	166797	3.9%
2011	1,708,604	4,588,252	37.2%	203964	4.4%
2016	1,792,151	4,761,865	37.6%	222073	4.7%

The anti-divorce campaigners in both 1986 and 1995 focused on voters' fears in relation to the men leaving their wives and children, property rights, as well as access to easy divorce, and are well illustrated by the 1995 billboard posters "Hello Divorce, Bye-bye Daddy".³² 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.³³ Slightly more divorce applications are made by wives, e.g. in 2017 there were 3,964 in the Circuit Court, 56% by wives. More husbands made applications for divorce in the High Court, of 31 applications 55% were made by husbands.³⁴ The Courts Service website says the majority of applications for judicial separations are on the grounds that the couple have not had a normal marital relationship for a year before applying for the separation.³⁵

Tony Fahey used census data from 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 and family instability in Ireland had been increasing prior to 1997 due to the changes in family law in 1970s and 80s and also family behaviour, especially the rate of non-marital child-bearing. 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.³⁶ He concluded that the introduction of divorce came too late in Ireland to affect trends as seen in other European countries.

³² Burley and Regan

³³ The Circuit and High courts can grant divorces, the Circuit court has jurisdiction to hear cases involving property with a market values less than €3,000,000.

³⁴ The High Court hears applications where there is property valued above €3million.

³⁵ Courts Service website

³⁶ Tony Fahey (2012)

5. Time living part as grounds for divorce in EU Member States

As Table 3 shows, most European countries have several different grounds for divorce, 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 time living apart required for couples seeking to divorce.

Generally, there is a shorter time living apart required for the granting of a divorce when the divorce application is by the mutual consent of both parties. For example, in Belgium, divorce on the grounds of irretrievable breakdown can be granted on the basis of a de facto separation 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 can be granted after a separation of two years prior with consent of other spouse, without the consent of the spouse a separation for five years prior to divorce application is required. In Scotland non-cohabitation for one year is grounds for divorce with consent of other spouse, without consent non-cohabitation for two years can be grounds for divorce application.

Malta has similar provisions to those in Ireland, with couples required to live apart for four out of the previous five years.³⁷

Table 3: Grounds for divorce in EU countries – living apart period highlighted where applicable

Country	Grounds for divorce
Austria	Main ground is irretrievable breakdown - living apart for three years 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 mutual consent or irretrievable breakdown. Irretrievable breakdown: <ul style="list-style-type: none"> • Legal proof of irretrievable breakdown, or • De facto separation longer than six months (joint submission), or • De facto separation longer than 1 year (unilateral application).
Croatia	Three grounds for divorce: <ul style="list-style-type: none"> • By agreement • Relationship has broken down severely and permanently • One year has passed since the 'termination of the marital union'

³⁷ Malta introduced divorce in 2011.

Czech Republic	A marriage is considered to have broken down if it lasted for at least one year, the spouses have not lived together for at least six months and the other spouse joins the petition for divorce, or the couple have not lived together for three years ..
Cyprus	There are 12 possible grounds for divorce including separation for five years , irretrievable breakdown or through specified faults: adultery, desertion, violence, mental illness, disappearance, imprisonment for longer than seven years, sexual incapacity, refusal to have a child despite other spouse's desire to do so, change of religion.
Finland	Divorce can be granted after a six-month cooling off period . No cooling off period is required where spouses have lived separately for at least two years before filing for divorce.
France	Four types of divorce: <ol style="list-style-type: none"> 1. Mutual consent 2. Acceptance of principle of marital breakdown 3. Irretrievable breakdown of marriage – spouses not living together for two years 4. Faults
Germany	Marriage is considered to have broken down if the parties no longer cohabit and it is not expected that they will resume matrimonial cohabitation. <ul style="list-style-type: none"> • One year living apart with consent • Three years living apart regardless of consent.
Greece	Two types of divorce, by consent and a contested divorce. In a contested divorce the fact the couple have been separated for at least two years is considered irrebuttable presumption of breakdown.
Hungary	Divorce may be granted on the grounds that the marriage has completely and irretrievably broken down with no specific timeframe.
Italy	No divorce by mutual consent. Grounds for divorce include legal separation for at least three years or specified faults.
Lithuania	By mutual consent if the spouses had been married for at least a year and have signed a divorce settlement agreement. Without consent on one of the following four grounds: <ol style="list-style-type: none"> 1. Separation for 1 year 2. One spouse declared legally incapacitated 3. Whereabouts of one spouse us unknown

	<p>4. One spouse in prison for more than a year for committing a non-premeditated crime.</p>
Luxembourg	<p>Divorce by mutual consent or divorce due to irretrievable breakdown of the marital relationship with a cooling off period of three months.</p>
Malta	<p>Three conditions for divorce (similar to Ireland):</p> <p>The spouses must have lived apart for a period or periods totaling at least four years during the five years immediately preceding the petition, or at least four years must have elapsed from the date of legal separation.</p> <p>The court must also be satisfied that there is no reasonable prospect of reconciliation of the spouses.</p> <p>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.</p>
Poland	<p>Divorce granted where a marriage has broken down completely and irretrievably. No specific timeframe</p>
Portugal	<p>Divorces by mutual consent, spouses are not required to give the reason for their application.</p> <p>Contested divorce (4 grounds):</p> <ol style="list-style-type: none"> 1. <i>De facto</i> separation for one full year 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; 3. Absence, without any news from the absentee, for a period of not less than one year; 4. Any other facts that, regardless of the fault attached to the spouses prove the irretrievable breakdown of the marriage.
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; or</p> <p>At the request of one spouse following a <i>de facto</i> separation that has lasted for at least two years;</p> <p>At the request of a spouse whose state of health makes the continuation of the marriage impossible.</p>
Sweden	<p>Divorce must be preceded by a six-month period for reconsideration unless the couple have been living apart for two years.</p>

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

Source: L&RS based on [EU website Divorce and legal separation](#)

England, Wales and Northern Ireland 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, 3 are behaviour/fault based and two refer to time living apart, as set out in the Table above. There is a proposal to introduce a ‘no-fault’ divorce.³⁸ 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 introduced “no-fault divorce” and required the parties to a divorce to attend “information meetings” with a view to encouraging reconciliation where possible. However, the provisions were repealed in 2001, when following a series of information meeting pilot schemes, the then Government concluded that the provisions were “unworkable”.

A UK Government consultation paper described the proposal and its objectives:

The government therefore proposes 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:

- to make sure that the decision to divorce continues to be a considered one, and that spouses have an opportunity to change course

³⁸ House of Commons Library (2018). Research Briefing “[No-fault divorce](#)”

- 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".³⁹

6. Recognition of Foreign Divorces in Ireland

Currently, the recognition of foreign divorces in Ireland is governed by two principle pieces of legislation:

1. [Domicile and Recognition of Foreign Divorces Act, 1986](#) and
2. The Brussels II regulation of 2001, later amended by [Brussels II bis](#).

Under Brussels II bis couples (or one party), with the means to do so, can move and live temporarily in another EU Member state for the purpose of obtaining a divorce more quickly than they could if they remained in Ireland. See Table 3 for the time limits applicable across EU Member states. A divorce obtained in one EU country must be recognised in all other Members States.

Common law rules of recognition govern foreign divorces obtained prior to October 2 1986. Under common law a foreign divorce could be recognised once the divorcing spouses were domiciled (permanent residence) in the jurisdiction that granted the divorce.

Following the introduction of divorce in 1997 fewer couples who were married in Ireland have sought divorces in other countries as they could obtain a divorce in Ireland. However, the validity of some second marriages in Ireland depends on the recognition of a previous foreign divorce. With increased international mobility, issues around the recognition of foreign divorces can also arise.

The complexities associated with the recognition of foreign divorces arise primarily in terms of proving that a foreign court had jurisdiction over a couple to grant a divorce or providing proof of domicile in a country where the divorce has been granted. Under [section 29 of the Family Law Act 1995](#) a person can apply to court for a declaration of their marital status including a declaration of whether a foreign divorce is recognised in Ireland.

The Minister for Justice, Mr Flanagan T.D. has said that he will be guided by the recommendations of the Law Reform Commission (LRC) in relation to the recognition of foreign divorces in future legislation. The LRC has included two areas of divorce law; proper provision on divorce and the recognition of foreign divorces and marriages, in the [Draft Fifth Programme of Law Reform](#) (2018) which was laid before the Houses of the Oireachtas. The Fifth Draft programme was referred to the

³⁹ UK Ministry of Justice (2018) [Reducing family conflict. Reform of the legal requirements for divorce](#).

Joint Committee on Justice and Equality for its consideration on 11 December 2018,⁴⁰ the Government must formally approve the Programme of Work.

Conclusion

The *Family Law (Divorce) Act 1996* came into force on 27 February 1997 after two divisive referendums. Divorce rates in Ireland are rising but they remain low by EU standards. For several reasons the anticipated flood of divorce applications never occurred, either because people were satisfied with alternative remedies for marital breakdown, particularly judicial separation, or they did not wish to remarry. The right to remarry remains the key difference between a judicial separation and a divorce. A judicial separation can be obtained more quickly than a divorce. The Irish divorce regime does not allow for a ‘clean break’ as the constitutional and legislative requirements for ‘proper provision’ of spouses and dependents allow applications for ancillary reliefs even after a divorce has been granted. The LRC stated that “the determination of ‘proper provision’ remains primarily a matter for judicial discretion” with a large body of case law in the area.⁴¹

The LRC plans to consider the proper provision aspect of the law on divorce as part of its next programme of work, specifically to ensure consistency in approach of judges and to assist spouses to reach settlements and resolve disputes more efficiently and at lower cost.⁴² The LRC will also review the law on the recognition of foreign divorces and make recommendations on reforms.

To date in the Dáil there has been cross party support for the *Thirty-fifth Amendment of the Constitution (Divorce) Bill 2016 [PMB] in the Dáil*. The Government amendments to be introduced at Report Stage in the Dáil go further than the original bill in that they propose to remove the ‘living apart’ provision from the Constitution altogether and deal with it in legislation. The provision regarding the recognition of foreign divorces will be replaced with a provision stating that the Oireachtas may legislate for the recognition of foreign divorces.⁴³ The original Bill did not deal with foreign divorces.

As yet there is no reliable polling data on voter intentions for a referendum that will be held in two months time.

Based on the campaigns of previous divorce referendums and the marriage equality referendum it is likely that opposition to the referendum will focus on the threat posed to the institution of marriage by the changes proposed, the risk of increasing the rate of divorce if becomes easier to obtain a divorce, and the negative impact of divorce on adults and children.

An L&RS [Note Explaining the outcome of rejected referendums](#) (2018) found that general support for a policy does not always translate into support for a constitutional amendment and in particular

⁴⁰Seanad Éireann [Debate 12 December 2018](#)

⁴¹ Law Reform Commission (2018) [Draft Fifth Programme of Law Reform](#)

⁴² Law Reform Commission (2018)

⁴³ Department of Justice and Equality (26 March 2019) [Minister Flanagan announces publication of text of amendments to be proposed for the referendum on divorce](#)

when the campaign against the proposal raises doubts in the mind of soft yes voters about the true implications of the proposed change.



Contact:

Houses of the Oireachtas
Leinster House
Kildare Street
Dublin 2
D02 XR20

www.oireachtas.ie
Tel: +353 (0)1 6183000 or 076 1001700
Twitter: @OireachtasNews

Library & Research Service
Tel: +353 (0)1 6184701
Email: library.and.research@oireachtas.ie

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