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BRIEFING PAPER

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"No-fault divorce"

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Summary

England and Wales

Parts 1 to 6 of this briefing paper deal with the position in England and Wales.

Current basis for divorce

The only ground for divorce is that the marriage has irretrievably broken down. The court cannot hold that the marriage has broken down irretrievably unless the petitioner satisfies the court of one or more of five facts, three of which are fault based (adultery, behaviour, desertion). Two of the facts relate to periods of separation – two years if both parties consent, and five years without consent.

Family Law Act 1996 provisions for no-fault divorce: not implemented and now repealed

Part 2 of the 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 meeting pilot schemes, the then Government concluded that the provisions were "unworkable". The relevant provisions in Part 2 have now been repealed.

Calls for introduction of no-fault divorce

Among others, some senior members of the Judiciary; the Family Mediation Taskforce; Resolution (the national organisation of family lawyers); and The Times newspaper have called for the introduction of no-fault divorce.

In a Court of Appeal decision in March 2017, Sir James Munby, President of the Family Division, spoke of an aspect of the law and procedures being based on "hypocrisy and lack of intellectual honesty".

In October 2017, the report of a Nuffield Foundation funded research project, led by Professor Liz Trinder of Exeter University, recommended removing fault entirely from divorce law and replacing it with a notification system. The report concluded that it was time for the law to be reformed to address the mismatch between law and practice.

In 2015, Richard Bacon introduced a Ten Minute Rule Bill which aimed to allow no-fault divorce. The Bill did not proceed any further.

Advocates of this form of divorce speak of reducing the conflict which can be caused by allegations of fault. In some cases, the assertion of fault is considered to be a "charade".

Arguments against no-fault divorce

The arguments of those who oppose the introduction of no-fault divorce include that the institution of marriage should be supported; the risk of the divorce rate increasing if it is perceived to be easier to get a divorce; and the negative impact of family breakdown.

Government position

The Government has indicated that any proposals for legislative change to remove fault from divorce would have to be considered as part of its more general consideration of possible reform of the family justice system. The Government has also said that it would study the evidence for divorce law reform but would not rush to a conclusion.

Scotland

Part 7 of this briefing paper deals with the position in Scotland.

The basis for divorce under the Divorce (Scotland) Act 1976 was originally very similar to that in England and Wales. The irretrievable breakdown of marriage had to be evidenced by one of five facts, including two years separation with consent and five years separation without consent. However, the Family Law (Scotland) Act 2006 reduced the separation periods from two years to one where there is consent, and from five to two years where the respondent does not consent. The 'desertion' fact was also removed.

A simplified (do it yourself) divorce procedure may be used with the no-fault facts (there are also other qualifying criteria). This is now the most frequently used procedure.

1. The current basis for divorce in England and Wales

1.1 Matrimonial Causes Act 1973

Section 1 of the Matrimonial Causes Act 1973 (MCA) provides that the only ground for divorce in England and Wales is that the marriage has irretrievably broken down.

The court cannot hold that the marriage has broken down irretrievably unless the petitioner satisfies the court of one or more of the five facts set out in MCA section 1(2).[1] Some of the facts are fault based (adultery, behaviour, desertion), but two relate only to periods of separation and are:

- that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted (two years separation with consent);[2] and
- that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (five years separation - no consent needed).[3]

Further information about the grounds for divorce

Online information includes:

- Gov.UK, Get a divorce 2. Grounds for divorce;
- Advicenow, How to get a divorce or end a civil partnership without the help of a lawyer, October 2017 – section 9, "The application: ground and facts", includes more detailed information about each fact and the effect of periods of time when the couple live together. [4]

1.2 Fault based petitions

The ONS publishes statistics on divorces. The latest figures for divorces by "facts proven" are for 2016 and show that 57.7% of divorces were based on a fault-based petition:

1 See Owens v Owens [2017] EWCA Civ 182, and section 2 of this paper below
2 Section 1(2)(d)
3 Section 1(2)(e)
4 Both links accessed 4 December 2017

DIVORCES IN ENGLAND AND WALES
By fact proven, 2016

Fact Proven	Number	% of all divorces
Fault Based	**61,549**	**57.7%**
Adultery	11,973	11.2%
Unreasonable Behaviour	48,315	45.3%
Desertion	637	0.6%
Other	624	0.6%
Separation Based	**45,164**	**42.3%**
Separation (2 years & consent)	29,135	27.3%
Separation (5 years)	16,029	15.0%
Total	**106,713**	

Note: Includes divorce of same-sex couples, but excludes dissolution of civil partnerships

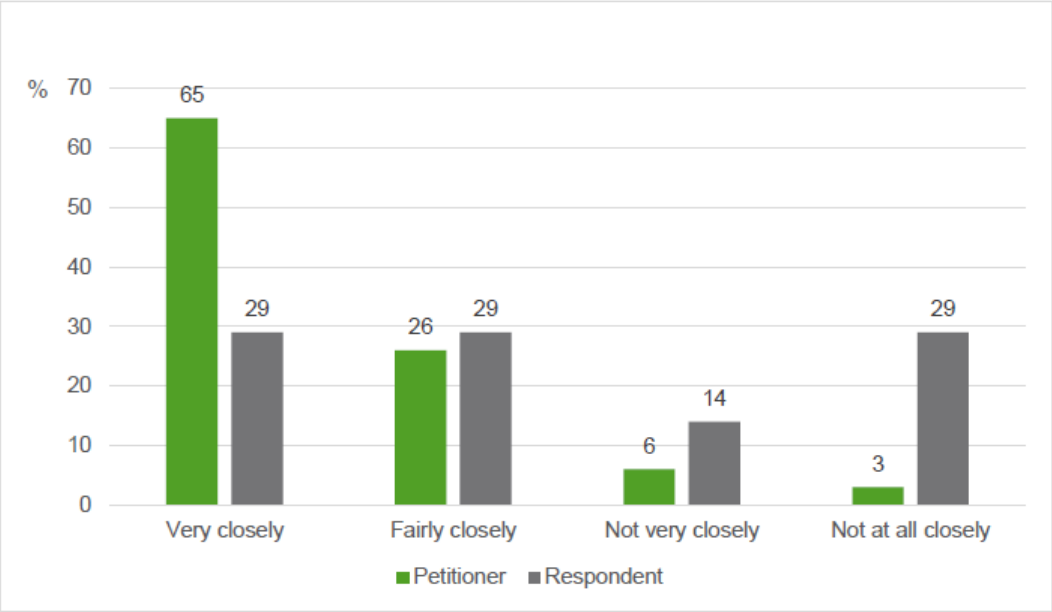
Source: ONS, Divorces in England & Wales 2016

As part of a national opinion poll conducted for a Nuffield Foundation funded research study, researchers asked those who had been involved in a fault-based divorce how closely the fact relied on by the petitioner matched the real reason for the divorce.[5] The report of the study, published in October 2017, includes these results:

> As Table 3.1 shows, perceptions of the 'accuracy' or 'truthfulness' of the petition in this sense is highly dependent upon who is asked, highlighting the problem of the non-justiciable nature of relationship breakdown. Only 29% of respondents to a fault-based divorce reported that the Fact had very closely matched the reason and 29% said that it did not match the reason closely at all. Even amongst petitioners, only 65% claimed that the (fault) Fact chosen very closely matched the reason for the relationship breakdown.

[5] Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, Finding Fault? Divorce Law and Practice in England and Wales, October 2017, pp39-40. Further information about this project is provided below in section 4.2 of this briefing paper

Table 3.1 Among fault-based divorcees divorced in past 10 years: how closely Fact given related to real reason for their divorce



Base: Fault divorcees currently divorcing or divorced in past 10 years
Sample sizes: Fault petitioner 240; Fault respondent 137

Research carried out by YouGov for Resolution,[6] (formerly known as the Solicitors Family Law Association), published in June 2015, found that 27% of divorcing couples who asserted blame in their divorce petition admitted the allegation of fault was not true, but was the easiest option.[7]

6 Resolution describes itself as "an organisation of 6,500 family lawyers and other professionals in England and Wales, who believe in a constructive, non-confrontational approach to family law matters. Resolution also campaigns for improvements to the family justice system." Resolution, About us [accessed 4 December 2017]

7 Resolution News Release, MPs need to get behind no-fault divorce if they're serious about reducing family conflict, 3 December 2015 [accessed 4 December 2017]

2. Court of Appeal consideration of "behaviour" fact

2.1 Court of Appeal upholds decision not to grant divorce

In March 2017, the Court of Appeal dismissed an appeal by a wife (Mrs Owens) from the refusal of His Honour Judge Tolson QC, sitting in the Central Family Court, to grant her a decree nisi of divorce, even though he had found that the marriage had broken down.[8] The husband had defended the divorce – defended divorces are rare in practice.

The judge found that the wife had failed to prove, within the meaning of section 1(2)(b) of the Matrimonial Causes Act 1973, that her husband had behaved in such a way that she could not reasonably be expected to live with him.

"With no enthusiasm whatsoever", Lady Justice Hallett agreed with Sir James Munby, President of the Family Division, that the appeal should be dismissed. She regretted that the decision would leave the wife "in a very unhappy situation".[9]

Mrs Owens has been granted permission to appeal to the Supreme Court.[10]

2.2 Comment on law and procedures

Sir James Munby spoke of an aspect of the law and procedures being based on "hypocrisy and lack of intellectual honesty":

> The simple fact, to speak plainly, is that in this respect the law which the judges have to apply and the procedures which they have to follow are based on hypocrisy and lack of intellectual honesty. The simple fact is that we have, and have for many years had, divorce by consent, not merely in accordance with section 1(2)(d) of the 1969 Act but, for those unwilling or unable to wait for two years, by means of a consensual, collusive, manipulation of section 1(2)(b). It is ironic that collusion, which until the doctrine was abolished by section 9 of the 1969 Act was a bar to a decree, is now the very foundation of countless petitions and decrees.[11]

Sir James added that "Too often the modern 'behaviour' petition is little more than a charade". He said that this charade 'works' because of the operation of the rule of pleading that if a claim is conceded it goes through, in effect, by default.

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8 Owens v Owens [2017] EWCA Civ 182
9 Ibid, paragraph 102
10 Supreme Court, Permission to appeal decision Owens (Appellant) v Owens (Respondent) [accessed 4 December 2017]
11 Owens v Owens [2017] EWCA Civ 182 paragraph 94

2.3 Role of judges and Parliament

Lady Justice Hallett said that it was for Parliament and not judges to change the law:

> 99….It was the trial judge's duty, and ours, to apply the law as laid down by Parliament. We cannot ignore the clear words of the statute on the basis we dislike the consequence of applying them. It is for Parliament to decide whether to amend section 1 and to introduce "no fault" divorce on demand; it is not for the judges to usurp their function. Furthermore, this court cannot overturn a decision of a trial judge who has applied the law correctly, made clear findings of fact that were open to him and provided adequate reasons, simply on the basis we dislike the consequence of his decision.[12]

[12] Ibid, paragraph 99

3. Family Law Act 1996 Part 2

Summary

In 1990, the Law Commission set out problems with divorce law and practice and recommended reform.

Part 2 of the 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 meeting pilot schemes, the then Government concluded that the provisions were "unworkable".

The relevant provisions in Part 2 have now been repealed.

3.1 Law Commission recommendations

In 1990, the Law Commission published a report, Family Law The Ground for Divorce, which set out a number of problems with the law and practice at that time.[13]

The Law Commission recommended that:

- irretrievable breakdown of the marriage should remain the sole ground for divorce; and
- that such breakdown should be established by the expiry of a minimum period of one year for consideration of the practical consequences which would result from a divorce and reflection upon whether the breakdown in the marital relationship is irreparable.[14]

3.2 Provision for "no-fault divorce"

Part 2 of the Family Law Act 1996 (FLA) included provisions to allow a form of "no-fault divorce". The provisions "were aimed at reducing the bitterness of divorce and the damaging impact on all involved in divorce".[15]

As well as requiring married couples to attend information meetings, with a view to encouraging reconciliation where possible, a system of divorce as a process over time was to replace the current arrangements.

Issues to be covered at the meetings would have included the availability of marriage counselling; mediation; the use of solicitors; the welfare of children; and the division of financial assets.

The divorce provisions in the Bill which preceded the FLA proved controversial at the time. Concerns were raised about, among other things, the need to uphold the institution of marriage. Many amendments were made to the original proposals and implementation

13 Law Com 192
14 Ibid p20
15 Bill 131-EN 2012-13 paragraph 140

of the new scheme was delayed pending piloting of certain aspects. A textbook on family law sets out further information:

> The Family Law Bill was introduced in November 1995. The Bill did not have an easy passage through Parliament, in part because of the lack of enthusiasm of many (and opposition on the part of some) of the Government's own supporters.[16] In order to save the Bill from defeat, the Government had to accept many amendments.[17] The result was that what had been an essentially simple and elegant legislative scheme became exceedingly complex.[18] Questions also arose regarding the best means of delivering certain key features of the new legislative scheme. As a result, although the Bill passed on to the statute book as the Family Law Act 1996, implementation of the new scheme was delayed in order for certain aspects to be piloted.[19]

3.3 Pilot schemes

A series of information meeting pilot schemes was launched in June 1997. Six models of information meeting were piloted and the programme was completed in 1999. In June 1999, Lord Irvine of Lairg, who was then Lord Chancellor, confirmed that preliminary results of the pilot schemes were disappointing in view of the then Government's objectives of saving saveable marriages and encouraging the mediated settlement of disputes. He said that the Government would await the final evaluation report before deciding what to do next.[20]

The Final Evaluation Report was presented to the Lord Chancellor by the Newcastle Centre for Family Studies in September 2000.[21] In the light of the problems which had been identified, in January 2001, Lord Irvine announced that the Government would invite Parliament to repeal the relevant sections of Part 2 once a suitable legislative opportunity occurred.[22] He confirmed that section 22, in Part 2, relating to the funding of marriage support services, which was already in force, would remain.

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16 Footnote to text: "112 Conservative Members voted against the Government in the crucial free vote in the House of Commons on the retention of fault-based divorce: *Official Report* (HC) April 24, 1996 Vol.276 col.543"

17 Footnote to text: "137 amendments were made to the Bill in the course of its passage through the House of Commons; and many amendments had already been made in the House of Lords. Some of the amendments reflected concern about the need to uphold the institution of marriage, in practice by making it more difficult to obtain a divorce. Others were intended to ensure that the possibility of reconciliation be fully explored by increased use of counselling and marriage support services. Yet others reflected concern that the interests of children should be given greater protection."

18 Footnote to text: "The Labour Party's spokesman on the Bill in the House of Commons, Mr Paul Boateng, is said to have described it as a "dog's breakfast": Law Society Gazette, May 30, 1996, p10."

19 J Masson, R Bailey-Harris and R Probert, Cretney, Principles of Family Law, 8th edition, 2008, p308

20 HL Deb 17 June 1999 c39WA

21 Information Meetings & Associated Provisions within the Family Law Act 1996: Final Evaluation of Research Studies Undertaken by Newcastle Centre for Family Studies, University of Newcastle upon Tyne, September 2000

22 HL Deb 16 January 2001 cc126-7WA

3.4 Repeal of Family Law Act 1996 Part 2

Most of the provisions in Part 2 were never brought into force and have now been repealed by section 18 of the Children and Families Act 2014.

In Grand Committee debate on the clause which became section 18, Lord McNally, who was then Justice Minister, said that he had "the utmost respect for the position of supporting the principle of 'no-fault divorce'". However, he said that, in 2001, the then Government had concluded that the provisions were "unworkable":

> I fully understand that the provisions of Part 2 were intended to save saveable marriages and reduce distress and conflict when it was inevitable that a marriage would need to be brought to an end. While Part 2 retained as the ground for divorce the irretrievable breakdown of the marriage, it would, if implemented, have removed the need to establish irretrievable breakdown through one or more facts. I understand why proponents of no-fault divorce believe that the approach in Part 2 would have helped to reduce conflict and acrimony.
>
> However, there are two separate issues here. The first concerns the principle of no-fault divorce in Part 2, and the second concerns the information meeting and other provisions of Part 2 which were an integral part of that policy. The Government in 2001 concluded that the provisions were unworkable, would not achieve the objectives of saving saveable marriages and reducing distress and conflict, and should be repealed. It is that second issue that led us to include Clause 18 in the Bill.

Lord McNally said that the then Government's decision in 2001 was based on the results of the pilot schemes:

> The decision to repeal Part 2 was made in principle long ago on the basis of extensive academic research by the University of Newcastle. The research looked at six models of information meeting that a party to a marriage would have been required to attend as the key first step in initiating a divorce. Part 2 is built around that initial mandatory information meeting. The research concluded that none of the six models of information meeting tested was good enough for implementation nationally. For most people, the meetings came too late to save marriages and tended to cause parties who were uncertain about their marriages to be more inclined towards divorce. While people valued the provision of information, the meetings were too inflexible, providing general information about both marriage-saving and the divorce process. People wanted information tailored to their individual circumstances and needs. In addition, in the majority of cases, only the person petitioning for divorce attended the meeting. Marriage counselling and conciliatory divorce all depend on the willing involvement of both parties.

Lord McNally indicated that there had been no opposition to the proposed repeal of the relevant sections of Part 2 in any of the written responses to the preceding draft bill, published for pre-legislative scrutiny in September 2012. He said that there was no prospect of those provisions in Part 2 being implemented and that its repeal was a long-standing commitment to Parliament.[23]

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[23] HL Deb 23 October 2013 cc365-6GC

The Coalition Government stated that it remained committed to the principles behind the FLA "of saving saveable marriages and, where marriages break down, bringing them to an end with the minimum distress to the parties and children affected, and encouraging people to use family mediation to resolve disputes".[24] The Explanatory Notes published with the draft legislation stated that "a range of non-statutory initiatives pre-court and at court have been introduced to promote and encourage consideration and use of mediation and these are aimed at all separating parents, whether or not the parents are married".[25]

The Coalition Government had already indicated that it did not intend to change the grounds for divorce or the facts required to prove that the marriage had broken down irretrievably, but would provide for uncontested divorces to be dealt with administratively.[26]

24 Draft legislation on Family Justice Explanatory Notes, p46
25 Ibid
26 HC Deb 6 September 2012 c390W

4. Calls for the introduction of no-fault divorce

Summary

Among others, some senior members of the Judiciary; the Family Mediation Taskforce; Resolution (the national organisation of family lawyers); and The Times newspaper have called for the introduction of no-fault divorce.

In October 2017, the report of a Nuffield Foundation funded research project, led by Professor Liz Trinder of Exeter University, recommended removing fault entirely from divorce law and replacing it with a notification system. The report concluded that it was time for the law to be reformed to address the mismatch between law and practice.

In 2015, Richard Bacon introduced a Ten Minute Rule Bill which aimed to allow no-fault divorce. The Bill did not proceed any further.

Advocates of this form of divorce speak of reducing the conflict which can be caused by allegations of fault. In some cases, the assertion of fault is considered to be a 'charade'.

4.1 Calls for no-fault divorce by senior members of the Judiciary

In recent years, some senior members of the Judiciary have called for the introduction of no-fault divorce including:

- On 24 March 2012, the late Sir Nicholas Wall, then President of the Family Division, gave a speech to the Annual Resolution Conference. He said that he could see no good arguments against no-fault divorce.[27]
- On 29 April 2014, Sir James Munby, President of the Family Division, gave a speech on family justice reforms. He questioned whether the time had come to remove all concepts of fault as a basis for divorce.[28]

  At a press conference on the same day, Sir James elaborated on his comments. He considered that reform would bring "a bit of intellectual honesty to the situation".[29]
- In December 2014, in an interview with the Evening Standard, Baroness Hale of Richmond, then Deputy President (now President) of the Supreme Court, called for the introduction of a new system of no-fault divorce to reduce the cost and acrimony of marital splits. Lady Hale considered that couples should be able

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27 Sir Nicholas Wall, President of the Family Division, Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012 [accessed 4 December 2017]

28 Remarks by Sir James Munby President of the Family Division and Head of Family Justice in the President's Court, The Family Justice Reforms, 29 April 2014 [accessed 4 December 2017]

29 Judicial Office Press Conference, 29th April 2014 [accessed 4 December 2017]

to end their marriages simply by declaring that the relationship had failed and waiting a year.[30]

- In April 2015, in another press interview, Baroness Hale repeated her call for divorce law to be reformed to remove the need for allegations of adultery and blame. She said that she wanted to see the acrimony taken out of most matrimonial disputes with divorces granted without a person being held at fault.[31]
- In October 2017, Baroness Hale reiterated that she had not changed her position of supporting the introduction of no-fault divorce.[32]
- In February 2017, Supreme Court judge, Lord Wilson of Culworth, was said to have expressed disappointment that attempts to introduce no-fault divorce in England and Wales had so far been unsuccessful.[33] He was quoted as saying that "that the law was in urgent need of updating to do away with the old-fashioned requirement of fault being apportioned in a divorce".[34]

4.2 Research study

In October 2017, the Nuffield Foundation published the report of a research project led by Professor Liz Trinder of Exeter University, Finding Fault? Divorce Law and Practice in England and Wales,[35] together with associated documents.[36]

The aim of the research was to inform debate about whether and how the law might be reformed.

The Nuffield Foundation provides this summary:

> **Divorce petitions are often not accurate descriptions of why a marriage broke down and the courts make no judgement about whether allegations are true.** 43% of those surveyed who had been identified as being at fault by their spouse disagreed with the reasons cited for the marriage breakdown and 37% of respondents in the court file analysis denied or rebutted the allegations made against them. The court did not raise questions about the truth of a petition in any of the 592 case files analysed, despite evidence that respondents disagreed with the claims made. Rebuttals are ignored except in the rare cases where the respondent is able to defend the case.

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30 Martin Bentham, "Top judge calls for rules which force women to take off veils when giving evidence in court", Evening Standard, 12 December 2014 [accessed 4 December 2017]

31 Frances Gibb, "Judge calls for divorce overhaul to take blame out of break-ups", Times, 9 April 2015 (registration required).

32 Owen Bowcott, "UK's new supreme court chief calls for clarity on ECJ after Brexit", Guardian, 5 October 2017 [accessed 4 December 2017]

33 Stowe Family Law LLP, Supreme Court Justice 'disappointed' at lack of no fault divorce, 27 February 2017 [accessed 4 December 2017]

34 Jonathan Ames, No-fault divorce is long overdue, says top judge, The Times, 27 February 2017 (registration required). Report of an interview on BBC Radio 4's Broadcasting House on 26 February 2017 [accessed 4 December 2017]

35 Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, Finding Fault? Divorce Law and Practice in England and Wales, October 2017

36 Nuffield Foundation, Finding Fault? Divorce Law in Practice in England and Wales [accessed 4 December 2017]

> **Uncertainty about what constitutes unreasonable behaviour undermines the principle for the rule of law to be 'intelligible, clear and predictable'.** In the 1980s, 64% of behaviour petitions were based on allegations of physical violence, but this has now fallen to 15%, indicating that there has been a large drop in the expectations as to what is needed to prove 'behaviour'. Many lawyers and members of the public do not know exactly how low the threshold is and as a result some are filing stronger petitions than necessary, while others who cannot afford a lawyer may think they have to wait out long separation periods because they do not 'qualify' for fault-based divorce.
>
> **The use of fault may trigger, or exacerbate, parental conflict, which has a negative impact on children.** In the national survey, 62% of petitioners and 78% of respondents said that in their experience using fault had made the process more bitter, 21% of fault-respondents said fault had made it harder to sort out arrangements for children, and 31% of fault-respondents thought fault made sorting out finances harder. When interviewed, both petitioners and respondents gave examples of how the use of fault, mainly behaviour, had had a negative impact on contact arrangements, including fuelling litigation over children. Some described threats to show the petition to children.
>
> **Divorce law in England and Wales is out of step with Scotland, most other countries in Europe, and North America.** In 2015, 60% of English and Welsh divorces were granted on adultery or behaviour. In Scotland, where a divorce can be obtained after one year if both parties agree, this figure was 6%.
>
> **Fault does not protect marriage or deter divorce.** The study found no empirical support for the argument that is sometimes made that fault may protect marriage because having to give a reason makes people think twice about separating. In fact the evidence points the other way: analysis of case files shows fault was associated with shorter marriages and shorter gaps between the break-up of the relationship and filing for divorce.[37]

Based on their findings, the researchers recommend removing fault entirely from divorce law and replacing it with a notification system. This means that divorce would be available if one or both parties registered that the marriage had broken down irretrievably, and then one or both parties confirmed the intention to divorce after a minimum period of six months.

The report concluded that it was time for the law to be reformed to address the mismatch between law and practice:

> In reality, we already have divorce by consent or even (given the extreme difficulty and impracticality of defending a case) 'on demand', but masked by an often painful, and sometimes destructive, legal ritual of fault with no obvious benefits for the parties or the state. There is no evidence from this study that the current law protects marriage. The divorce process is currently being digitised. This is a timely opportunity for long overdue law

[37] Ibid

> reform so that divorce is based solely on irretrievable breakdown after notification by one or both spouses.[38]

4.3 "Family Matters" campaign in The Times

The Times is running a campaign, "Family Matters" and is calling for the modernisation of family law, including the introduction of no-fault divorce.[39]

It states that there is growing support in Parliament for divorce reform, including from former Conservative Lord Chancellor, Lord Mackay of Clashfern, and former Lord Justice of Appeal and President of the High Court Family Division, Baroness Butler-Sloss (crossbencher).[40]

In an editorial published on 17 November 2017, the Times said that it was joining the charity, Marriage Foundation [founded by former family High Court judge, Sir Paul Coleridge], senior judges and leading family law experts to campaign for the urgent reform of divorce laws adding, "This is for the sake of children and spouses locked in loveless marriages, and for the institution of marriage itself".[41]

4.4 Labour Party Manifesto 2017

The Labour Party Manifesto 2017 included a commitment to introduce a no-fault divorce procedure.[42]

4.5 Resolution campaign

Resolution's Manifesto for Family Law was launched in February 2015. Among other things, it calls for the removal of blame, associated with petitions based on adultery or unreasonable behaviour, from the divorce process:

> This often creates conflict and makes reaching a mutually acceptable agreement much more difficult.
>
> Removing blame from divorce will not make it more likely that people will separate. It will simply make it easier for people to manage their separation with as little conflict and stress as possible and reduce the likelihood that they will end up in court.
>
> In 2012, there were over 72,000 divorces where adultery or unreasonable behaviour were cited. People should not have to go through this blame charade to bring their relationship to a dignified conclusion and move on with their lives. A civilised society deserves a civilised divorce process.[43]

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38 Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, Finding Fault? Divorce Law and Practice in England and Wales Summary Report, October 2017, p8

39 Frances Gibb, "Urgent call for new divorce laws", The Times, 17 November 2017 (subscription required) [accessed 4 December 2017]

40 See also, Frances Gibb and Oliver Wright, "Overhaul divorce to protect children, say MPs and peers", The Times, 17 November 2017 (subscription required) [accessed 4 December 2017]

41 "Modern Marriage", The Times, 17 November 2017 (subscription required) [accessed 4 December 2017]

42 Labour Party Manifesto 2017, p81

43 Resolution, Allow people to divorce without blame [accessed 4 December 2017]

Resolution proposes a new divorce procedure, where one or both partners can give notice that the marriage has broken down irretrievably:

> The divorce can then proceed and, after a period of six months, if either or both partners still think they are making the right decision, the divorce is finalised.

Resolution considers that this approach would have advantages:

> Divorce without blame will increase the chances of success for non-court dispute resolution processes as it immediately puts both partners on a level footing. This will reduce the burden on the family court and help government to meet their aim for more people to resolve their problems outside of the courts.[44]

In a briefing sent to MPs ahead of a proposed Second Reading of Richard Bacon's No Fault Divorce Bill, (which did not go ahead), Resolution disagreed with the reservations expressed at First Reading:

> We cannot agree with concerns raised at first reading of the Bill that changes in the divorce process, including adding a sixth reason where both of the couple agree (as proposed by the Bill), would make divorce easier and encourage more divorces.
>
> There is consensus across international research studies that no fault divorce has had little clear impact on propensity to divorce, though you may find short term blips in response to policy changes. That is exactly what happened in Scotland after the implementation of reforms in 2006 – within two years the divorce rate reverted to the pre-reform level and then continued on a downward trend, and with a reduction in the number of divorces based on fault.
>
> In our members' experience, the vast majority of people know little about the divorce process and their decision to divorce is therefore unaffected by process. Instead, they carefully consider whether to end their marriage and our members report that people have reflected long and hard before beginning divorce proceedings. People divorce for many different reasons, not because of the nature of the divorce process itself. It is not the divorce process which saves saveable marriages, it is the information and support available.[45]

4.6 Report of the Family Mediation Task Force

In June 2014, the Family Mediation Task Force, chaired by David Norgrove, published recommendations on what more could be done to increase the uptake of family mediation. The Task Force urged the Government to consider reforming the adversarial language used in material relating to separation and divorce.

The Task Force also joined calls for the Government to abolish fault- based divorce, pointing to the damage which could be caused by the existing process:

> Some of the language stems from the requirements of fault based divorce. Mediators, including those on the Task Force, refer often

44 Ibid
45 4 December 2015

> to the damage done by the requirements of what most people recognise is a charade. Some separating couples can see this and accept that to make the necessary allegations is a price worth paying. But others are not in that rational state and the allegations drive the receiving party into even greater hostility and away from mediation. We join all those, including most recently the President of the Family Division, who have urged the government now to abolish fault based divorce. [46]

4.7 Private Member's Bill

In October 2015, Richard Bacon (Conservative) introduced the No Fault Divorce Bill 2015-16 under the Ten Minute Rule.[47] He proposed that couples should have the option to declare jointly that their marriage had broken down irretrievably, without either party being required to satisfy the Court of any other facts – although the existing five facts in MCA section 1(2) would also be retained as alternatives:

> The conclusion I draw is that the previous legislation—however well-intentioned—was trying to accomplish too much. I propose one simple amendment to the law: the option of divorce without blame. A petitioner who wished to do so, rather than offering the court one of the five facts currently required—adultery, unreasonable behaviour, desertion, et cetera—could instead satisfy the court that a marriage had broken down irretrievably with a sixth fact, namely that both parties to the marriage had separately signed a declaration that the marriage had broken down irretrievably.
>
> This declaration would by itself satisfy the court without the need to show any other facts. It would apply only when both parties had agreed and, consequently, signed such a declaration. It would not in any way alter—or, still less, abolish—the existing concept of blame. Those who wished to avail themselves of the other provisions of the law which require blame—which may sometimes, although decreasingly so, be a factor in financial settlements and arrangements for children— could do so. My simple change would mean that those who wished to avoid apportioning blame in a divorce could do so. The only other provision in my Bill would be a cooling-off period of one year before a decree of divorce could be made absolute, so that couples would have time to reflect on whether a divorce was really what they wanted.[48]

Mr Bacon said that he did not intend to make it easier or quicker to get a divorce:

> Let me begin by saying that I do not wish to make divorce "easier", because I do not think divorce should be easy. Currently, one can get divorced in just five months, so what is called "quickie divorce" is already available. A couple wishing to take advantage of my proposal would take somewhat, but not inordinately, longer to get divorced—probably one year—but without any requirement to throw mud at each other, as is currently the case, and with more time for reflection on whether

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46 Ministry of Justice, Report of the Family Mediation Task Force, June 2014, paragraphs 35 and 36
47 HC Deb 13 October 2015 cc189-94
48 HC Deb 13 October 2015 c191

> divorce was what they really wanted for themselves and their children.[49]

Richard Bacon considered the current position to be contradictory:

> Although the whole thrust of current policy is supposedly about taking disputes away from the courts and towards reconciliation, mediation and alternative dispute resolution, people seeking a divorce who wish to avoid apportioning blame often find themselves required by the law to follow a path they do not wish to take. In effect, they are required to throw mud at each other.

He also favoured easier access to counselling, but did not think that the Bill needed to deal with this:

> I would also favour more discretion for the judge to inquire into the intentions of the couple and the extent to which they had sought counselling. I would not object to making some form of counselling mandatory. These are all desirable, but it is not necessary to deal with all of them at once or in one Bill. These matters could be dealt with separately, if at all.[50]

The Member considered that his Bill would provide a simple way of introducing divorce without blame:

> Any attempt to reform the law on divorce should be modest in its ambitions, simple to understand and simple to implement. My Bill would not deliver all that some of the more radical reformers wish to see, but it would provide a route for divorcing couples to reduce acrimony and tension during what is already a very traumatic process, if they wished to use it. It would be more likely to gain widespread consent…[51]

The Bill did not make any further progress.

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49 HC Deb 13 October 2015 c189
50 HC Deb 13 October 2015 c191
51 HC Deb 13 October 2015 c191

5. Arguments against the introduction of no-fault divorce

Summary

The arguments of those who oppose the introduction of no-fault divorce include that the institution of marriage should be supported; the risk of the divorce rate increasing if it is perceived to be easier to get a divorce; and the negative impact of family breakdown.

5.1 Private Member's Bill debate

Although he did not attempt to vote down Richard Bacon's No Fault Divorce Bill 2015-16 on First Reading, Sir Edward Leigh (Conservative) expressed reservations about the introduction of no-fault divorce. He said "Of course I would like to make the moral case for marriage and for a lifelong commitment to children", but pointed to evidence from other countries which, he said, showed the wider consequences such legislation might have:

> The social researchers have done their job and the evidence is now available. If this were merely a matter of allowing a few cases of obvious irrevocable breakdown to be dealt with more quickly, cheaply and less destructively, very few people would oppose the idea. It would be a common-sense thing to do. But, while that is what my hon. Friend seeks, very honourably, to achieve, that is not the sole impact of no fault divorce. Unfortunately, all the available evidence points to the introduction of no fault divorce having a large, widespread and demonstrable effect on the societies in which it has been introduced. That is true across the spectrum of developed nations, from Canada and certain American states to Sweden and elsewhere.

Sir Edward spoke of the recent emphasis on strengthening marriage as an institution. He considered that bringing in no-fault divorce would make divorce easier, thus increasing the number of divorces. Sir Edward detailed what had happened in Canada following the introduction of no-fault divorce in 1968, where, he said, there had been "a sixfold increase in just two years, after a century of relatively stable divorce rates". He also spoke of other studies which noted an increase in the divorce rate when no-fault divorce was introduced:

> Scholars have noted similar results in US states correlating to when states introduced no fault divorce. The first significant study of no fault divorce was published in 1986, and all the further major published papers since then have concluded that the divorce rate increased at the same time as the introduction of no fault divorce. Do we want to increase the divorce rate? We know that the preponderance of evidence suggests that we will end up having more divorces and a higher divorce rate if no fault divorce is brought in.

Sir Edward then set out other potential impacts of family breakdown, drawing on evidence from a study in the US:

> A study in the US argued that 75% of low-income divorced women with children had not been poor when they were married,

> but Douglas Allen also points out in the Harvard Journal of Law & Public Policy that
>
> "the real negative impact of the no-fault divorce regime was on children, and increasing the divorce rate meant increasing numbers of disadvantaged children."

In the UK, Sir Edward continued, a 2009 review by the then Department for Children, Schools, and Families had found that a child not growing up in a two-parent family household was more likely to experience a number of problems which he detailed. He also spoke of other research on the effects of family breakdown.

Sir Edward considered that the potential adverse consequences of no-fault divorce should rule out its introduction:

> A Bill to bring about no fault divorce would have implications throughout the country and I suspect that that is why successive Labour and Conservative Governments have, in the end, balked at it. Other developed countries have introduced it, so we are capable of assessing its likely impact. I accept that there can be no doubt that it will lead to a simpler, less traumatic, less costly way of dissolving marriages that have suffered irretrievable breakdown, but the evidence shows that it comes with further consequences. Do we want to see more disadvantaged children? Do we want to see women poorer? Do we want to see women working longer hours? Do we want to see the wide variety of social problems that the Prime Minister so justly highlighted in Manchester last week deepen further in our society? The answer must surely be no.[52]

5.2 Coalition for Marriage

The Coalition for Marriage describes itself as follows:

> The Coalition for Marriage is an umbrella group of individuals and organisations in the UK that support traditional marriage and opposed its redefinition.
>
> Our supporters believe that marriage is between a man and a woman, to the exclusion of all others and for life…

Further information is provided on the Coalition for Marriage website.[53]

The Coalition for Marriage has set out "five reasons why 'no-fault divorce' would be a disaster for marriage":

> 1. **Cause the loss of 10,000 marriages a year** by making the divorce process an administrative formality and removing the breathing space which currently allows 10% of the couples who begin a divorce petition to abandon it before finalising [raw data here].
>
> 2. **Reduce the status of marriage to that of a tenancy contract** which can be dissolved at minimal notice by either side with no expectation of permanence.
>
> 3. **Punish the spouse faithful to their marriage vows** who could now experience, without any defence in the courts, the state terminating their marriage, dividing their family, splitting

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52 HC Deb 13 October 2015 cc192-4

53 Coalition for Marriage, Our Mission [accessed 4 December 2017]

> their assets and removing them from their home at minimal notice.
>
> 4. **Put the most vulnerable at risk** by removing the protections in the current system for those who become disabled or suffer a financial setback and whose spouses currently cannot divorce them on this basis.
>
> 5. **Trivialise marriage** as currently two consenting parties already have access to a no-fault divorce after two years. Is this really an unduly onerous period to ask people to spend cooling off and attempting to reconcile?[54]

5.3 Baroness Deech: reform financial provision law

Baroness Deech (crossbencher) has said that she can see arguments on both sides of the no-fault divorce debate. She noted that no-fault divorce already exists – based on periods of separation, adding, "So the essence of the demand for reform is speed".

Baroness Deech argued that reform should instead be directed towards financial provision law:

> I say [no-fault divorce] reform would bring little benefit because the real harm in the divorce process is, first, to the children (who will probably be unaware of the legal grounds, but most affected by the actual separation of their parents), and second, the ghastly state of our financial provision law. It is so expensive in legal costs that it can eat up the assets of all but the richest, and so confrontational that it makes the substantive divorce mild by comparison. That is where reform should be directed. I suggest that all that is needed by way of substantive divorce reform of the "fault" grounds, is a slowing up, e.g no decree absolute for 12 months from the service of the petition.[55]

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54 Coalition for Marriage, Five reasons why 'no-fault divorce' would be a disaster for marriage, 22 November 2017 [accessed 4 December 2017]

55 Lords of the Blog, No Fault Divorce by Baroness Deech, 22 September 2017 [accessed 4 December 2017]

6. Government position

6.1 Parliamentary questions

In February 2017, in response to a written question, Lord Keen of Elie indicated that the Government did not have any plans at that time to introduce no-fault divorce:

> The government is committed to improving the family justice system so separating couples can achieve the best possible outcomes for themselves and their families. Whilst we have no current plans to change the existing law on divorce, we are considering what further reforms to the family justice system may be needed.[56]

In March 2017, replying for the Government to questions on divorce legislation, Baroness Buscombe indicated that any proposals for legislative change to remove fault from divorce would have to be considered as part of the Government's more general consideration of what further reform may be needed to the family justice system. Baroness Buscombe said that the Government would publish a Green Paper with proposals on family justice "in due course".[57]

Referring to the Owens case,[58] Baroness Buscombe said that it was not representative of the 98% of divorces decided without the need for any hearing involving the parties. She stated that "in the vast majority of divorce petitions, the evidence put forward by the petitioner will be accepted by the court as sufficient to demonstrate the irretrievable breakdown of the marriage".

Baroness Buscombe said that the Government felt strongly that "it would not make sense to take forward one aspect of law reform in isolation without consideration of its fit within the family justice system". She considered that some people would not want no-fault divorce:

> The Government are considering potential reforms to divorce law and at this stage have not reached any conclusions. We acknowledge, however, that some people will not wish to divorce without being able to cite a fault, particularly if their faith requires them to do so.

6.2 Westminster Hall debate

On 15 November 2017, Suella Fernandes (Conservative) led a Westminster Hall debate on family justice reform, when the introduction of no-fault divorce was one of the matters raised.[59] In response, junior Justice Minister, Dr Phillip Lee, said that the Government would study the evidence but would not rush to a conclusion:

> We are aware of the strength of feeling on the issue. It is important to note, however, that the existing law already allows people to divorce without needing to cite fault, as I am sure the

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56 PQ HL5103 [on Divorce], 13 February 2017
57 HL Deb 29 March 2017 cc597-9
58 See section 2 of this paper
59 HC Deb 15 November 2017 cc166-187WH

> House appreciates. Parliament has determined that the law should provide for divorce only if the marriage has irretrievably broken down. One way of demonstrating that is to cite a period of separation. Some are concerned that the periods required are too long, but many things need to be balanced when considering whether reform is necessary. We will study the evidence for change, but will not rush to a conclusion.[60]

[60] HC Deb 15 November 2017 c184WH

7. Divorce in Scotland

The basis for divorce under the Divorce (Scotland) Act 1976 was originally very similar to that in England and Wales as provided by the Matrimonial Causes Act 1973. The irretrievable breakdown of marriage had to be evidenced by one of five facts, including two years separation with consent and five years separation without consent.

However, the Family Law (Scotland) Act 2006 reduced the separation periods from two years to one year where there is consent, and from five to two years where the respondent does not consent. The 'desertion' fact was also removed.

An article by Liz Trinder, who led the research project on the current grounds for divorce in England and Wales, considers the effect of this change:

"In anticipation of a temporary blip: Would a change in the divorce law increase the divorce rate?", Family Law, 2 December 2015.[61]

A simplified (do it yourself) divorce procedure may be used with the no-fault facts (there are also other qualifying criteria). Information is provided on the Scottish Courts and Tribunals website, Simplified/Do it Yourself Procedure.[62]

The Scottish Government's Civil Justice Statistics in Scotland 2015-16 notes the general downward trend in the number of divorces, with the year in which the separation periods were reduced being an exception. The commentary also notes the prevalence of the simplified procedure:

> The number of divorces has been slowly decreasing from around 13,300 in 1985 to 8,875 in 2015-16 (Figure 8).[63] The main exception to this trend was a sharp rise in divorces in 2006. This rise can be attributed to the reduction in non-cohabitation periods required to prove irretrievable breakdown of a marriage brought into force by the Family Law (Scotland) Act 2006.
>
> The total number of divorces granted in Scotland in 2015-16 was 8,875, 2% less than in 2014-15 (9,036) (Table 9). In 2015-16, 62% of divorces granted used the simplified procedure and 38% used the ordinary procedure.[64]

Non-cohabitation for two years (68 per cent in 2015-16) and non-cohabitation for one year with consent (26 per cent in 2015-16) were the two most common reasons for divorce. The statistics bulletin notes that these proportions have not changed much since 2010-11.[65]

In the 2015-16 Parliamentary session, the then Justice Committee reviewed the Family Law (Scotland) Act 2006 in a brief inquiry. Divorce was not one of the areas on which the Committee focused. Written

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61 Accessed 4 December 2017
62 Accessed 4 December 2017
63 Footnote to text: "Data prior to 2008-09 cannot be compared directly with later data, and is discussed here only to provide historical context. For more information, see the Quality of the statistics section"
64 Scottish Government, Civil Justice Statistics in Scotland 2015-16, 28 March 2017, p27
65 Ibid, p29

responses from stakeholders did not highlight this as an area of particular controversy (relative to other topics).[66] All the written submissions from stakeholders are publicly available on the Scottish Parliament website.[67]

[66] Personal communication from SPICe, 12 October 2016
[67] Scottish Parliament, Family Law (Scotland) Act 2006 [accessed 4 December 2017]

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