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BRIEFING PAPER

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Divorce, Dissolution and Separation Bill [HL] 2019-21

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Summary

The Divorce, Dissolution and Separation Bill [HL] 2019-21

The Divorce, Dissolution and Separation Bill [HL] (the Bill) was introduced in the House of Lords on 7 January 2020. It completed its Lords stages on 24 March 2020 and was introduced in the House of Commons on 25 March 2020 as Bill 125 of 2019-21. Second Reading in the House of Commons is due to take place on 8 June 2020.

In short, the Bill would:

- replace the requirement to provide evidence of conduct or separation 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.

The Bill would extend to England and Wales. Matters relating to marriage and civil partnership are devolved. Part 8 of this briefing paper sets out a brief summary of the position in Scotland.

The Bill follows two similar bills. The first was introduced in the House of Commons on 13 June 2019 and the second was introduced in the House of Lords on 15 October 2019. Neither bill completed its passage through Parliament, the first because of prorogation and the second due to the dissolution of Parliament for the General Election.

Background

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,

said that, in this respect, the law and procedures were 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.

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. There have also been Private Members' Bills in the Commons and the Lords, which did not become law, on this issue.

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 2018, the Ministry of Justice consulted 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, the then 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.

Scotland

The basis for divorce in Scotland was originally very similar to that in England and Wales. 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.

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 [HL] (the Bill) would:

- replace the requirement to provide evidence of conduct or separation 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;
- 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
>
> 3) To make the legal process fairer, more transparent, and easier to navigate

[1] Bill 125-EN, paragraph 13

> 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, David Gauke, who was then 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, 23 September 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, 20 February 2020)

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 3 June 2020

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 2018 and show that 57% of divorces granted to a sole party were based on a fault-based petition:

Divorces by fact proven
England and Wales, 2018

Fact proven	Number of divorces	% of all divorces
Fault based	**52,102**	**57.2%**
Adultery	9,214	10.1%
Unreasonable behaviour	42,167	46.3%
Desertion	353	0.4%
Combination (adultery & unreasonable behaviour)	368	0.4%
Separation based	**38,925**	**42.8%**
2 years and consent	24,351	26.8%
5 years	14,574	16.0%
Total granted to a sole party	**91,027**	**100.0%**

Source: ONS, *Divorces in England and Wales: 2018*, 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:

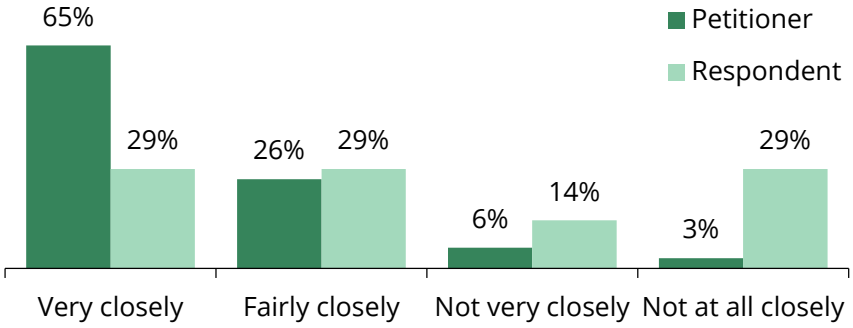
> As Table 3.1 shows [see chart below], perceptions of the 'accuracy' or 'truthfulness' of the petition in this sense is highly dependent upon who is asked, highlighting the problem of the non-justiciable nature of relationship breakdown. Only 29% of respondents to a fault-based divorce reported that 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

9 Gov.UK, press release from the Ministry of Justice, "End to divorce 'blame game' moves closer", 13 June 2019 [accessed 3 June 2020]

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

65% claimed that the (fault) Fact chosen very closely matched the reason for the relationship breakdown.

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).

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.[11]

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.[12]
>
> 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 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

11 Matrimonial Causes Act 1972 section 3
12 Matrimonial Causes Act 1972 section 1(3)

> 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.[13]

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 eight weeks, and three in ten cases between 9 and13 weeks.[14]

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.[15] 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.[16]

The basis for judicial separation

The Matrimonial Causes Act 1973 also provides for judicial separation.[17] 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".[18]

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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13 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p15
14 Gov.UK, press release from the Ministry of Justice, "End to divorce 'blame game' moves closer", 13 June 2019 [accessed 3 June 2020]
15 Matrimonial Causes Act 1973 section 9
16 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, pp15-16
17 Sections 17 and 18
18 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.[19] 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".[20]

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.[21]

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

Lady Justice Hallett regretted that the decision would leave the wife "in a very unhappy situation".[22]

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.[23]

Sir James added that, "Too often the modern 'behaviour' petition is little more than a charade".[24]

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 had to 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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22 Ibid, paragraph 102
23 Ibid, paragraph 94. Section 1 of the MCA 1973 re-enacted provisions originally in sections 1 and 2 of the Divorce Reform Act 1969 (paragraph 23)
24 Ibid, paragraph 95
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.[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.

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

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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

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

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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

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'".[41] However, he said that, in 2001, the then Government had concluded that the provisions were "unworkable, would not achieve the objectives of saving saveable marriages and reducing distress and conflict, and should be repealed". 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.[42]

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".[43]

41 HL Deb 23 October 2013 c365
42 Ibid
43 Draft legislation on Family Justice Explanatory Notes, paragraph 70, p46

3. Calls for, and arguments against, the introduction of no-fault divorce

Summary

Advocates of no-fault divorce speak of reducing the conflict which can be caused by allegations of fault, which can be particularly damaging for children. 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;[44] Sir James Munby, then President of the Family Division;[45] Baroness Hale of Richmond, later President of the Supreme Court;[46] and Supreme Court judge, Lord Wilson of Culworth.[47]

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.[48] Since then the Nuffield Foundation has published further associated reports.[49] The aim

44 Sir Nicholas Wall, President of the Family Division, Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012 [accessed 3 June 2020]

45 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 3 June 2020]

46 Martin Bentham, "Top judge calls for rules which force women to take off veils when giving evidence in court", Evening Standard, 12 December 2014; 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 [links accessed 3 June 2020]

47 Stowe Family Law LLP, Supreme Court Justice 'disappointed' at lack of no fault divorce, 27 February 2017; and 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 [links accessed 3 June 2020]

48 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

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

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.[50] 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 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.[51]

Based on their findings, the researchers recommended removing fault entirely from divorce law and replacing it with a notification system.

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50 A table on p 23 of the report sets out the components of the study and includes information of the method, sample size and sample source for each study element

51 Nuffield Foundation, Finding Fault? Divorce Law in Practice in England and Wales [accessed 3 June 2020]

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.[52]

3.3 Private Members' Bills

In July 2018, Baroness Butler-Sloss (Crossbench) introduced a Lords Private Member's Bill, Divorce (etc.) Law Review Bill [HL] 2017-19,[53] intended to require the Lord Chancellor to review whether the irretrievable breakdown of a marriage or civil partnership should be evidenced solely by a system of application and notification.

Previously, in October 2015, Richard Bacon (Conservative) introduced the No Fault Divorce Bill 2015-16 under the Ten Minute Rule.[54] 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.

Neither bill made any further progress.

3.4 "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.[55] In an editorial published on 17 November 2017, The Times said that it was joining the charity, Marriage Foundation, senior judges and leading family law experts to campaign for the urgent reform of divorce laws.[56]

3.5 Resolution campaign

Resolution, the national membership body representing 6,500 family justice professionals, launched its Manifesto for Family Law in

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52 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

53 HL Bill 126 0f 2017-19

54 HC Deb 13 October 2015 cc189-94

55 Frances Gibb, "Urgent call for new divorce laws", The Times, 17 November 2017 (subscription required)

56 "Modern Marriage", The Times, 17 November 2017 (subscription required)

February 2015.[57] Among other things, it called for the removal of blame, 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.[58]

3.6 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.[59]

3.7 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 at 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.[60]

Sir Edward spoke of the recent emphasis at that time 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 six fold increase in just two years, after a century of relatively stable divorce rates". He also spoke of other studies which noted an

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57 Resolution describes itself as "a community of family justice professionals who work with families and individuals to resolve issues in a constructive way", Resolution, About Resolution [accessed 3 June 2020]

58 Resolution, Manifesto for Family Law, 2015, p21

59 Ministry of Justice, Report of the Family Mediation Task Force, June 2014, paragraphs 35 and 36

60 HC Deb 13 October 2015 c192-4

increase in the divorce rate when no-fault divorce was introduced and set out other potential impacts of family breakdown.

Sir Edward considered that the potential adverse consequences of no-fault divorce should rule out its introduction.[61]

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.[62]

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?[63]

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".

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61 HC Deb 13 October 2015 cc192-4
62 Coalition for Marriage, Our Mission [accessed 4 June 2020]
63 Coalition for Marriage, Five reasons why 'no-fault divorce' would be a disaster for marriage, 22 November 2017 [accessed 4 June 2020]

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 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.[64]

[64] Lords of the Blog, No Fault Divorce by Baroness Deech, 22 September 2017 [accessed 3 June 2020]

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.[65]

In his Ministerial Foreword, David Gauke, who was then Lord Chancellor and Secretary of State for Justice, referred specifically to the Owens case.[66] 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 its proposals:

> 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".[67]

Consultation paper

The consultation paper set out problems associated with the present law,[68] and stated that the current law works against agreement and reconciliation.[69] 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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65 The consultation paper also deals with judicial separation during a marriage and to the equivalent processes of dissolution and separation orders for civil partnerships

66 See section 2.2 of this briefing paper

67 Gov.UK from the Ministry of Justice, Reform of the legal requirements for divorce, 15 September 2018 [accessed 3 June 2020]

68 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p5

69 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.[70] In addition, the Government 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.[71]

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, and there would be a minimum timeframe for divorce.[72]

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.[73] 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.[74]

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 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.

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70 Ibid
71 Ibid, p29
72 Ibid, p26
73 Ministry of Justice, Reducing family conflict Government response to the consultation on reform of the legal requirements for divorce, CP 58, April 2019
74 HCWS1501 [on Divorce law reform], 9 Apr 2019

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).[75]

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".[76]

Response document

The Government stated that it 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".[77]

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

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75 Ministry of Justice, Reducing family conflict Government response to the consultation on reform of the legal requirements for divorce, CP 58, April 2019, p19
76 Ibid, p42
77 Ibid, p6

> fundamental change of legal status that alters people's rights and responsibilities.

- 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 period, where exceptional grounds to expedite the process exist, should be retained.[78]

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.[79]

- 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 would not be 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.

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78 Ibid, p7
79 Ibid, p34

- Modernising language used within the divorce process.[80]

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.[81]

80 Ibid, pp6-7
81 Gov.UK, Press release from the Ministry of Justice, New divorce law to end the blame game, 9 April 2019 [accessed 3 June 2020]

5. Previous Government Bills

5.1 2017-19 session of Parliament

The Divorce, Dissolution and Separation Bill 2017-19 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.

A Commons Library briefing paper, published for Second Reading of this Bill in the Commons, provides background information.

Second Reading took place on 25 June 2019. The Bill was supported by Labour and the Liberal Democrats.

The bill was considered by a Public Bill Committee in two sittings on 2 July 2019. At its first sitting the Committee heard evidence from witnesses. The Public Bill Committee also received written submissions which are available on the Bill page on the Parliament website.

At its second sitting on 2 July 2019, the Public Bill Committee conducted a line-by-line consideration of the Bill. No amendments had been tabled. The Bill was scrutinised by way of clause stand part debates. All clauses were ordered to stand part of the Bill without any division. The Bill was reported without amendment.

Another Commons Library briefing paper on the Committee stage provides further information.

Before Commons Report stage took pace, this Bill fell when Parliament was prorogued.

5.2 October – November 2019 session of Parliament

The bill was reintroduced in the House of Lords on 15 October 2019 as HL Bill 3 of 2019 . However, it did not receive its Second Reading before Parliament was dissolved on 6 November 2019.

6. The Bill

The Divorce, Dissolution and Separation Bill [HL] 2019-21 (the Bill) would amend the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, as well as other legislation. Information about the Bill is provided on the Bill page on the Parliament website. Detailed information about each provision is provided in the Government's Explanatory Notes.

The Ministry of Justice has also published a number of associated documents including a Fact sheet.[82]

6.1 Bill stages

The Bill was introduced in the House of Lords on 7 January 2020 as Bill 2 of 2019-21. Second Reading took place on 5 February 2020.

Committee stage was on 3 March 2020 when almost all of the time was spent debating suggested amendments to Clause 1, though none were agreed at that stage. The Bill was reported without amendment.

Report stage was on 17 March 2020, when Government amendments were agreed. Again, much of the time was spent considering Clause 1.

Third Reading took place without debate on 24 March 2020.

The Bill was introduced in the House of Commons on 25 March 2020 as Bill 125 of 2019-21.

6.2 Changes in terminology

Some of the terminology in existing legislation, particularly in relation to divorce and judicial separation, would be updated with the intention of making 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

82 GOV.UK, Divorce, Dissolution and Separation Bill [accessed 3 June 2020]

6.3 Extent

With some minor exceptions, the Bill would extend and apply to England and Wales only. The Explanatory Notes, [83] and in particular, Annex A, provide further detail.

6.4 Second Reading in the House of Lords

On 5 February 2020, at Lords Second Reading, Lord Keen of Elie, the Advocate-General for Scotland, said that the Government believed that the law should reflect the reality:

> No one wants a marriage or civil partnership to fail, but the unfortunate reality is that some marriages and civil partnerships do fail. The irreparable damage will have been done long before an application to the court to bring a legal end to the relationship. The Government believe that the law should deal with that reality in a way that not only protects society's interests in marriage but avoids making the legal process of divorce or civil partnership dissolution unnecessarily antagonistic. The end of a marriage will always be difficult for the couple and children involved. It cannot be right that the law adds to that by incentivising the attribution of fault. Marriages fail for many reasons, and the responsibility may be shared. The simplistic allocation of blame cannot reflect reality and does not protect marriages.[84]

Lord Keen reiterated that the Government's proposals would allow time for couples to consider the implications of divorce, and that in many cases the divorce process would be lengthier:

> Our reform is in no measure introducing so-called quickie divorce; for around 80% of couples the divorce will actually take longer than it does currently. In addition to the new minimum period of 20 weeks, the six-week minimum period between conditional and final orders will remain. As is the case now, the divorce will not be able to proceed to conditional order unless the court is satisfied in relation to service on the respondent.[85]

Lord Marks of Henley-on-Thames, Liberal Democrat Justice Spokesperson and Baroness Chakrabarti, who was then Shadow Attorney General, broadly welcomed the Bill.[86]

In the debate, support for the Bill included:

- Baroness Burt of Solihull (Liberal Democrat) wholeheartedly welcomed the Bill, "enabling as it does no-fault divorce to be introduced to potentially take some of the tension and emotional strain out of leaving a marriage".[87]
- Lord Mackay of Clashfern (Conservative) said, "The idea that a marriage can continue when one party has lost interest in it is a complete fallacy".[88]

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83 Bill 125-EN, paragraphs 22-23
84 HL Deb 5 February 2020 c1807
85 HL Deb 5 February 2020 c1810
86 HL Deb 5 February 2020 c,1847 and 1850
87 HL Deb 5 February 2020 cc1811-12
88 HL Deb 5 February 2020 c1815

- Lord Walker of Gestingthorpe (Crossbencher) considered that the Bill would be " a great step forward".[89]
- Lord Marks of Henley-on-Thames said that there was no credible evidence either that no-fault divorce undermines or weakens marriage or the respect in which it is held, adding "I believe that the evidence supports the contrary view: making divorce honest and improving our support for marriage, family stability and relationship support are… the best ways of expressing society's commitment to marriage. [90]
- Baroness Chakrabarti considered no-fault divorce to be "a no-brainer".[91] She welcomed the Bill but was concerned at the removal of legal aid from divorce cases.

Opposition to the Bill included:

- The Lord Bishop of Carlisle, while appreciating the motivation behind the Bill, considered that "this deceptively simple piece of legislation actually creates more difficulties than it resolves". He did not support the Bill and said:

> While in certain circumstances divorce may well be the least-worst option for some couples, the Bill promotes individual choice over and at the expense of the sort of commitment, self-giving and sacrifice that lie at the heart of the marriage covenant.
>
> Reducing divorce to a statement made by one party that the marriage has broken down undermines the seriousness with which marriage and divorce are regarded and has the unfortunate effect of shifting any power in the process away from the respondent to the person initiating the divorce. What is more, studies suggest that making divorce quicker and easier will significantly increase the already high divorce rate, with all the implications that has both for human misery and financial cost.[92]

- Lord Farmer (Conservative) considered the introduction of no-fault divorce to be "fundamentally flawed because it not only ignores the urgent need to strengthen families but weakens them".[93]
- The Lord Bishop of Portsmouth said that perhaps his biggest concern about the Bill was that it was partial reform:

> Yes, it seeks to reduce conflict and remove the requirement to allege fault when marriage breaks down, but a significant strain, often with acrimony and hardship, is arguments over the division of assets and the arrangements made for the children of a marriage. If we are truly to address the financial and emotional fallout, to reduce family conflict and to minimise the impact on children, which again are the Government's laudable intentions, I suggest that fuller and wider reforms be considered. Divorce needs to be kinder to all involved, rather than easier.[94]

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89 HL Deb 5 February 2020 c1842
90 HL Deb 5 February 2020 c1848
91 HL Deb 5 February 2020 c1851
92 HL Deb 5 February 2020 c1814
93 HL Deb 5 February 2020 c1821
94 HL Deb 5 February 2020 c1825

- Lord Morrow (DUP) expressed concern "that this Bill, in making divorce more accessible, is likely to elicit a greater readiness to turn to divorce and will thereby foster a lower dissatisfaction threshold within marriage when previously couples would have exhibited a greater willingness to stay and fight for their marriage".[95] He also drew attention to there being "no mechanism to compel the petitioner to serve notice on the respondent until he wants the first decree of divorce at the end of the 20-week reflection period".
- Baroness Howe of Idlicote (Crossbencher) spoke of "some important research suggesting that [for children] conflict is better than no conflict because divorce without conflict makes no sense to children who, in the absence of better explanations, are apt to blame themselves when things go wrong for no apparent reason".[96] She considered that the Bill effectively introduced a shift in power towards the person wanting to initiate divorce proceedings, the petitioner, and away from the other party to the marriage, the respondent.
- Baroness Eaton (Conservative) was concerned about how much account the Government had taken into account the responses to its consultation:

> In the consultation on divorce reform, 80% of those who responded did not agree with the proposal to replace the five facts demonstrating that a marriage had irretrievably broken down with a notification process. A mere 17% were in favour of the proposed change.
>
> Furthermore, 83% of those who responded disagreed with the Government's proposal to remove the ability of a spouse who does not want divorce to contest the assertion that their marriage has irretrievably broken down, while only 15% supported the plans.[97]

6.5 Clauses in the Bill

This part of this briefing paper includes a brief description of the clauses in the Bill together with some extracts from matters raised in debates in the House of Lords.

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 a 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 divorce process 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

95 HL Deb 5 February 2020 c1829
96 HL Deb 5 February 2020 c1831
97 HL Deb 5 February 2020 cc1840-1

for a respondent to dispute the breakdown. 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) confirm, at least 20 weeks after the start of the proceedings, that they wish 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, 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. In the Bill originally presented in the House of Lords, the statutory instrument was to be made under the negative resolution procedure, but this was amended to the affirmative resolution procedure at Report stage. This means that, under the Bill as amended, any exercise of the power would have to be approved by both Houses of Parliament to become law.

The court would have power to shorten the periods in particular cases. 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).[98]

House of Lords debate on Clause 1

Timing of statement of irretrievable breakdown

At Committee stage, Lord McColl of Dulwich (Conservative) moved **Amendment 1**. This would have provided for the initial application, which would start the minimum time period, to be accompanied by a statement that the petitioner thinks the marriage may have broken down irretrievably. Lord McColl considered that beginning the process of divorce with a statement that the marriage has broken down irretrievably was counterproductive to reconciliation, and that this statement should come immediately prior to divorce. This was to avoid divorce being seen as a foregone conclusion as soon as the application was made.[99]

Members of the House spoke for and against the amendment.[100]

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98 Bill 125-EN paragraph 32

99 HL Deb 3 March 2020 cc528-530

100 The Amendment was supported by Baroness Howe of Idlicote, Lord Morrow, and Lord McCrea of Magherafelt and Cookstown (DUP), but opposed by

Lord Keen of Elie resisted the amendment. He agreed that the parties should have the opportunity to consider reconciliation and said that was one reason for the new 20-week period between application and conditional order, and why the two-stage order and bar on divorce applications in the first year of the marriage were being retained.[101] Lord Keen considered it right to continue to demand a statement of irretrievable breakdown at the point of the initial application as the grounds on which a decree could then proceed.

Lord McColl withdrew the amendment but returned with a redrafted amendment at Report stage (**Amendment 1**). He indicated at the outset that he would not be seeking a vote on it.[102] The new amendment sought to set out different processes for joint and sole applications – Lord McColl thought it unfair that the two should be treated as if they were the same. He suggested "a two-track scenario":

> Where there is a joint application, the initial application includes a statement saying that the marriage has broken down irretrievably. Where the application is by one party only, the applicant is required to make two statements. The first, on applying for a divorce, would state that the applicant's intention was to apply for a conditional order, which they would have to do under subsection (5), on the basis that the marriage may have broken down. The statement of irretrievable breakdown would then accompany the application for a conditional order 20 weeks after the first application if the petitioner wished to proceed to the next stage.

Lord McColl set out two main rationales for his amendment:

> First, it means that someone who wants to end the marriage cannot suddenly drop a bombshell on his or her spouse that their marriage—which she or he may have thought was all right—has actually irretrievably broken down. The first move the petitioner can make is a declaration that he intends to apply for a conditional order on the basis that he thinks the marriage may have broken down, not that it has already broken down irretrievably. This has the effect of requiring him to treat his spouse with greater respect, in the sense that the statement he makes to her is not one that says emphatically "It is all over" such that there are no grounds upon which she can respond and seek to save the marriage.
>
> The Bill proposes to remove from the respondent the right to contest a divorce. In this context, it is only right that if the spouse who joined them in making a "till death us do part" commitment wishes to move towards disengaging himself from that commitment, he must do so in a way that affords his spouse some respect. This must involve giving her the opportunity—should she wish to take it—to make the case for why the marriage is saveable and worth saving, before it is condemned by a final statement of irretrievable breakdown.
>
> (…)

Baroness Butler-Sloss (Crossbencher), Baroness Burt of Solihull, Baroness Shackleton of Belgravia (Conservative), Lord Mackay of Clashfern and Baroness Chakrabarti

101 HL Deb 3 March 2020 c537

102 HL Deb 17 March 2020 cc1390-94

> Secondly, changing the initial statement is important if we are really serious about trying to promote reconciliation during the divorce process.

Baroness Howe of Idlicote supported the amendment. She hoped that the Government would either support it or come back with an alternative means of "restoring dignity to the respondent and making the most of the new opportunities in a no-fault system to promote reconciliation".[103]

Baroness Butler-Sloss (Crossbencher) was among those who opposed the amendment.[104] She said that there was no evidence to support the view that a period of reflection would create more reconciliation and considered it "very unlikely" that the application would come as a surprise to the respondent. Baroness Butler-Sloss drew particular attention to the position of spouses in abusive marriages:

> If there has to be this period before you can even apply for a divorce, the opportunities for intimidation, coercion and other behaviours against the escaping spouse—unless they go to a refuge—would mean that this measure would make life infinitely worse for them.

Lord Keen resisted the amendment and spoke of the purpose of the application for divorce:

> The Government remain firmly of the view that an application for divorce is precisely that: an application seeking the legal dissolution of the marriage by the court because it has broken down irretrievably. A divorce application cannot be a notice to the other party that there may be marital difficulties. That is not a proper use of the court process. The legal process of divorce is not a remedy for marital discord but a means to dissolve the legal ties at the end of a marriage.[105]

Lord McColl withdrew the amendment.

The impact of divorce on children

At Committee stage, Baroness Howe of Idlicote moved **Amendment 2** and also spoke to **Amendment 14** to Clause 3.

The Member's explanatory statement to Amendment 2 was: "This amendment would require the courts to take the wellbeing of any children in the family into account before granting a divorce order to end a marriage". Baroness Howe considered that the rights of children should be placed on the face of the legislation.[106]

The amendments were also in the name of Baroness Meyer (Conservative) who considered that it was hard to justify a narrow focus on divorce, excluding matters related to money and children, "when they are inextricably linked" and were the greatest source of conflict between couples.[107]

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103 HL Deb 17 March 2020 cc1394-5
104 HL Deb 17 March 2020 cc1395-6
105 HL Deb 17 March 2020 cc1399-1400
106 HL Deb 3 March 2020 c540
107 HL Deb 3 March 2020 c542

Baroness Butler-Sloss was among those who disagreed with the amendment. She agreed that "finance desperately needs changing" but that said that was not a reason not to have the Bill,[108] and added:

> I cannot see how a court can adequately assess whether the children will be better off if the parents, one of whom wants a divorce, are still together or separated. There will be a difficult balancing act for the judge, and it will take a long time, because the family courts are seriously overburdened. How on earth will you find time to do this, and between a couple who will not be represented?[109]

Lord Keen resisted the amendment. He considered that it could result in a parent being trapped in a failed or even abusive marriage, and that it could also reintroduce contested divorce in cases where there are children, because it would allow a parent to put forward arguments that divorce is not in the children's best interests. Lord Keen said that the amendment could cause a worsened parental conflict through the legal process of divorce, with further damaging consequences for the children involved.[110]

The Minister acknowledged the importance of considering the impact of divorce on children but said that this was not a matter for the process of divorce:

> The decision to marry or divorce is an autonomous one. It is not for the law to stand in the way of one or both parties who no longer wish to be in a marriage. The legal process of divorce should focus only on ending the legal relationship between the adult parties. Issues that may arise from the divorce, such as disputed arrangements for children, can and are dealt with now under separate statutory provision.

Baroness Howe withdrew the amendment but indicated that she would return to the matter on Report.

At Report stage, Baroness Howe moved **Amendment 5**, intended to require the Lord Chancellor to ensure that individuals applying for a divorce order, who have children under the age of 18, were provided with "a concise statement of the main findings from the relevant social science disciplines about the impact of divorce on different aspects of a child's wellbeing."[111]

Baroness Howe disagreed with Lord Keen's comment at Committee stage that the decision to divorce should be autonomous:

> While it is not my intention to table any amendment that would prevent a couple who want to divorce from divorcing, I am deeply concerned about doing anything that authenticates an ethic of autonomous decision-making in family life. When two people marry and bring children into the world, they …use their autonomous choice to create a family unit of dependents and interdependence, in which anyone who is committed to the notion of responsibility must acknowledge that they say goodbye to autonomous decision-making, in the sense of decision-making

108 HL Deb 3 March 2020 c543
109 HL Deb 3 March 2020 c544
110 HL Deb 3 March 2020 cc548-9
111 HL Deb 17 March 2020 cc1415-17

> based entirely on self, and engaging with the consequences for others only after the fact.

Baroness Howe considered that the legislation should encourage adults with dependants to make decisions "that are fully cognisant of the implications of those decisions on others, including their children". She said that this decision-making was relevant to the divorce process. Quoting from the Government's consultation paper, Baroness Howe said that it envisaged that decisions might be negotiated through the first two stages of the divorce process.

The amendment provoked a wide-ranging debate.[112]

For example, Lord Browne of Belmont (DUP) agreed that, "rather than encouraging people to make autonomous decisions about divorce in the legal process of divorce, we should be encouraging them to make responsible decisions about divorce—decisions that do not think just about themselves but about their children".[113] He said that the amendment would not block couples seeking divorce; it would entitle them to receive information and what they did with the information was up to them.

Baroness Butler-Sloss did not think it was a matter for primary legislation. She wanted there to be a requirement for the applicant to read advice about dealing with the issues raised by Lady Howe, and information about relationship support, mediation, domestic abuse and related matters (as called for by Lord Harries) alongside the online application.[114]

Lord Keen acknowledged the concern about the impact of divorce on children. However, he spoke of the difficulties in complying with the terms of the amendment:

> Academic research will grow over time, and any concise statement of the main findings will be fluid and continually subject to review. Indeed, the findings of any academic research would then be questioned as to what evidence there was supporting it, what the nature of any cohort examined was, and whether the study was, for example, longitudinal. Any number of questions would arise in that context. However, even if a statement of the main findings of such research could be achieved concisely, we are not persuaded that pointing to academic research will affect people's decision to divorce, which must be the ultimate intent of the amendment. For most people, the application to divorce will come after much reflection about what the future will hold without the other spouse, and it will include consideration of the children as well.[115]

Baroness Howe withdrew the amendment.

Information about relationship support and mediation

At Committee stage, Lord Harries of Pentregarth moved **Amendment 3**. The Member's explanatory statement was "This amendment seeks to ensure that divorcing couples have access to

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112 HL Deb 17 March 2020 cc1415-17
113 HL Deb 17 March 2020 c1420
114 HL Deb 17 March 2020 c1421
115 HL Deb 17 March 2020 cc1424-6

information about relationship support and mediation so that they can think again about the best way forward before being issued a final divorce order".

Lord Farmer (Conservative) spoke to **Amendment 21**, in the same group, which, he said, would require the Government to offer relationship and marriage counselling before and during the divorce procedure.[116]

Lord Keen said that he understood the desire for the marriage relationship to be supported, but did not consider that the appropriate time for this was at the point of an application for divorce on the grounds of irretrievable breakdown, or that the Bill was the appropriate vehicle for addressing this issue.[117] Lord Keen outlined other ways the "laudable ends" of the amendment might be achieved:

- by working with the Department for Work and Pensions on signposting mediation services in places where couples experiencing relationship difficulties could best access that information;
- by using the update of the online system, and the paper forms, for applying for divorce, which would be necessary to implement the provisions of the Bill, as an opportunity to signpost applicants, where appropriate, to relationship support and mediation services at the earliest stage: when divorce begins and before any related application is made in respect of children or finances;
- by Her Majesty's Courts and Tribunals Service consolidating and streamlining information on its website about how to approach the matter of divorce: that would be a first port of call for many people considering bringing their marriage to an end.

With regard to Amendment 21, Lord Keen said that the Government did not believe that making provision for counselling within the legislative framework of divorce was the best way to support marriage; relationship support at that point would often be too late. He acknowledged the need to test what works in helping couples stay together, where appropriate, adding, "Funding for different ways to support relationships will be a cross-government issue, to be considered alongside other steps being taken to support families".

Amendment 3 was withdrawn.

At Report stage, in context of the debate on Amendment 5 (see above), Lord Harries of Pentregarth spoke to **Amendment 13**: "It is the duty of a Minister of the Crown to ensure that those applying for a divorce order using the website of Her Majesty's Courts and Tribunals Service have access to information about services related to relationship support, mediation, domestic abuse and related matters."[118]

Lord Harries said it sought "simply to ensure that important information is available for divorcing couples so that they have the chance to think again about whether divorce is the best, or the only, way forward". He

[116] HL Deb 3 March 2020 cc553-5
[117] HL Deb 3 March 2020 cc563-5
[118] HL Deb 17 March 2020 c1418

referred back to the debate at Committee stage and said that the amendment would seek to ensure that, as the Minister suggested then, the information would be made available on an official website.

Lord Keen agreed that all divorcing couples should have opportunities to find out about support services and mediation but said that the Government saw this as a practical, rather than a legislative, issue.[119] He set out how the Government would proceed to improve the signposting of these services and information about them, in particular by way of content on the GOV.UK website. Lord Keen made a firm commitment that the Government would work to make prompts in both the paper and online systems as effective as they could be in providing information about support services and mediation.

The minimum period for divorce

At Committee stage, Lord Mackay of Clashfern moved **Amendment 4**, the intention of which was to extend the minimum legal period for a divorce from six months to one year. Lord Mackay noted that more respondents to the consultation favoured the longer period than the shorter one.[120]

Lord Farmer supported the amendment. He considered that "time for reflection and reconciliation will be squeezed out".[121]

Lord Marks of Henley-on-Thames spoke against the amendment, saying:

> Once the decision to divorce has been made, forcing parties to stay married for longer than is necessary to confirm that decision serves no purpose. Enforced delay rarely leads to reconciliation. It extends the unhappiness and uncertainty.[122]

Lord Keen resisted the amendment. He acknowledged that there was "no magic number as far as this timing is concerned" and pointed out that, at present, more than 80% of divorces take place sooner than the timescale set out in the Bill.[123] He considered the timescales in the Bill to be appropriate.

Lord Mackay of Clashfern withdrew the amendment.

When does the 20-week period commence?

At Committee stage, Lord Farmer moved **Amendment 5.** The Member's explanatory statement was "This amendment seeks to address that, if the 20-week period begins as soon as the application is made, the respondent may have less than 20 weeks by the time they have been served notice".[124]

Other peers spoke to grouped amendments which sought to address the point that the respondent might not receive prompt service of the application and considered when, therefore, the 20-week period should begin.

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119 HL Deb 17 March 2020 cc1425-6
120 HL Deb 3 March 2020 c576
121 HL Deb 3 March 2020 c579
122 HL Deb 3 March 2020 c577
123 HL Deb 3 March 2020 c579
124 HL Deb 3 March 2020 c580

In response, Lord Keen said that the Government accepted that it should address the service issue in the context of the Bill and that the Lord Chancellor had raised this issue with the President of the Family Division the previous week. He provided the following further information:

> The Family Procedure Rule Committee will be invited to consider the matter when reviewing the rules required to implement the Bill, including a rule requiring service of the application within a specific period following the issue of proceedings.[125]

Lord Keen said that making the starting point for the 20-week period the date on which notice of the proceedings was served on the respondent would create the potential for new disputes as to when notice was served or received:

> Such an approach risks handing too much power to a respondent party who wishes to frustrate the divorce proceedings by avoiding or disputing service or delaying the entire process.

He considered that the amendment would create "new potential for mischief from a respondent who is not co-operative". Lord Keen considered that the correct way to achieve the right balance was by working with the Family Procedure Rule Committee to address the issue of service:

> The provisions of the Courts Act 2003 already provide a power for the Family Procedure Rule Committee to make rules of court regulating matters governing the practice and procedure to be followed in family proceedings, including the requirements for service. I am quite happy today to give a commitment that we will work with the Family Procedure Rule Committee to address these concerns over service. They already have the relevant statutory powers to address this.[126]

Lord Farmer withdrew Amendment 5.

Baroness Meyer (Conservative) returned to this issue at Report stage when she moved **Amendment 3** (which had been tabled by Lord Curry (Crossbencher)) and spoke to other amendments. She said that for the 20-week period to work, it was vital for both parties to be aware that divorce proceedings had been initiated, and that the amendments would tie the start of proceedings to service in the case of a sole petition divorce.[127]

Baroness Meyer spoke of two concerns with Lord Keen's approach at Committee stage:

> First, the principle is so important, and the potential for injustice so profound, that we cannot risk the Bill coming into force without this problem being solved first. To delegate this to the Family Procedure Rule Committee is to neglect the responsibility of this House to scrutinise and improve legislation. Secondly, on the point of a respondent who wishes to avoid or frustrate the divorce process, we accept the concerns of noble Lords. That is why these amendments give the court power to abridge and

125 HL Deb 3 March 2020 c583
126 HL Deb 3 March 2020 cc583-4
127 HL Deb 17 March 2020 cc1408-10

> shorten the 20-week period if it arises that a respondent is attempting to frustrate the process.

Lord Keen spoke of the practical difficulty of the amendment:

> The only fail-safe way of knowing that the respondent has been served is when the respondent returns to the court with the form acknowledging service, if indeed they return at all. In his amendment, the noble Lord sought to address this issue by giving the court the power to abridge the 20-week period between the start of proceedings and when it may make the conditional order if there is evidence that the respondent has sought to evade or delay service. The difficulty, as with the existing procedures for the court to grant deemed service or dispense with service in England and Wales, is the evidence that the court will require to be shown that the respondent should be aware of the application when in fact he refuses to return the acknowledgement of service, and therefore it makes the process of dispensation difficult. Indeed, such a process can be lengthy and requires separate applications to the court, which in turn can make it a complex process for applicants to navigate.
>
> The amendment would place a further requirement on the applicant to apply to abridge the time of the 20-week period in such cases by providing evidence that the respondent has deliberately sought to evade service. Inviting an applicant to prove a negative is always going to be rather challenging, particularly in this sort of process.[128]

Lord Keen reiterated that he considered that working on the issue with the Family Procedure Rule Committee to be the correct approach.

Baroness Meyer was disappointed with the Minister's response but withdrew the amendment.

Lord Chancellor's power to shorten time periods

At Committee stage, Baroness Chakrabarti moved **Amendment 6** and also spoke to **Amendment 16**. She said that both amendments had been recommended by the Delegated Powers and Regulatory Reform Committee.[129]

The amendments concerned the Lord Chancellor's power, by statutory instrument, to reduce the length of either of the two periods in the Bill (twenty weeks and six weeks). In the Bill as originally presented, the exercise of this power would not have required the approval of both Houses of Parliament.

Lord Keen gave an example of when the power might be exercised as:

> a situation in which there were a multitude of applications to reduce the timeframe and it was felt that this directed us towards a conclusion that there should be an overall reduction in the timeframe, because it was creating particular difficulties. That is why these powers exist.

The Minister gave an undertaking to amend the Bill at Report stage.[130]

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128 HL Deb 17 March 2020 cc1412-13
129 HL Deb 3 March 2020 cc584-5
130 HL Deb 3 March 2020 c586

Baroness Chakrabarti withdrew Amendment 6.

At Report stage, amendments moved by Lord Keen, to make the delegated powers subject to the affirmative resolution procedure,[131] were agreed without a vote (**Amendments 4** and **10**).

Should there be a litigation-free period at start of divorce process?

At Committee stage, Lord Farmer moved **Amendment 7**, the purpose of which, he said, was to ensure that no discussions about financial settlement would take place for 20 weeks (if the overall period before conditional order was 46 weeks, which he sought, otherwise a shorter litigation-free period would be appropriate) unless both parties agreed, or unless there was an application to the court for interim maintenance and financial injunctions.[132]

Lord Morrow (DUP) supported the amendment saying:

> Financial provision proceedings are by nature contentious and would serve only to undermine the chances of meaningful conversation between spouses in the initial weeks. I believe that keeping the first 12 weeks free from litigation would increase the possibility of the parties being able to discuss their marriage without having to take up entrenched positions.[133]

Baroness Deech (Crossbencher) spoke to **Amendment 20**. She considered that the Government would not succeed in removing hostility from the divorce proceedings without also dealing with financial provision law:

> In brief, there is no point in trying to achieve the aims of the divorce Bill—to make divorce less acrimonious and harmful to children—if the laws relating to the division of money on divorce remain as uncertain, expensive and acrimonious as they are. Research has shown that the quicker the divorce, the less likely the parties are to come to an agreed settlement, and that they will be more likely to settle on financial matters when more time has elapsed. This does not augur well for consensus in the proposed new law. [134]

Baroness Deech's amendment would have required the Government "to carry out a prompt review of the law on financial provision and to consider a more certain, less costly regime, with priority for children up to 21 and, like Scotland, a statutory basis for prenups, equal division of assets and shorter-term maintenance".[135]

Lord Marks of Henley-on-Thames considered it very important not to hold up financial provision applications "on a blanket basis", adding that there was no compulsion on a party to commence financial provision proceedings immediately. He agreed that a review of the law

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131 Requiring the approval of both Houses of Parliament to become law
132 HL Deb 3 March 2020 c587
133 HL Deb 3 March 2020 c587
134 HL Deb 3 March 2020 cc589-91
135 HL Deb 3 March 2020 c591

on financial provision was desirable, but not that there should be a statutory requirement to conduct one.[136]

Lord Keen resisted Lord Farmer's amendment, saying that it was in no one's interests to restrict when an application could be started.[137] He thought it could have the perverse effect of allowing one party effectively to "coerce or control the other by frustrating attempts to secure a financial settlement and essentially to use that as a delaying tactic".

With regard to Baroness Deech's amendment, Lord Keen said preparatory work on a review of financial provision law was already underway:

> As I said at Second Reading, the Government are considering how to approach any reform of the law with regard to financial settlement. My officials on this Bill are already at work on how best to take this forward. Drawing on that, it will be necessary to essentially lay the parameters for a review that will require, among other things, knowledge and expertise from outside government, to build an evidence base and to assess the problems that the present situation creates.
>
> … to set a fixed period for review is not, I suspect, helpful, because we are going to have to produce very robust recommendations and proposals that will pass in this House and the other place, and that will require detailed consideration and detailed evidence. I cannot say that such a process would be concluded within a year.

Lord Farmer withdrew Amendment 7. Amendment 20 was disagreed.[138]

Basis of divorce

At Report stage, Lord Farmer moved **Amendment 2** and also spoke to associated amendments. He said that the purpose of his amendments was to "retain the good things in this Bill and reject the bad":

> My amendments will retain the option for both parties in the marriage or civil partnership to make a joint application for a divorce, judicial separation or dissolution. They will also retain the minimum time period before which a divorce or dissolution cannot be granted. …
>
> My amendments would also retain the ability in the current law to cite fault to obtain a divorce or dissolution and to contest a divorce. I know that this happens rarely and that only 2% of respondents state intention to defend, with fewer than half of these going through the formal process. I also know that the number contesting may be less than 1,000 every year and that many are resisting the particulars of unreasonable behaviour and other fault-based facts. However, some will be trying to keep their marriage vows alive by resisting being unilaterally divorced.[139]

Lord Keen noted that, except for retaining the Bill's approach for joint applications, the amendments sought to maintain the status quo and deny any meaningful reform of the law. He said that this would "drive

136 HL Deb 3 March 2020 cc595-6
137 HL Deb 3 March 2020 c597
138 HL Deb 3 March 2020 c606
139 HL Deb 17 March 2020 cc1400-2

a coach and horses through the Government's measured and progressive Bill" and that the Government could not accept them:

> The law does not do what people think it does. It does not keep a party to a marriage in a relationship against their will. Marriage is a consensual union between two people. Unilateral divorce has been available under the current law for over 40 years. This Bill seeks to remove elements of the current law that can drive conflict. It does not and cannot make the painful decision to divorce any easier.[140]

Lord Farmer withdrew the amendment.

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.

The Explanatory Notes state that the amendments would be made for consistency of approach and terminology.[141]

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 marriage order can be made final. This will align the position with that relating to the nullity of civil partnerships.[142]

Clause 6 would also enable the Lord Chancellor, by statutory instrument made under the affirmative resolution procedure, to amend,

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[140] HL Deb 17 March 2020 cc1406-7
[141] Bill 404-EN paragraphs 66-67
[142] Bill 404-EN paragraph 15

repeal or revoke any primary legislation in force when the Bill is passed. 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:

> 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. [143]

Remaining clauses

Clause 7 deals with extent.

Clause 8 deals with commencement and transitional provision.

Clause 9 provides the short title of the Bill.

6.6 House of Lords debate on proposed new clauses

Committee stage

At Committee stage the House of Lords considered two proposed new clauses, both of which were withdrawn:

- Baroness Howe of Idlicote moved a new clause which would have allowed a party to a marriage who did not consent to divorce to have it on record. Lord Keen resisted the amendment.[144]
- Lord Farmer moved a new clause which would have required the Government to report on the impact on divorce applications and marriage support – effectively to track the trends following the legislation. Lord Keen of Elie pointed to statistics which were already publicly available and said that it would be unduly onerous to collect the other information in the proposed new clause.

Report stage

At Report stage, the House of Lords considered the following proposed new clauses:

Impact on marriage

Lord Harries of Pentregarth moved the following new clause (**Amendment 14)**: "Nothing in this Act changes the understanding of marriage as established by law." He said that this would reassure a lot

[143] Ministry of Justice, Divorce, Dissolution and Separation Bill Delegated Powers Memorandum, March 2020, paragraph 35
[144] HL Deb 3 March 2020 cc598-600

of people "who feel that this Bill undermines the traditional institution of marriage".[145]

Lord Keen said that the law provides only for how people enter into marriage, not what it is. He gave an assurance:

> As I stand at this Dispatch Box, I am more than happy to assure him that this Government believe that the vital institution of marriage is a strong symbol of wider society's desire to celebrate a mutual commitment and that it is one of the things that binds society together and makes families what they are. We support marriage for all these reasons, and I hope that reassurance will be sufficient to persuade the noble and right reverend Lord to consider withdrawing this amendment.[146]

Lord Harries withdrew the amendment.

Reporting requirements

Baroness Howe of Idlicote moved a new clause (**Amendment 15**) intended to require the Government to report on the effect on children of divorce or dissolution in families with low conflict. She said that the position of these children had not been fully considered:

> Much has been made in this House of the damage done to children by warring parents staying together…and I am sure that in those situations children are not surprised to find their parents choosing to divorce. However, I am concerned that both our parliamentary debate and general public discourse have been less informed of the fact that where there is no conflict between parents, divorce can be more harmful to their children than their staying together. Children can face a divorce that comes out of nowhere.[147]

Baroness Howe quoted from research that highlighted this issue and said that she wanted the Government to engage with it.

Lord Keen considered that terms in the amendment were not clear, nor was what it might achieve.[148]

Baroness Howe withdrew the amendment.

Lord Farmer spoke to his **Amendment 16** which was another attempt to require the Government to report annually on the impact of the Bill. He disagreed with the Minister's reasons for rejecting his similar amendment in Committee.[149]

Lord Keen reiterated that figures on the number of divorce applications, along with the gender of applicants, was already publicly available. He resisted the attempt to gather information about income, which he considered to be more appropriate to other applications.[150]

Lord McColl of Dulwich spoke to his probing **Amendment 17** which sought to require the Lord Chancellor to produce "a report drawing

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145 HL Deb 17 March 2020 cc1427-9
146 HL Deb 17 March 2020 c1428
147 HL Deb 17 March 2020 c1428
148 HL Deb 17 March 2020 c1437
149 HL Deb 17 March 2020 cc1430-1
150 HL Deb 17 March 2020 cc1437-8

from multiple peer reviewed academic sources comparing the scope for reconciliation under a fault-based divorce system with a no-fault based divorce system".[151]

Lord McColl pointed to multiple occasions when the Government had said that promoting reconciliation during divorce was part of the policy intention behind the reforms, and also to what he said were contradictory statements that reconciliation was not possible once the divorce process had started.

Lord McColl spoke of the research conducted on the information meetings proposed by the now repealed provisions in the Family Law Act 1996, which he said, indicated that potentially, between five and ten per cent of couples might reconcile. He considered that there was a need for further research:

> Given the huge public policy benefits of marriage to health and well-being, which I set out in my speech at Second Reading, the Government need to be on a very firm foundation indeed if they are to cast aside the significance of the shortfall between the number of divorces commenced and concluded, suggesting with great confidence that reconciliation is negligible once the divorce process has begun. I do not believe that one can argue that conclusively from the Nuffield or indeed the Newcastle report. Moreover, the statistics I have quoted from Nuffield are based on research which looks at couples who divorce under the current system. We do not know how couples will act under the new system. Law and prophecy are two separate subjects. Indeed, the Nuffield report was very helpful when it stated that under a system where one party is notified of the intention to divorce, as proposed by this Bill,
>
> "there is also the possibility that notification would be more facilitative of reconciliation."
>
> I see nothing in the present research to demonstrate authoritatively that we should not bother actively promoting reconciliation during the divorce process.

Lord Keen reiterated that evidence pointed to the prospect of reconciliation during the divorce process being very low. He also highlighted potential problems with the proposed reporting requirement:

> This amendment would result in a report which I suspect would satisfy no one. Some people may want to see evidence for whether more or fewer couples reconcile after our reforms are implemented, but that will mean waiting years for the report so that any longer-term trend can be assessed. Other people may want to see comparisons between the existing divorce processes internationally, but they differ from jurisdiction to jurisdiction, whether or not they are based on fault, and of course some jurisdictions have a hybrid process. The report envisaged in this amendment would not put an end to differing views about the evidence. I would also note that there is a difference between what is termed "scope for reconciliation"—that is, the theoretical possibility—and whether couples actually reconcile.[152]

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151 HL Deb 17 March 2020 cc1431-4
152 HL Deb 17 March 2020 c1438

7. 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 proposals.[153]

7.1 Christian Institute

When the Bill was first introduced in the House of Commons in June 2019, the Christian Institute's Director, Colin Hart, described it as "euthanasia for marriage". [154]

The Christian Institute also criticised the Bill when it was introduced in the House of Lords in December 2019:

> The Divorce, Dissolution and Separation Bill would further liberalise our law, which already allows far too many divorces. The most recent figures available show that there were over 100,000 divorces in 2017.
>
> Under the existing law, one of five 'facts' must be proven to show that a marriage has broken down irretrievably. These include matters of fault, like adultery. The five facts are set to be scrapped. Instead, the new system would allow someone to simply walk away from a marriage without having to give a reason and without their spouse being able to contest. This is often called 'no-fault' divorce.
>
> Under the plans, there would be a minimum legal period of just six months between the application for divorce and it being finalised, greatly reducing the opportunity for reconciliation.
>
> Divorce causes great damage to spouses, children and society. We already have it at epidemic levels. The Bill would make this worse and create enormous instability in marriage.
>
> Institute Director Colin Hart has said: "We are already seeing a deeply worrying shift in young people's attitudes, away from Christian marriage and lifelong commitment to your husband or wife. Forty-two percent of marriages already end in divorce but the Government is carrying on as if it wants it to be 100 per cent. Its approach to no-fault divorce is a marriage-wrecker's charter."[155]

7.2 Coalition for Marriage

The Coalition for Marriage[156] opposes the Government's proposals. Chairman, Colin Hart, commented:

> "The Government is right to think that this is a big shake-up of the divorce system, but it is not one most ordinary people will celebrate. Far from helping families to stick together, making separating easier and quicker will lead to more divorces, more broken families and makes a mockery of the Government's claims to be pro-family."

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153 All links accessed 3/4 June 2020
154 The Christian Institute News, Govt no-fault divorce plans 'euthanasia for marriage', 18 June 2019
155 The Christian Institute, No fault divorce
156 See section 3.7 of this briefing paper

> Mr Hart continued: "This Bill creates a conveyor belt to divorce which will be extremely difficult to jump off. There is certain to be a huge jump in the divorce rate."
>
> "Exactly as Fiona Bruce MP warned when she said this legislation promotes divorce on demand and could 'inhibit the dialogue that could promote reconciliation'.
>
> "We had hoped that after the Government's own consultation which saw more than four-in-five oppose no-fault divorce and we helped to expose the failure of the Ministry of Justice to include meaningful help to struggling couples, the Government might ditch this disastrous legislation, which is why we are doubly disappointed to see its return.
>
> "Lawyers are the only beneficiaries from these plans. Their work will be made much easier, and they'll be guaranteed to get many more divorce cases".
>
> "There is still time for the Government to withdraw the legislation and bring forward measures that will strengthen families, rather than rip them apart." [157]

7.3 Law Society

The Law Society has stated, "We welcome and support the Bill and have been vocal in our support of no-fault divorce".[158]

In March 2020, President, Simon Davis, reiterated the Law Society's position:

> Divorce can be a highly stressful experience and the current requirement to prove a fault-based fact or spend years still legally married often exacerbates tensions between couples.
>
> For separating parents, this can make it even more difficult to focus on the needs of their child and co-parent amicably.
>
> Introducing 'no fault' divorce will allow couples to separate as painlessly as possible – citing irretrievable breakdown as the sole reason for ending their marriage.
>
> The Law Society has long been in favour of reform. We very much welcome and support the Bill as a landmark step forwards for divorce law and are pleased to see the Bill reintroduced following the December 2019 election. [159]

Simon Davis went on to set out the areas of the Bill which the Law Society considered should be addressed, in each case with reasons:

- "in sole petitions, we believe the notice period should begin when the respondent receives notice"…;
- "Introducing a three-month reflection period at the beginning of proceedings – without any non-urgent financial discussions – would give couples enough time to consider their situation, attend mediation, seek the legal and financial advice they need or engage marriage counselling". Mr Davis added:

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157 Coalition for Marriage, Colin Hart speaks out on new No-Fault Divorce Bill, 10 January 2020

158 Law Society, Parliamentary briefing: Divorce, Dissolution and Separation Bill - House of Lords committee stage, 3 March 2020

159 Simon Davis, "Ending the 'blame game'", Law Society Gazette, 21 February 2020

> Where needed, urgent applications such as emergency protection applications, should of course be available. Likewise, if both parties agree to proceed immediately to a court application, then they should be able to waive this reflection period.

- "The current £550 court fees for divorce applications are too high – especially for those with lower incomes – and add an extra financial hurdle to what is already a costly process for many couples. The government's new online divorce system will cut the cost of administration for the courts and this should be reflected in more affordable court fees".
- "Finally, we also believe that in cases where there is disagreement over finances no final divorce order should be granted if there would be any prejudice to either party…".

7.4 Relate

Aidan Jones, Chief Executive at the relationship support charity Relate, welcomed the Bill introduced in the House of Commons in June 2019:

> "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."[160]

7.5 Resolution

In a briefing for the House of Lords ahead of Second Reading, Resolution set out why it is supporting the Bill:

- Resolution's 6,500 members are family lawyers, mediators and other family justice professionals, committed, through our Code of Practice, to a non-adversarial approach to family law and the resolution of family disputes.
- However, our members' work to reduce conflict in divorce is often impeded by the current law, which requires many of their clients to apportion blame, even if neither of them wishes to do so or it isn't actually the reason the marriage broke down.
- In a recent survey of Resolution members, 9 out of 10 agreed that the current law makes it harder for them to reduce conflict and confrontation between divorcing couples. In addition:
  - 67% said that the current law makes it harder for separating parents to reach an amicable agreement over arrangements for children.
  - 80% believe that the introduction of no-fault divorce would make it more likely that separating couples would reach an agreement out of court.

[160] Relate, Relate Response to the Divorce, Dissolution and Separation Bill, 13 June 2019

- On a daily basis, our members see the negative impact the current law has on separating families. That is why we have been campaigning for over 30 years for a change in the law, and why we are pleased to see the government introduce a bill, supported by all main parties, that will bring an end to the blame game.[161]

[161] Divorce, Dissolution and Separation Bill Second Reading: Briefing from Resolution, January 2020

8. 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.[162]

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.[163]

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.[164]

The shorter time periods for the Scottish separation-based grounds have proved to be significant in practice. Just 5% of divorces in Scotland take place on fault-based grounds.[165]

The Scottish Government's Civil Justice Statistics in Scotland 2018-19 notes the general downward trend in the number of divorces, with the

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162 Scottish Government, Future of civil partnership: consultation, 28 September 2018, paragraph 2.06
163 Scottish Government, Civil Justice Statistics in Scotland 2016-17, 28 August 2018, p24
164 Accessed 3 June 2020
165 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 3 June 2020]

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 7,300 in 2018 (Figure 10).[166] This decrease could be linked to the general downward trend in marriages across the same period as shown by the chart. 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 2018-19 was 7,379, 7% higher than in 2017-18 (6,869) (Table 9). In 2018-19, 61% of divorces granted used the simplified procedure. Thirty-five divorces were granted to same sex couples.
>
> There were 67 civil partnership dissolutions granted in 2018-19, slightly down from 70 in 2017-18 (Table 10). The vast majority of dissolutions granted in 2018-19 (93%) used the simplified procedure.[167]

166 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.

167 Scottish Government, Civil Justice Statistics in Scotland 2018-19, 7 April 2020, section 2.2.3, p23

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