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BRIEFING PAPER

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Divorce, Dissolution and Separation Bill 2017-19

By Catherine Fairbairn

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Contributing Authors: Cassie Barton, Statistics, Section 1.2

Summary

Parts 1 to 6 of this briefing paper deal with the position in England and Wales. Part 7 deals with the position in Scotland. Matters relating to marriage and civil partnership are devolved.

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. In many cases, it is possible to divorce more quickly if the petition is based on one of the conduct (fault) facts.

Owens v Owens

In 2016, a judge in the Central Family Court refused to grant Mrs Owens a decree nisi of divorce, even though he found that the marriage had broken down. The husband had defended the divorce – defended divorces are rare in practice. The judge found that Mrs Owens had failed to prove, within the meaning of the law, that her husband had behaved in such a way that she could not reasonably be expected to live with him.

Both the Court of Appeal in 2017, and the Supreme Court in 2018, dismissed Mrs Owens' appeal. Judges in both courts said that it was for Parliament, and not judges, to change the law. In the Court of Appeal, Sir James Munby, then President of the Family Division, spoke of an aspect of the law and procedures being based on "hypocrisy and lack of intellectual honesty".

Family Law Act 1996 provisions for no-fault divorce: not implemented and now repealed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 The relevant provisions in Part 2 have now been repealed.

Private Member's Bill

In July 2018, Baroness Butler-Sloss (Crossbench) introduced a Lords Private Member's Bill, intended to require the Lord Chancellor to conduct a review which would include considering whether the law ought to be changed so that irretrievable breakdown of a marriage or civil partnership is evidenced solely by a system of application and notification. This Bill has not made any further progress.

Previous 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 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.

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 consultation and response

In September 2018, the Ministry of Justice published a consultation paper, Reform of the legal requirements for divorce. The consultation closed on 10 December 2018. It asked for views on replacing the current requirement to establish one or more of the five facts to show that a marriage has broken down irretrievably, with a process based on notification. In his Ministerial Foreword, David Gauke, Lord Chancellor and Secretary of State for Justice, referred specifically to the Owens case, and said that it had generated broader questions about what the law requires of people going through divorce and what it achieves in practice.

On 9 April 2019, the Government published its response to the consultation. David Gauke announced that legislation would be introduced to remove the legal requirement to make allegations about spousal conduct or to have lived separately for up to five years. He said that the Government would continue to support marriage but that the law should allow people to move on constructively when divorce is inevitable, and that this would benefit children.

The Divorce, Dissolution and Separation Bill

The Divorce, Dissolution and Separation Bill was introduced in the House of Commons on 13 June 2019 as Bill 404 of 2017-19. In short, it would:

- replace the requirement to provide evidence of conduct or separation facts with a new requirement to provide a statement of irretrievable breakdown;
- remove the possibility of contesting the decision to divorce, as the statement of irretrievable breakdown would be taken as conclusive evidence that the marriage has broken down irretrievably;
- introduce a new option of a joint application;
- introduce a minimum overall timeframe of six months into the divorce process;
- enable the Lord Chancellor, by order, to adjust the time periods;
- update terminology.

The law relating to judicial separation, and to dissolution of civil partnership and separation of civil partners, would be amended in a similar way.

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. Overview

At present, to get divorced in England and Wales, it is necessary for one party to submit a petition to the court. The only ground for divorce is that the marriage has broken down irretrievably. To establish this, the petitioner must satisfy the court of one or more of five facts – these are based on the conduct of the other spouse (the respondent) or on periods of separation.

In many cases, it is possible to divorce more quickly if the petition is based on one of the conduct (fault) facts. It has been claimed that, in some cases, the allegation of fault by one spouse against the other is a "charade" designed to speed up proceedings, and that, in any event, the process can introduce or worsen conflict.

Although rare in practice, it is possible for the respondent to contest (defend) the divorce petition.

For a number of years, calls have been made for the introduction of "no-fault" divorce, in order to reduce unnecessary conflict – although some people strongly oppose this reform.

Following consultation and assessment of the evidence, the Government is now proposing to reform divorce law. In short, the Divorce, Dissolution and Separation Bill (the Bill) would:

- replace the requirement to provide evidence of conduct or separation facts with a new requirement to provide a statement of irretrievable breakdown;
- remove the possibility of contesting the decision to divorce, as the statement of irretrievable breakdown would be taken as conclusive evidence that the marriage has broken down irretrievably;
- introduce a minimum overall timeframe of six months (26 weeks) into the divorce process;
- enable the Lord Chancellor, by order, to adjust the time periods;
- introduce a new option of a joint application;
- update terminology.[1]

The law relating to judicial separation, and to dissolution of civil partnership and separation of civil partners, would be amended in a similar way.

The Government's stated main policy objectives are:

> 1) To ensure that the decision to divorce is a considered one
>
> 2) To minimise the adversarial nature of the legal process, to reduce conflict and to support better outcomes by maximising the opportunity for the parties to agree arrangements for the future

[1] Bill 404-EN, paragraph 13

> 3) To make the legal process fairer, more transparent, and easier to navigate
>
> 4) To reduce the opportunities for an abuser to misuse the legal process for divorce as a way to perpetrate further abuse.[2]

In a written Ministerial Statement made on 13 June 2019, when the Bill was introduced in the House of Commons, David Gauke, Lord Chancellor and Secretary State for Justice, set out further information about the Government's approach:

> Marriage and family have long been vitally important to our functioning as a society. Where a marriage or civil partnership regrettably breaks down and is beyond repair, the law must deal with that reality with the minimum of acrimony by creating the conditions for people to move forward and agree arrangements for the future in an orderly and constructive way. Above all, the legal process should not exacerbate conflict between parents, as this is especially damaging for children. The process must better support and encourage parents to co-operate in bringing up their children.
>
> The evidence is clear that the current legal requirements can needlessly rake up the past to justify the legal ending of a relationship that is no longer a beneficial and functioning one. The requirement for one person to blame the other—if it is not practical for them to have separated for at least two years—can introduce or worsen conflict at the outset of the process, conflict that may continue long after the legal process has concluded. Allegations about a spouse's conduct may bear no relation to the real cause of the breakdown. Such allegations do not serve the interests of society or help family relationships to heal. Instead, they can be damaging to any prospects for couples to reconcile or to agree practical arrangements for the future. In the extremely difficult circumstances of divorce, the law should allow couples, where reconciliation is not possible, to move on constructively.
>
> The Divorce, Dissolution and Separation Bill will change or remove conflict flashpoints. It will align the law with the non-confrontational approach that Parliament has enacted in other areas of family law...[3]

David Gauke referred to the reform being "long overdue" and said that the legislation was not about making the decision to divorce or to dissolve a civil partnership easier.[4]

The proposed legislation would not affect financial provision on divorce where, in any event, "fault" rarely has any material effect.[5] In financial provision proceedings the court takes conduct into account only if it would be inequitable (unfair) to disregard it. [6]

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2 Reducing Family Conflict – Reform of the Legal Requirements for Divorce, Impact Assessment, IA No: MoJ021/2018, 5 April 2019, paragraph 12
3 HCWS1621 [on Divorce, Dissolution and Separation Bill], 13 June 2019
4 Ibid
5 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p18
6 Another Library briefing paper provides further information about financial provision, Financial provision when a relationship ends, (05655, 16 January 2019)

2. Background

2.1 The current law in England and Wales

The basis for divorce

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). Three of the facts are fault based (adultery, behaviour, desertion), and two relate to periods of separation. The facts are:

- that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent (often referred to as the "unreasonable behaviour" fact);
- that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- 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); 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).

Further information about the facts

Online information includes:

- Gov.UK, Get a divorce Check you can get a 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.[7]

In practice, using the adultery or behaviour facts, if they can be applied, can give people a route to a divorce at an earlier opportunity, avoiding the need to wait two years before petitioning if the other spouse consents to the divorce, or five years if not.[8]

7 Both links accessed 19 June 2019

8 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p14

The Government has stated that, "separation-based facts are effectively unavailable to those who cannot afford to run two households before resolving their financial arrangements on divorce".[9]

Fault based petitions

The Office for National Statistics (ONS) publishes statistics on divorces. The latest figures for divorces by "facts proven" are for 2017 and show that 58% of divorces were based on a fault-based petition:

Divorces by fact proven
England and Wales, 2017

Fact proven	Number of divorces	% of all divorces
Fault based	**58,994**	**58.0%**
Adultery	10,623	10.4%
Unreasonable behaviour	47,407	46.6%
Desertion	475	0.5%
Combination (adultery & unreasonable behaviour)	489	0.5%
Separation based	**42,681**	**42.0%**
2 years and consent	27,058	26.6%
5 years	15,623	15.4%
Total	**101,675**	**100.0%**

Source: ONS, *Divorces in England and Wales: 2017*, Table 5

Notes: Includes divorce of same-sex couples, but excludes dissolution of civil partnerships. Also excludes divorces granted to both parties jointly and annulments.

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.[10] The report of the study, published in October 2017, includes these results:

> As Table 3.1 shows [see chart below], 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.

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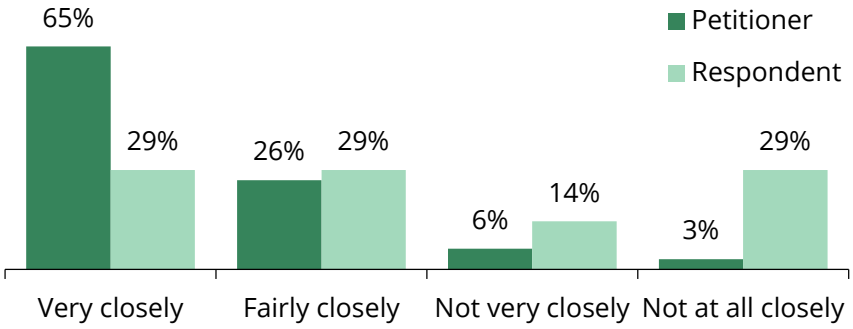
9 Gov.UK, press release from the Ministry of Justice, "End to divorce 'blame game' moves closer", 13 June 2019

10 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 3.2 of this briefing paper

How closely does the fact given relate to the real reason for divorce?
Survey of fault-based divorcees divorced in past 10 years, 2016



Source: *Finding fault? Divorce law and practice in England and Wales*, Table 3.1

Notes: Percentages are from a survey of fault-based divorcees divorced in the past 10 years (240 petitioners and 137 respondents).

Research carried out by YouGov for Resolution[11] (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.[12]

Divorce process

It is not possible to petition for divorce in the first year of marriage. This does not prevent evidence of conduct or separation that occurred in the first year of the marriage from being relied on in the petition.[13]

The court decides on the petition as follows:

> When the court receives a divorce petition, it carries out a number of administrative checks, including to make sure of the details of the marriage and that the court has jurisdiction to dissolve the marriage. The statute law also places a duty on the court:
>
> > to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.[14]
>
> In practice, the court has limited means to carry out extensive inquiries beyond considering whether the petition proves a particular fact to the court's satisfaction, unless there is a need to do so. In 1973, what is known as the "special procedure" was introduced for uncontested divorces on the fact of two years' separation, if the couple did not have children. This meant that the petitioner and respondent no longer had to attend a court hearing if they both agreed to the divorce. The special procedure was extended to all uncontested divorces in 1977. …In this special

11 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 13 June 2019]

12 Resolution News Release, MPs need to get behind no-fault divorce if they're serious about reducing family conflict, 3 December 2015 [accessed 13 June 2019]

13 Matrimonial Causes Act 1972 section 3

14 Matrimonial Causes Act 1972 section 1(3)

> procedure, if the court is satisfied that a decree nisi should be granted, a judge will grant the decree. In practice, petitions are now dealt with by legal advisers under the supervision of a district judge, who grants the decree. With the volume of divorces and few respondents contesting them, the court in almost all cases must adjudicate the petition at face value.
>
> If the divorce is one of the very few that are contested, the respondent files an answer to the petition. There could ultimately be a contested hearing at which the court hears evidence from both parties. Most contested divorces, however, are settled before a final hearing and contested hearings… are very rare.
>
> The court has the power to refer matters to the Queen's Proctor (in practice, to the office of the Treasury Solicitor, the Head of the Government Legal Service) if, for example, a petition is suspected to be fraudulent.[15]

Granting a decree of divorce is a two-stage process:

- First, the court grants the decree nisi, which is a provisional decree. At this stage the marriage has not legally ended.
- Second, the court grants the decree absolute, which is the final decree of divorce and formally ends the marriage.

The current law does not require any minimum period of time to elapse before granting the decree nisi. The Government has stated that, between 2011 and 2018, around one in ten cases reached decree nisi within 8 weeks, and 3 in 10 cases between 9-13 weeks.[16]

In an undefended divorce, the petitioner may apply for the decree nisi to be made absolute six weeks and a day after the decree nisi is granted. If the petitioner does not make the application, the respondent must wait a further three months before being allowed to do so.[17] In practice there may be a longer time gap between the two decrees - for example, so that financial arrangements can be agreed. The court also has power to shorten the period.

The basis for judicial separation

The Matrimonial Causes Act 1973 also provides for judicial separation.[18] This does not end a marriage but enables financial orders to be made. The Government has stated that "judicial separation is sometimes a preferable way to deal with family breakdown for people who have a religious objection to divorce".[19]

As for divorce, people seeking judicial separation must give evidence of one or more of the five facts. However, because judicial separation does not end the marriage, the court does not have to consider whether the marriage has broken down irretrievably. A decree of judicial separation is granted in a single stage.

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15 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p15
16 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p14
17 Matrimonial Causes Act 1973 section 9
18 Sections 17 and 18
19 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p9

Dissolution of civil partnership and separation of civil partners

For civil partners, the equivalent of divorce is dissolution and the equivalent of judicial separation is separation. The relevant legislation is the Civil Partnership Act 2004.

Some of the terminology is different – for example:

- the equivalent of a decree is called an order;
- the person seeking the decree or order is called a petitioner in relation to marriage and an applicant in relation to civil partnership;
- for the dissolution of a civil partnership, a dissolution order is called a conditional order at the first stage (instead of decree nisi) and a final order at the second and final stage (instead of decree absolute).

There are only four facts on which the applicant may rely to establish irretrievable breakdown of the civil partnership or for a separation order – there is no adultery fact.

In this briefing paper, references to divorce and marriage include, where appropriate, references to dissolution and civil partnerships

2.2 Owens v Owens: consideration of "behaviour" fact

Family Court: divorce refused

In 2016, His Honour Judge Tolson QC, sitting in the Central Family Court, refused to grant Mrs Owens (the petitioner) a decree nisi of divorce, even though he found that the marriage had broken down.[20] The husband had defended the divorce – defended divorces are rare in practice.

The judge found that the petitioner 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. The petition was said to have been drafted in "anodyne terms".[21]

Court of Appeal: appeal dismissed

Mrs Owens appealed to the Court of Appeal. In 2017, "with no enthusiasm whatsoever", Lady Justice Hallett agreed with Sir James Munby, then President of the Family Division, that the appeal should be dismissed:

> …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.[22]

20 Owens v Owens [2017] EWCA Civ 182, paragraph 1
21 Ibid, paragraph 42
22 Ibid, paragraph 99

Lady Justice Hallett regretted that the decision would leave the wife "in a very unhappy situation".[23]

Sir James Munby said that, in this respect, the law and procedures were 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.[24]

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.

Sir James stressed that there was no implied criticism of the lawyers involved in this type of work, whose professional guidance advised moderation in the drafting of "behaviour" petitions:

> On the contrary, it must be borne in mind that solicitors are, very properly, if I may say so, advised by their professional bodies to be very moderate in what they include in a 'behaviour' petition. The Law Society's Family Law Protocol, ed 4, 2015, para 9.3.1, identifies guidelines which should be followed in drafting a divorce petition. Guideline 2 is in the following terms:
>
> > "Where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court, and not to include any reference to children"[25]

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

> …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.[26]

Supreme Court: further appeal dismissed

In July 2018, the Supreme Court dismissed a further appeal by Mrs Owens, meaning that she must remain married to Mr Owens for the time being.[27]

Lord Wilson confirmed the questions to be addressed in a case based on the behaviour fact:

> The inquiry has three stages: first (a), by reference to the allegations of behaviour in the petition, to determine what the

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23 Ibid, paragraph 102
24 Owens v Owens [2017] EWCA Civ 182 paragraph 94
25 Ibid, paragraph 96
26 Ibid, paragraph 99
27 Owens v Owens [2018] UKSC 41

> respondent did or did not do; second (b), to assess the effect which the behaviour had upon this particular petitioner in the light of the latter's personality and disposition and of all the circumstances in which it occurred; and third (c), to make an evaluation whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation that the petitioner should continue to live with the respondent would be unreasonable.[28]

Lord Wilson acknowledged that the appeal gave rise to "uneasy feelings". He said that it was for Parliament to consider whether the law should be changed:

> Parliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances.[29]

Lady Hale described the case as "troubling" but agreed that "it is not for us to change the law laid down by Parliament - our role is only to interpret and apply the law that Parliament has given us".[30]

2.3 Family Law Act 1996, Part 2

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.[31]

The Law Commission recommended that:

- irretrievable breakdown of the marriage should remain the sole ground for divorce; and
- 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 was irreparable.[32]

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".[33]

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.

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28 Ibid, paragraph 28
29 Ibid paragraph 45
30 Ibid paragraph 46
31 Law Com 192
32 Ibid, p20
33 Bill 131-EN 2012-13 paragraph 140

The divorce provisions in the Bill which preceded the FLA proved controversial at the time. Concerns were raised about the need to uphold the institution of marriage, among other things. Many amendments were made to the original proposals and implementation 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.[34] In order to save the Bill from defeat, the Government had to accept many amendments.[35] The result was that what had been an essentially simple and elegant legislative scheme became exceedingly complex.[36] 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.[37]

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.[38]

The Final Evaluation Report was presented to the Lord Chancellor by the Newcastle Centre for Family Studies in September 2000.[39] In January 2001, Lord Irvine announced that, in the light of the problems which had been identified, the Government would invite Parliament to repeal the relevant sections of Part 2 once a suitable legislative opportunity occurred.[40] He confirmed that section 22, in Part 2, relating

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34 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"

35 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."

36 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."

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

38 HL Deb 17 June 1999 c39WA

39 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

40 HL Deb 16 January 2001 cc126-7WA

to the funding of marriage support services, which was already in force, would remain.

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".

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

> 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.[41]

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".[42]

41 HL Deb 23 October 2013 cc365-6GC
42 Draft legislation on Family Justice Explanatory Notes, p46

3. Calls for, and arguments against, 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 July 2018, Baroness Butler-Sloss (Crossbench) introduced a Lords Private Member's Bill, which would require the Lord Chancellor to review the law relating to divorce, judicial separation, the dissolution of civil partnerships and the separation of civil partners. Previously, in 2015, Richard Bacon introduced a Ten Minute Rule Bill which aimed to allow no-fault divorce. That 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'.

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.

3.1 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 the late Sir Nicholas Wall, then President of the Family Division;[43] Sir James Munby, then President of the Family Division;[44] Baroness Hale of Richmond, now President of the Supreme Court;[45] and Supreme Court judge, Lord Wilson of Culworth.[46]

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43 Sir Nicholas Wall, President of the Family Division, Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012 [accessed 13 June 2019]

44 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 and Judicial Office Press Conference, 29th April 2014 [accessed 13 June 2019]

45 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 13 June 2019] Frances Gibb, "Judge calls for divorce overhaul to take blame out of break-ups", Times, 9 April 2015 (registration required) and Owen Bowcott, "UK's new supreme court chief calls for clarity on ECJ after Brexit", Guardian, 5 October 2017 [accessed 13 June 2019]

46 Stowe Family Law LLP, Supreme Court Justice 'disappointed' at lack of no fault divorce, 27 February 2017 [accessed 13 June 2019] and Jonathan Ames, No-fault divorce is long overdue, says top judge, The Times, 27 February 2017 (registration

3.2 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.[47] Since then the Nuffield Foundation has published further associated reports.[48] The aim of the research was to inform debate about whether and how the law might be reformed.

The Nuffield Foundation provides this summary of the 2017 report (the main study):

> **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.
>
> **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

required). Report of an interview on BBC Radio 4's Broadcasting House on 26 February 2017 [accessed 13 June 2019]

47 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

48 Nuffield Foundation, Finding Fault? Divorce Law in Practice in England and Wales [accessed 13 June 2019]

> 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.[49]

Based on their findings, the researchers recommended 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 reform so that divorce is based solely on irretrievable breakdown after notification by one or both spouses.[50]

The Nuffield Foundation has also published the following related reports:

No Contest: Defended Divorce in England and Wales

This report presented findings from an empirical study of why defended divorce occurs and how those cases are dealt with by the courts. It found that most disputes are generated by the law itself and that the law then provides "an ineffective, unhelpful and potentially unfair solution to the problems it has caused".[51]

The authors commented on the problems created by the concept of fault and the defence process:

> Most defences are not attempts to save the marriage, but quarrels about who should be blamed, mostly triggered by allegations about behaviour. Claims that the marriage is saveable generally reflect tactical considerations or are wholly unrealistic.
>
> The legal mechanism to address those problems is inadequate. Few of those who might wish to defend allegations are able to do so because of the financial and emotional costs of defending, and

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49 Ibid

50 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

51 Liz Trinder and Mark Sefton, No Contest: Defended Divorce in England and Wales, April 2018

> discouragement from the family justice system. The inaccessibility of the only remedy available is procedurally unfair.
>
> Most defended cases that do reach the courts are settled, rather than decided by a judge. The outcomes therefore reflect the relative bargaining capacity of the parties, not an inquiry into the truth of allegations. The court's willingness to accept the results of some deals appeared intellectually dishonest, even if it did bring an end to a damaging dispute.
>
> The pressure to settle reflects a realistic appraisal by family lawyers and judges that defence is costly, unhelpful and ultimately futile for the parties and burdensome for the courts. The defence process does increase acrimony, contrary to family justice policy. It can be misused by controlling spouses to make the divorce unnecessarily difficult. …

The report concluded that its analysis of a sample of defended cases strengthened the case for law reform to remove fault and to replace it with a straightforward notification process:

> If the law were to be reformed to remove fault, then the results of this study clearly suggest that the concept of defence could, and should, be redundant. In practice, defence of the marriage itself has been near impossible for many years, leaving aside the apparently unique circumstances of the Owens case. But if irretrievable breakdown were to be established purely on the basis of an objectively verifiable process of notification and confirmation, then irretrievable breakdown becomes undeniable. Nor would there be a Fact or particulars to object to, the current trigger for most disputes and defences.[52]

Taking Notice?: Non-standard Divorce Cases and the Implications for Law Reform

This report explored the implications for law reform of non-standard undefended cases, including where there are problems with service and the reasons why divorces are not completed.[53] The report concluded that the analysis it contained reinforced the case for reform of "an overly-complex law that can fuel conflict".

Reforming the Ground for Divorce: Experiences from Other Jurisdictions

This research considered divorce law in eight other comparable jurisdictions[54] and the implications for the Ministry of Justice's proposed reforms.[55] It found an international trend away from requiring any ground for divorce at all.

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52 Ibid, p83

53 Liz Trinder and Mark Sefton, Taking Notice?: Non-standard Divorce Cases and the Implications for Law Reform, February 2019

54 Australia, California, Colorado, Finland, Germany, New Zealand, Spain and Sweden

55 Jens M. Scherpe and Liz Trinder, Reforming the Ground for Divorce: Experiences from Other Jurisdictions, March 2019

3.3 Private Members' Bills

Lords Private Member's Bill

In July 2018, Baroness Butler-Sloss (Crossbench) introduced a Lords Private Member's Bill, Divorce (etc.) Law Review Bill [HL] 2017-19 (the Private Member's Bill).[56] Explanatory Notes have also been published.[57] No date has been announced yet for Second Reading.

The Private Member's Bill would require the Lord Chancellor to review the law relating to divorce, judicial separation, dissolution of civil partnerships and the separation of civil partners. The review would include consideration of whether the law ought to be changed so that irretrievable breakdown of a marriage or civil partnership is evidenced solely by a system of application and notification.[58]

Previous Commons Private Member's Bill

In October 2015, Richard Bacon (Conservative) introduced the No Fault Divorce Bill 2015-16 under the Ten Minute Rule.[59] 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.[60]

The Bill did not make any further progress.

3.4 Labour Party Manifesto 2017

The Labour Party Manifesto 2017 included a commitment to introduce a no-fault divorce procedure.[61]

3.5 "Family Matters" campaign in The Times

The Times campaign, "Family Matters" calls for the modernisation of family law, including the introduction of no-fault divorce.[62]

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.[63]

3.6 Resolution campaign

Resolution's Manifesto for Family Law, was launched in February 2015.

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56 HL Bill 126
57 HL Bill 126-EN
58 HL Bill 126-EN, paragraph 1
59 HC Deb 13 October 2015 cc189-94
60 HC Deb 13 October 2015 c191
61 Labour Party Manifesto 2017, p81
62 Frances Gibb, "Urgent call for new divorce laws", The Times, 17 November 2017 (subscription required)
63 "Modern Marriage", The Times, 17 November 2017 (subscription required)

Among other things, it called 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.[64]

Resolution proposed a new divorce procedure, where one or both partners could give notice that the marriage had broken down irretrievably. The organisation 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.[65]

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 about the effect any change in the law might have on the divorce rate:

> 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.[66]

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64 Resolution, Allow people to divorce without blame [accessed 13 June 2019]
65 Ibid
66 4 December 2015

3.7 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.[67]

3.8 Arguments against the introduction of no-fault divorce

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 pointed to evidence from other countries which, he said, showed the wider consequences such legislation might have.[68]

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.

Sir Edward then set out other potential impacts of family breakdown:

> 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."

Sir Edward said that, in the UK, 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.[69]

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67 Ministry of Justice, Report of the Family Mediation Task Force, June 2014, paragraphs 35 and 36
68 HC Deb 13 October 2015 c192-4
69 HC Deb 13 October 2015 cc192-4

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…
>
> We also continue to work to promote traditional marriage as a 'gold-standard' for couples and wider society, drawing on the substantial body of evidence which supports this view…

Further information is provided on the Coalition for Marriage website.[70]

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 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?[71]

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 has 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

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70 Coalition for Marriage, Our Mission [accessed 13 June 2019]
71 Coalition for Marriage, Five reasons why 'no-fault divorce' would be a disaster for marriage, 22 November 2017 [accessed 13 June 2019]

> 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.[72]

[72] Lords of the Blog, No Fault Divorce by Baroness Deech, 22 September 2017 [accessed 13 June 2019]

4. Government consultation and response

4.1 Government consultation

On 15 September 2018, the Ministry of Justice published a consultation paper, Reform of the legal requirements for divorce. The consultation closed on 10 December 2018. It asked for views on replacing the current requirement to establish one or more of the five facts to show that a marriage has broken down irretrievably, with a process based on notification.[73]

In his Ministerial Foreword, David Gauke, Lord Chancellor and Secretary of State for Justice, referred specifically to the Owens case.[74] He said that it had generated broader questions about what the law requires of people going through divorce and what it achieves in practice.

Overview

The Government provided this overview of what was proposed and why:

> The government … 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
> - 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".[75]

Consultation paper

The consultation paper set out problems associated with the present law,[76] and how the current law works against agreement and reconciliation.[77] It noted that, because petitioners might not know how much evidence would be sufficient to prove the particulars of the fact

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73 The consultation paper also deals with judicial separation during a marriage and to the equivalent processes of dissolution and separation orders for civil partnerships
74 See section 2 of this briefing paper
75 Gov.UK from the Ministry of Justice, Reform of the legal requirements for divorce, 15 September 2018 [accessed 13 June 2019]
76 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p5
77 Ibid, p20

being used, they might feel the need to make additional or more forceful allegations to ensure the petition was successful, and that this could increase acrimony between the parties.[78]

In addition, the consultation paper stated that the current law is open to apparent manipulation and that it does not support children positively.

The policy objective of the Government's proposals was stated as being to remedy the difficulties created by the current statutory requirement to evidence conduct or separation. The basic structure that underpins the divorce process would remain.[79]

The Government proposed that there would still be only one ground for divorce: that the marriage has broken down irretrievably. However, this would be established in a new way. There would be a complete move away from both the ability to allege "fault" and the ability to contest (defend) the divorce. The new proposed process would be based on notification, [80] and there would be a minimum timeframe for divorce.[81]

The Government said that its reform proposals would make divorce law consistent with the principles of the wider law relating to family difficulties, and with the approach many family law practitioners take with their clients.[82]

The Government stated that it had considered, but rejected, other ways to amend the law to reduce family conflict.

4.2 Government response

On 9 April 2019, the Government published its response to the consultation.[83]

Written Ministerial Statement

In a written Ministerial Statement on the same day, David Gauke announced that legislation would be introduced to change the law by removing the legal requirement to make allegations about spousal conduct or to have lived separately for up to five years.[84]

David Gauke said that the Government would continue to support marriage and that divorce should continue to be a considered decision. He stated that the law should allow people to move on constructively when divorce is inevitable, and that this would benefit children:

> When, sadly, a marriage or civil partnership has irretrievably broken down, continuing in it can be damaging for the couple and for any children they have, as well as undermining the institution of marriage itself which can work only if both parties are committed to it. It is vital that the law recognises this and, where divorce is inevitable, allows people to move on in as

78 Ibid
79 Ibid, p29
80 Ibid, p26
81 Ibid
82 Ibid, p24
83 Ministry of Justice, Reducing family conflict Government response to the consultation on reform of the legal requirements for divorce, CP 58, April 2019
84 HCWS1501 [on Divorce law reform], 9 Apr 2019

> constructive a way as possible. The ability to have a positive rapport and cooperate after separation is particularly crucial for parents, as children's outcomes are improved by cooperative parenting. Removing from the legal process for divorce those elements which can fuel long-lasting conflict between parents will therefore support better outcomes for children. Where, despite reflection, divorce cannot be avoided the law should do all it can to reduce conflict and encourage good relations as couples move on to reach agreement about practical arrangements for the future.

Responses to the consultation

There had been 3,372 responses to the consultation. The Government said that some groups, who objected to the Government's proposals, encouraged their supporters, through online guides, to respond to particular questions and make certain points in argument, and that this appeared to have prompted a surge of late responses in the final two weeks of the consultation. This had changed the balance of responses:

> The strong support earlier in the consultation for replacing the five facts, which was running at 70% of respondents in favour, was overturned at the end of the consultation by the impact of these later responses.
>
> The concerns raised involved opposition based on a Christian view of marriage and divorce. The Government acknowledges and respects these views. Some of the objections – often arising from sincere convictions – were based on a misunderstanding of how the current divorce law operates in practice (although misunderstanding was not limited to these groups). ... While we acknowledge views on the religious aspects of marriage vows, these are matters of conscience for the individuals in the marriage and are not matters that concern the legal requirements for divorce. Opposition to reform by Christian groups must be seen alongside the views of respondents more generally, who were broadly supportive of our proposals to reduce conflict.
>
> There was strong support for reform from those organisations with direct experience of the divorce process. These included family law bodies, relationship support groups, and public and voluntary sector bodies and groups, some of whom represent large groups of members (including the Association of District Judges, the Law Society, the Bar Council, Resolution, the Family Mediation Council, Relate, Women's Aid and Cafcass).[85]

By way of example, question 2 of the consultation asked, "In principle, do you agree with the proposal to replace the five facts with a notification process?". 17% of respondents (546) answered "yes" while 80% (2614) answered "no".[86]

Response document

The response document set out the Government's approach to reform:

> The Government's key policy objectives are to ensure that the decision to divorce is a considered one, with sufficient opportunity for reconciliation, and to reduce family conflict where divorce is

[85] Ministry of Justice, Reducing family conflict Government response to the consultation on reform of the legal requirements for divorce, CP 58, April 2019, p19
[86] Ibid, p42

> inevitable. Our reform principles are to make divorce law consistent with the non-confrontational approach taken in wider family law and to recognise that a legal process that does not introduce or aggravate conflict will better support adults to take responsibility for their own futures and, most importantly, for their children's futures.
>
> The current divorce law works against these principles. It incentivises an adversarial process which can undermine efforts to reconcile and which can fuel conflict when making arrangements for dividing assets or for the future care of any children.[87]

The Government wanted "a legal process which promotes amicable agreement, which is fair, transparent and easier to navigate, and which reduces opportunities for misuse by abusers who are seeking to perpetrate further abuse".

The Government's proposals to reform the law include the following:

- Retaining the irretrievable breakdown of a marriage or civil partnership as the sole ground for divorce and dissolution and replacing the requirement to evidence conduct or separation facts with a requirement for a statement of irretrievable breakdown. The process would still involve the court:

  > We are clear that the decision to grant a divorce remains a legal decision for the court to make, as divorce creates a fundamental change of legal status that alters people's rights and responsibilities. Where legal safeguards are met, we believe that this statement should be sufficient to satisfy the legal threshold for obtaining a divorce or dissolution.

- Providing for the option of a joint application.
- Removing the opportunity to contest, but an application could still be challenged on the bases of jurisdiction, the legal validity of the marriage, fraud or coercion, and procedural compliance.
- Introducing a minimum timeframe of six months, measured from petition stage to decree absolute, with power for the court, in exceptional circumstances, to allow a shorter period:

  > We heard that couples feel divorced when the court grants the decree nisi. Beginning the timeframe before this point is therefore key to allowing for both meaningful reflection and an opportunity to turn back.
  >
  > (…)
  >
  > We believe that an overall minimum period of six months provides a single framework that provides everyone with sufficient time to reflect and, if divorce is inevitable, to agree important arrangements for the future. This timeframe is also broadly in line with other similar jurisdictions. We continue to believe that, as a general rule, clarity and predictability for the legal process would benefit from a single minimum timeframe, without exceptions. However, we consider the court's power to fix a shorter

[87] Ministry of Justice, Reducing family conflict Government response to the consultation on reform of the legal requirements for divorce, CP 58, April 2019, p5

> period, where exceptional grounds to expedite the process exist, should be retained.[88]

The Government commented on how the minimum timeframe would affect the process of divorce:

> We have tested the expected time impact of introducing different minimum periods, ranging from three to twelve months between petition and final decree stages and inclusive of the current requirement of six weeks between decree stages (see the impact assessment for the options modelled). Under the current process, some divorcing couples progress from petition to final decree in three or four months. Regardless of any legislative reform, this will be made faster by 2020, when the end-to-end digital divorce process for users is fully online. Compared with both current and fully online timings, any new minimum timeframes would make the process slower for the majority of cases, but quicker for those who had previously waited for two or five years' separation.[89]

- Retaining the two-stage decree process – it would still be necessary to apply separately for the decree nisi and decree absolute, so that a divorce or dissolution is not automatic:

  > This will ensure that the parties retain control and can pull back from the brink at any time.

- Retaining the bar on divorce and dissolution applications in the first year, without exception.
- Modernising language used within the divorce process.[90]

Parallel changes would be made to the law governing the dissolution of a civil partnership which broadly mirrors the legal process for obtaining a divorce.[91]

88 Ibid, p7
89 Ibid, p34
90 Ibid, pp6-7
91 Gov.UK, Press release from the Ministry of Justice, New divorce law to end the blame game, 9 April 2019 [accessed 13 June 2019]

5. The Bill

The Divorce, Dissolution and Separation Bill (the Bill) was introduced in the House of Commons on 13 June 2019 as Bill 404 of 2017-19. Information about the Bill is provided on the Bill page on the Parliament website.

The Ministry of Justice has also published the following associated documents:

- Explanatory Notes;
- Delegated Powers Memorandum;
- Human Rights Memorandum;
- Impact Assessment;
- Equality statement;
- Fact sheet.

5.1 Extent

With some minor exceptions, the Bill would extend and apply to England and Wales only. The Explanatory Notes provide further detail.[92] More information is provided in Annex A to the Explanatory Notes.

For the purposes of Standing Order No. 83J, the Speaker has certified Clauses 1 to 5 of the Bill as relating exclusively to England and Wales on matters within devolved legislative competence.

5.2 Changes in terminology

Some of the terminology in existing legislation, particularly in relation to divorce and judicial separation, would be updated to make the law more accessible, and to be consistent with the terminology in the more recent civil partnership legislation. For example:

Existing legislation	**The Bill**
Petition	Application
Petitioner	Applicant
Presentation of the petition	Making of the application
Decree nisi	Conditional order
Decree absolute	Final order
Decree of divorce	Divorce order
Decree of judicial separation	Judicial separation order
Decree of nullity	Nullity of marriage order

92 Bill 404-EN, paragraph 23

5.3 Clauses in the Bill

The Bill has nine clauses and a Schedule and would amend the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, as well as other legislation. Detailed information about each provision is provided in the Government's Explanatory Notes.

Clause 1: Divorce: removal of requirement to establish facts etc

Clause 1 would substitute a new section 1 into the Matrimonial Causes Act 1973 to provide that either or both parties to the marriage could apply to the court for a divorce order on the ground that the marriage has irretrievably broken down. The option for a joint application, where the decision to divorce is a mutual one, is new. The current ability of one spouse only to initiate the legal process of divorce would be retained.

The application would have to be accompanied by a statement by the applicant(s) that the marriage has broken down irretrievably, which the court would take as conclusive evidence. This would remove the scope for a respondent to dispute that the marriage has broken down. The new provision would replace the existing five facts (based on conduct and periods of separation) and accordingly the requirement for the court to inquire so far as it reasonably can into any such facts.

The divorce order would be in two stages: a conditional order followed, no less than six weeks later, by a final order. The court would not make the conditional order unless the applicant(s) confirmed, at least 20 weeks after the start of the proceedings, that they wished the application to continue. At present there is no minimum period before a decree nisi may be made.

Family Procedure Rules would deal with the procedure for a joint application becoming a sole application because of only one of the spouses in a joint application wishing to continue.

The Lord Chancellor would have power, by statutory instrument made under the negative resolution procedure, to shorten or lengthen either the six-week period or the twenty-week period, but not so as to make the total minimum period longer than 26 weeks. As set out in the Ministry of Justice Delegated Powers Memorandum, a similar delegated power, (subject to the same bar on making the overall period longer than 6 months) is already in place for the current minimum timeframe between conditional order and final order in respect of civil partnerships. A slightly different power, expressed as one to shorten the period from six months (and therefore not to be used to extend it beyond six months), is in place for the current minimum timeframe between decree nisi and decree absolute for divorce.[93]

[93] Ministry of Justice, Divorce, Dissolution and Separation Bill Delegated Powers Memorandum, June 2019, paragraph 2d

The court would have power to shorten the periods in particular cases (Clause 1(8)). The Explanatory Notes set out when this power might be used:

> This replaces the existing power of the court currently set out in section 1(5) of the Matrimonial Causes Act 1973 used to reduce the six-week period to decree absolute in exceptional cases (such as in the case of terminal illness or imminent birth of a child to one of the parties).[94]

Clause 2: Judicial separation: removal of factual grounds

Clause 2 would amend section 17 of the Matrimonial Causes Act 1973 to replace the "fact" requirement in judicial separation proceedings with a requirement for a statement that the applicant(s) seek to be judicially separated. The court must then make a judicial separation order. Provision is made for both joint and sole applications.

Clause 3: Dissolution: removal of requirement to establish facts and Clause 4: Dissolution orders: time limits

Clauses 3 and 4 would amend the Civil Partnership Act 2004 so that there would be similar provisions and time limits for dissolution of civil partnership as those included in Clause 1 in respect of divorce.

Clause 5: Separation: removal of factual grounds

Clause 5 would make similar changes in respect of separation of civil partners to those in Clause 2 which would apply to judicial separation.

Clause 6 and Schedule: Minor and consequential amendments

Clause 6 introduces the Schedule which sets out minor and consequential amendments in three parts:

- Part 1 would amend the Matrimonial Causes Act 1973;
- Part 2 would amend the Civil Partnership Act 2004;
- Part 3 would amend other Acts – "typically where these other Acts contain references to decrees of divorce, judicial separation or nullity that need to be amended to reflect the new terminology of orders".[95]

The Explanatory Notes state that the amendments would be made for consistency of approach and terminology.[96]

Minor changes would also be made in relation to proceedings for nullity of marriage, principally to provide the Lord Chancellor with a power by statutory instrument, made under the negative resolution procedure, to amend the minimum time period before a conditional nullity of

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94 Bill 404-EN paragraph 33
95 Bill 404-EN paragraph 68
96 Bill 404-EN paragraphs 66-67

marriage order can be made final. This would align the position with that relating to the nullity of civil partnerships.[97]

Clause 6 would also enable the Lord Chancellor, by statutory instrument made under the affirmative resolution procedure, to amend, repeal or revoke any primary legislation in force when the Bill is passed (a "Henry VIII power"). The Lord Chancellor could also amend secondary legislation by negative resolution statutory instrument.

The Ministry of Justice believes that this power is necessary because of the wide-ranging references to divorce in existing legislation:

> The Schedule to the Bill already contains minor and consequential amendments to primary legislation but primary legislation on divorce, including cross-references in a wide range of statutes to the status or evidence of, and/or reasons for divorce (such as references to decrees nisi and/or absolute and adultery grounds) began with the Matrimonial Causes Act 1857 and continue through provision that remains in force today such as the Wills Act 1837, the Inheritance (Provision for Family and Dependents) Act 1975, the Agricultural Holdings Act 1986, the Taxation of Chargeable Gains Act 1992 and the Family Law Acts of 1986 and 1996 (the Schedule to this Bill contains further examples). Whilst the Government has made extensive efforts to identify primary legislative provision that requires minor and consequential amendment as a result of the provisions of this Bill, the Government considers that a delegated power to amend primary legislation for this purpose remains necessary due to the historic and wide-ranging references to divorce in the primary legislative statute book, which extend from property to wills and estates to tax to pensions to conflicts of law and numerous aspects of family law, and which, despite extensive efforts to identify at this stage, may only become apparent at a future time.[98]

Remaining clauses

Clause 7 deals with extent.

Clause 8 deals with commencement and transitional provision.

Clause 9 provides the short title of the Bill.

5.4 Progress of the Bill

Commons Second Reading of the Bill took place on 25 June 2019.[99]

The Bill was considered by a Public Bill Committee in two sittings on 2 July 2019. The Bill was reported without amendment.

Another Commons Library briefing paper provides further information:

Divorce, Dissolution and Separation Bill 2017-19: Committee Stage Report.[100]

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97 Bill 404-EN paragraph 15
98 Ministry of Justice, Divorce, Dissolution and Separation Bill Delegated Powers Memorandum, June 2019, paragraph 33
99 HC Deb 25 June 2019 cc575-602
100 Number 08618, 9 July 2019

6. Views of interested parties

This section of this briefing paper sets out (in alphabetical order) a non-exhaustive selection of the reaction of interested parties to the Government's announcement that it would legislate and/or to the introduction of the Bill.[101]

6.1 Christian Institute

The Christian Institute's Director, Colin Hart, described the Bill as 'euthanasia for marriage'. He said:

> "Under Government plans an innocent spouse will not be able to cite adultery or domestic violence in a divorce petition. The no-fault divorce scheme is plainly unjust."
>
> "Couples struggling through a difficult time in their marriage need time and opportunity to reconcile. This legislation seems to block off this possibility.
>
> "The Government's main argument is that fault-based divorces lead to acrimony. If that is so, why is the Government also abolishing separation grounds which never involve any allegation of fault?"
>
> "Four out of ten divorces are on the basis of separation and take well over two years. Under the Government's plan it will be six months. A massive speeding up of divorce. It's also disturbing that the Government has been trialling an online scheme which claims to process divorces in twelve weeks.
>
> "This Bill is a euthanasia programme for marriage."[102]

6.2 Coalition for Marriage

The Coalition for Marriage[103] opposes the Government's proposals:

> The Government's 'no-fault' divorce Bill makes getting out of your marriage easier than ending a mobile phone contract.
>
> It's a shocking read for anyone who cares about marriage.
>
> – In 2017, 42,000 divorces were on the basis of at least two years' separation before proceedings could start. Under the Bill, separation is scrapped. Divorce will be automatic after six months.
>
> – 58,000 divorces in 2017 were on the basis of a fault such as adultery. These fault grounds will be scrapped.
>
> – A victim of adultery or domestic violence will not be able to cite their spouse's conduct as the reason for the divorce.
>
> – Under the Bill divorce proceedings can be pushed through in as little as six months. The Government will have power to make them even quicker. Its pilot scheme cut the time to 12 weeks.
>
> – The legislation abolishes all differences in divorce between traditional marriage and a same-sex marriage.

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101 All links accessed 18 June 2019

102 Christian Institute News, Govt no-fault divorce plans 'euthanasia for marriage', 18 June 2019

103 See section 3.8 of this briefing paper

> We are studying the Bill carefully but in the meantime, it's important to speak out.

The Coalition for Marriage asked its supporters to raise the following points:

> – Marriage vows matter. These plans trivialise marriage promises. They also create instability and uncertainty in marriage.
>
> – Research overwhelmingly shows that children normally fare better in married households compared to those in broken homes. Making divorce even easier is not in the interests of children.
>
> – Divorce proceedings are dropped every year as couples decide to stick together – no-fault divorce makes it much harder to reconcile.[104]

6.3 Law Society

The Law Society welcomed the Government's announcement that it would legislate to reform divorce law, saying that the reform would allow separating couples to focus on what really matters and bring divorce law into the 21st century. Law Society president, Christina Blacklaws, said:

> "Divorce can be a highly stressful experience and the requirement for those divorcing in England and Wales to prove one of five fault-based reasons exacerbates tensions between separating couples.
>
> "For separating parents, it can be much more difficult to focus on the needs of their children when they have to prove a fault-based fact against their former partner.
>
> "Forcing couples to wait two years - or five years if they cannot agree on the terms of separation - only lengthens the divorce process and makes it all the more difficult for couples to move on amicably and co-parent.
>
> "Introducing a 'no fault' divorce and introducing a six-month time-frame allowing couples to reflect on their decision will change the way divorce works – for the better."[105]

6.4 Relate

Aidan Jones, Chief Executive at the relationship support charity Relate, welcomed the Bill:

> "We wholeheartedly support today's Bill to reform outdated divorce laws. Evidence clearly shows that parental conflict is damaging to children's wellbeing and chances in life, yet the current laws lead parting couples to apportion blame.
>
> "As we see in the counselling room, this can make it difficult for ex-partners to develop positive relationships as co-parents. This unnecessary blame game needs to end and we hope to see this Bill passed as soon as possible."[106]

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104 Coalition for Marriage, Govt publishes quickie divorce bill, 18 June 2019
105 Law Society, 'No fault' reform brings divorce law into the 21st century, 9 April 2019
106 Relate, Relate Response to the Divorce, Dissolution and Separation Bill, 13 June 2019

6.5 Resolution

Margaret Heathcote, Chair of Resolution,[107] welcomed the proposed legislation:

> "We're delighted that the government is introducing legislation which will help reduce conflict between divorcing couples.
>
> "Every day, our members are helping people through separation, taking a constructive, non-confrontational approach in line with our Code of Practice. However, because of our outdated divorce laws, they've been working with one arm tied behind their backs.
>
> "These proposals have the support of the public, politicians, and professionals. We therefore call on MPs and members of the House of Lords to pass this Bill without delay, and end the blame game for divorcing couples as soon as possible." [108]

[107] See section 2.1 of this briefing paper
[108] Resolution News Release, Resolution welcomes new Bill to end the blame game, 13 June 2019

7. Divorce in Scotland

Matters relating to marriage and civil partnership are devolved. Therefore, the Scottish Parliament can make provision on the rules on ending a marriage or civil partnership.[109]

In Scotland there are two grounds for divorce, which are:

- The irretrievable breakdown of the marriage, which can be established by:
    - adultery by the defender;
    - behaviour: "since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender";
    - one year non-cohabitation and the defender consents to the divorce;
    - two years non-cohabitation if one party does not agree to the divorce.
- Either party being issued with an interim gender recognition certificate.[110]

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.

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.[111]

The shorter time periods for the Scottish separation-based grounds have proved to be significant in practice. Just 5% of divorces in Scotland now take place on fault-based grounds.[112]

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109 Scottish Government, Future of civil partnership: consultation, 28 September 2018, paragraph 2.06
110 Scottish Government, Civil Justice Statistics in Scotland 2016-17, 28 August 2018, p24
111 Accessed 18 June 2019
112 Sarah Harvie-Clark, "It's the end of the line but no one's to blame" – 'no fault divorce' in the UK, Scottish Parliament, SPICe Spotlight, 12 September 2018 [accessed 18 June 2019]

The Scottish Government's Civil Justice Statistics in Scotland 2017-18 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 13,400 in 1985 to 6,800 in 2017 (Figure 9)[113]. 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 2017-18 was 6,873, 13% fewer than in 2016-17 (7,938) (Table 9). In 2017-18, 61% of divorces granted used the simplified procedure.
>
> There were 61 civil partnership dissolutions granted in 2017-18, down from 83 in 2016-17 (Table 10). The vast majority of dissolutions granted in 2017-18 (92%) used the simplified procedure. [114]

In the 2015-16 Parliamentary session, the then Scottish Parliament 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 responses from stakeholders did not highlight this as an area of particular controversy (relative to other topics).[115] All the written submissions from stakeholders are publicly available on the Scottish Parliament website.[116]

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[113] 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"

[114] Scottish Government, Civil Justice Statistics in Scotland 2017-18, 28 August 2018, section 2.2.3

[115] Personal communication from SPICe, 12 October 2016

[116] Scottish Parliament, Family Law (Scotland) Act 2006 [accessed 19 June 2019]

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