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BRIEFING PAPER

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"No-fault divorce"

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England and Wales

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

Current basis for divorce

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

Owens v Owens

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

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

Family Law Act 1996 provisions for no-fault divorce: not implemented and now repealed

Part 2 of the Family Law Act 1996 would have introduced "no-fault divorce" and required the parties to a divorce to attend "information meetings" with a view to encouraging reconciliation where possible. In 2001, following a series of information meeting pilot schemes, the then Government concluded that the provisions were "unworkable". The relevant provisions in Part 2 have now been repealed.

Private Member's Bill

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

Previous calls for introduction of no-fault divorce

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

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

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

Arguments against no-fault divorce

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

Government consultation paper

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

Government response: legislation planned

On 9 April 2019, the Government published its response to the consultation.
David Gauke announced that legislation would be introduced, as soon as Parliamentary time allows, 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. 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.

In short, the Government proposes to:

- retain the ground for divorce, replacing the requirement to evidence conduct or separation facts with a requirement for a statement of irretrievable breakdown;
- provide for the option of a joint application;
- remove the opportunity to contest, (although there would be some legal grounds for challenging an application);
- introduce a minimum timeframe of six months, from petition stage to decree absolute; in exceptional circumstances, the court could allow a shorter period;
- retain the two-stage decree process – it would still be necessary to apply separately for the decree nisi and decree absolute;
- retain the bar on divorce and dissolution applications in the first year;
- modernise the language used within the divorce process.

Scotland

Part 7 of this briefing paper deals with the position in Scotland. Matters relating to marriage and civil partnership are devolved.

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

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

1. The current basis for divorce in England and Wales

1.1 Matrimonial Causes Act 1973

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

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

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.[1]

Further information about the facts

Online information includes:

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

1 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p14
2 Both links accessed 9 April 2019

1.2 Fault based petitions

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

Divorces by fact proven
England and Wales, 2017

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

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

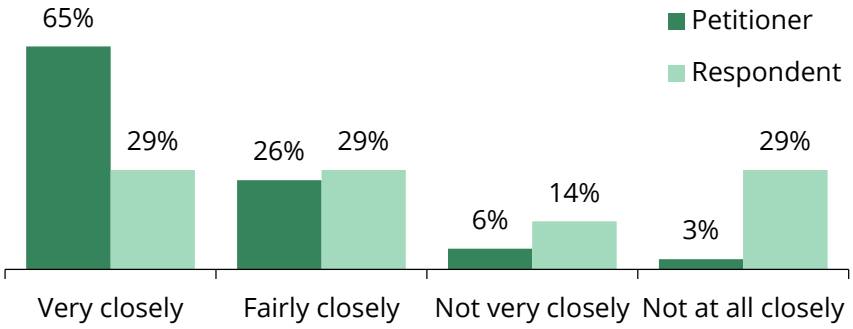
Notes: Includes divorce of same-sex couples, but excludes dissolution of civil partnerships. Also excludes divorces granted to both parties jointly and annulments.

As part of a national opinion poll conducted for a Nuffield Foundation funded research study, researchers asked those who had been involved in a fault-based divorce how closely the fact relied on by the petitioner matched the real reason for the divorce.[3] The report of the study, published in October 2017, includes these results:

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

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

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



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

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

Research carried out by YouGov for Resolution,[4] (formerly known as the Solicitors Family Law Association), published in June 2015, found that 27% of divorcing couples who asserted blame in their divorce petition admitted the allegation of fault was not true, but was the easiest option.[5]

1.3 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.[6]

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.[7]
>
> 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

4 Resolution describes itself as "an organisation of 6,500 family lawyers and other professionals in England and Wales, who believe in a constructive, non-confrontational approach to family law matters. Resolution also campaigns for improvements to the family justice system." Resolution, About us [accessed 9 April 2019]
5 Resolution News Release, MPs need to get behind no-fault divorce if they're serious about reducing family conflict, 3 December 2015 [accessed 9 April 2019]
6 Matrimonial Causes Act 1972 section 3
7 Matrimonial Causes Act 1972 section 1(3)

> 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 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.[8]

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.

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.[9] 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.

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8 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p15

9 Matrimonial Causes Act 1973 section 9

2. Owens v Owens: consideration of "behaviour" fact

2.1 Family Court: no divorce

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.[10] 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".

2.2 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.[11]

Lady Justice Hallett regretted that the decision would leave the wife "in a very unhappy situation".[12]

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

> The simple fact, to speak plainly, is that in this respect the law which the judges have to apply and the procedures which they have to follow are based on hypocrisy and lack of intellectual honesty. The simple fact is that we have, and have for many years had, divorce by consent, not merely in accordance with section 1(2)(d) of the 1969 Act but, for those unwilling or unable to wait for two years, by means of a consensual, collusive, manipulation of section 1(2)(b). It is ironic that collusion, which until the doctrine was abolished by section 9 of the 1969 Act was a bar to a decree, is now the very foundation of countless petitions and decrees.[13]

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

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10 Owens v Owens [2017] EWCA Civ 182, paragraph 1
11 Ibid, paragraph 99
12 Ibid, paragraph 102
13 Owens v Owens [2017] EWCA Civ 182 paragraph 94

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" [14]

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 [15]

2.3 Supreme Court: further appeal dismissed

In July 2018, the Supreme Court dismissed a further appeal by Mrs Owens, meaning that she must remain married to Mr Owens for the time being. [16]

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 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. [17]

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

> Parliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances. [18]

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14 Ibid, paragraph 96
15 Ibid, paragraph 99
16 Owens v Owens [2018] UKSC 41
17 Ibid, paragraph 28
18 Ibid paragraph 45

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".[19]

[19] Ibid paragraph 46

3. Family Law Act 1996 Part 2

Summary

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

Part 2 of the Family Law Act 1996 would have introduced "no-fault divorce" and required the parties to a divorce to attend "information meetings" with a view to encouraging reconciliation where possible.

In 2001, following a series of information meeting pilot schemes, the then Government concluded that the provisions were "unworkable".

The relevant provisions in Part 2 have now been repealed.

3.1 Law Commission recommendations

In 1990, the Law Commission published a report, Family Law The Ground for Divorce, which set out a number of problems with the law and practice at that time.[20]

The Law Commission recommended that:

- irretrievable breakdown of the marriage should remain the sole ground for divorce; and
- that such breakdown should be established by the expiry of a minimum period of one year for consideration of the practical consequences which would result from a divorce and reflection upon whether the breakdown in the marital relationship is irreparable.[21]

3.2 Provision for "no-fault divorce"

Part 2 of the Family Law Act 1996 (FLA) included provisions to allow a form of "no-fault divorce". The provisions "were aimed at reducing the bitterness of divorce and the damaging impact on all involved in divorce".[22]

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

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

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

20 Law Com 192
21 Ibid, p20
22 Bill 131-EN 2012-13 paragraph 140

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

> The Family Law Bill was introduced in November 1995. The Bill did not have an easy passage through Parliament, in part because of the lack of enthusiasm of many (and opposition on the part of some) of the Government's own supporters.[23] In order to save the Bill from defeat, the Government had to accept many amendments.[24] The result was that what had been an essentially simple and elegant legislative scheme became exceedingly complex.[25] 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.[26]

3.3 Pilot schemes

A series of information meeting pilot schemes was launched in June 1997. Six models of information meeting were piloted, and the programme was completed in 1999. In June 1999, Lord Irvine of Lairg, who was then Lord Chancellor, confirmed that preliminary results of the pilot schemes were disappointing in view of the then Government's objectives of saving saveable marriages and encouraging the mediated settlement of disputes. He said that the Government would await the final evaluation report before deciding what to do next.[27]

The Final Evaluation Report was presented to the Lord Chancellor by the Newcastle Centre for Family Studies in September 2000.[28] In the light of the problems which had been identified, in January 2001, Lord Irvine announced that the Government would invite Parliament to repeal the relevant sections of Part 2 once a suitable legislative opportunity occurred.[29] 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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23 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"

24 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."

25 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."

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

27 HL Deb 17 June 1999 c39WA

28 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

29 HL Deb 16 January 2001 cc126-7WA

3.4 Repeal of Family Law Act 1996 Part 2

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

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

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

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

> The decision to repeal Part 2 was made in principle long ago on the basis of extensive academic research by the University of Newcastle. The research looked at six models of information meeting that a party to a marriage would have been required to attend as the key first step in initiating a divorce. Part 2 is built around that initial mandatory information meeting. The research concluded that none of the six models of information meeting tested was good enough for implementation nationally. For most people, the meetings came too late to save marriages and tended to cause parties who were uncertain about their marriages to be more inclined towards divorce. While people valued the provision of information, the meetings were too inflexible, providing general information about both marriage-saving and the divorce process. People wanted information tailored to their individual circumstances and needs. In addition, in the majority of cases, only the person petitioning for divorce attended the meeting. Marriage counselling and conciliatory divorce all depend on the willing involvement of both parties.[30]

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".[31]

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30 HL Deb 23 October 2013 cc365-6GC

31 Draft legislation on Family Justice Explanatory Notes, p46

4. Calls for the introduction of no-fault divorce

Summary

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

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

In July 2018, Baroness Butler-Sloss (Crossbench) introduced a Lords Private Member's Bill, which would require the Lord Chancellor to review the law relating to divorce and judicial separation and to the dissolution of civil partnerships and the separation of civil partners. The review would include consideration of whether the law ought to be changed so that irretrievable breakdown of a marriage or civil partnership is evidenced solely by a system of application and notification. Previously, in 2015, Richard Bacon introduced a Ten Minute Rule Bill which aimed to allow no-fault divorce. That Bill did not proceed any further.

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

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

In recent years, some senior members of the Judiciary have called for the introduction of no-fault divorce including the late Sir Nicholas Wall, then President of the Family Division;[32] Sir James Munby, then President of the Family Division;[33] Baroness Hale of Richmond, now President of the Supreme Court;[34] and Supreme Court judge, Lord Wilson of Culworth.[35]

32 Sir Nicholas Wall, President of the Family Division, Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012 [accessed 9 April 2019]

33 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 9 April 2019]

34 Martin Bentham, "Top judge calls for rules which force women to take off veils when giving evidence in court", Evening Standard, 12 December 2014 [accessed 9 April 2019] Frances Gibb, "Judge calls for divorce overhaul to take blame out of break-ups", Times, 9 April 2015 (registration required) and Owen Bowcott, "UK's new supreme court chief calls for clarity on ECJ after Brexit", Guardian, 5 October 2017 [accessed 9 April 2019]

35 Stowe Family Law LLP, Supreme Court Justice 'disappointed' at lack of no fault divorce, 27 February 2017 [accessed 9 April 2019] 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 [accessed 9 April 2019]

4.2 Research study

In October 2017, the Nuffield Foundation published the report of a research project led by Professor Liz Trinder of Exeter University, Finding Fault? Divorce Law and Practice in England and Wales,[36] together with associated documents.[37] The aim of the research was to inform debate about whether and how the law might be reformed.

The Nuffield Foundation provides this summary:

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

[36] 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

[37] Nuffield Foundation, Finding Fault? Divorce Law in Practice in England and Wales [accessed 9 April 2019]

> 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.[38]

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

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

> In reality, we already have divorce by consent or even (given the extreme difficulty and impracticality of defending a case) 'on demand', but masked by an often painful, and sometimes destructive, legal ritual of fault with no obvious benefits for the parties or the state. There is no evidence from this study that the current law protects marriage. The divorce process is currently being digitised. This is a timely opportunity for long overdue law reform so that divorce is based solely on irretrievable breakdown after notification by one or both spouses.[39]

4.3 Lords Private Member's Bill

In July 2018, Baroness Butler-Sloss (Crossbench) introduced a Lords Private Member's Bill, Divorce (etc.) Law Review Bill [HL] 2017-19 (the Bill).[40] Explanatory Notes have also been published.[41] No date has been announced yet for Second Reading.

The Bill would require the Lord Chancellor to review the law relating to divorce and judicial separation and to the dissolution of civil partnerships and the separation of civil partners. The review would include consideration of whether the law ought to be changed so that irretrievable breakdown of a marriage or civil partnership is evidenced solely by a system of application and notification.[42]

On 6 September 2018 (before the Government's consultation paper was published[43]), the subject of the Bill was raised in the context of Lords oral questions on divorce law:

> Baroness Anelay of St Johns (Conservative):
>
> … Surely, the recent case of Owens v Owens has shown clearly that our divorce law is not working; it is not up to standard. It encourages people to enter into a blame game and therefore increases acrimony within the family. Can I press my noble friend a little further? Can she now confirm, as reported in the press, that Justice Ministers want to work with the noble and learned

38 Ibid
39 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
40 HL Bill 126
41 HL Bill 126-EN
42 HL Bill 126-EN, paragraph 1
43 See section 6 of this briefing paper

> Baroness, Lady Butler-Sloss, on her Private Member's Bill, to take forward divorce law reform?
>
> Baroness Vere of Norbiton (Conservative):
>
> The case of Owens v Owens in the Supreme Court this summer is not typical. Only 2% of respondents contest the divorce and only a handful of those do so in a contested court hearing. However, we have noted the judgment and, as importantly, the comments of Lord Justice Munby that change is needed. My right honourable friend the Lord Chancellor is sympathetic to the argument for reform and appreciates the positive changes being put forward by the noble and learned Baroness, Lady Butler-Sloss, in her Private Member's Bill. We look forward to working with her.[44]

4.4 Previous Commons Private Member's Bill

In October 2015, Richard Bacon (Conservative) introduced the No Fault Divorce Bill 2015-16 under the Ten Minute Rule.[45] 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.[46]

Mr Bacon said that he did not intend to make it easier or quicker to get a divorce. He considered the current position to be contradictory:

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

The Bill did not make any further progress.

4.5 Labour Party Manifesto 2017

The Labour Party Manifesto 2017 included a commitment to introduce a no-fault divorce procedure.[47]

4.6 "Family Matters" campaign in The Times

The Times is running a campaign, "Family Matters" and is calling for the modernisation of family law, including the introduction of no-fault divorce.[48]

In an editorial published on 17 November 2017, the Times said that it was joining the charity, Marriage Foundation [founded by former family High Court judge, Sir Paul Coleridge], senior judges and leading family law experts to campaign for the urgent reform of divorce laws.[49]

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44 HL Deb 6 September 2018 c1894
45 HC Deb 13 October 2015 cc189-94
46 HC Deb 13 October 2015 c191
47 Labour Party Manifesto 2017, p81
48 Frances Gibb, "Urgent call for new divorce laws", The Times, 17 November 2017 (subscription required)
49 "Modern Marriage", The Times, 17 November 2017 (subscription required)

4.7 Resolution campaign

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

> This often creates conflict and makes reaching a mutually acceptable agreement much more difficult.
>
> Removing blame from divorce will not make it more likely that people will separate. It will simply make it easier for people to manage their separation with as little conflict and stress as possible and reduce the likelihood that they will end up in court.
>
> In 2012, there were over 72,000 divorces where adultery or unreasonable behaviour were cited. People should not have to go through this blame charade to bring their relationship to a dignified conclusion and move on with their lives. A civilised society deserves a civilised divorce process.[50]

Resolution proposed a new divorce procedure, where one or both partners could give notice that the marriage had broken down irretrievably. The organisation considers that this approach would have advantages:

> Divorce without blame will increase the chances of success for non-court dispute resolution processes as it immediately puts both partners on a level footing. This will reduce the burden on the family court and help government to meet their aim for more people to resolve their problems outside of the courts.[51]

In a briefing sent to MPs ahead of a proposed Second Reading of Richard Bacon's No Fault Divorce Bill, (which did not go ahead), Resolution disagreed with the reservations expressed at First Reading about the effect any change in the law might have on the divorce rate:

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

50 Resolution, Allow people to divorce without blame [accessed 9 April 2019]
51 Ibid

divorce process which saves saveable marriages, it is the information and support available.[52]

4.8 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.[53]

[52] 4 December 2015
[53] Ministry of Justice, Report of the Family Mediation Task Force, June 2014, paragraphs 35 and 36

5. Arguments against the introduction of no-fault divorce

Summary

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

5.1 Private Member's Bill debate

Although he did not attempt to vote down Richard Bacon's No Fault Divorce Bill 2015-16 on First Reading, Sir Edward Leigh (Conservative) expressed reservations about the introduction of no-fault divorce. He said "Of course I would like to make the moral case for marriage and for a lifelong commitment to children", but pointed to evidence from other countries which, he said, showed the wider consequences such legislation might have.[54]

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

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

> A study in the US argued that 75% of low-income divorced women with children had not been poor when they were married, but Douglas Allen also points out in the Harvard Journal of Law & Public Policy that
>
> "the real negative impact of the no-fault divorce regime was on children, and increasing the divorce rate meant increasing numbers of disadvantaged children."

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

Sir Edward considered that the potential adverse consequences of no-fault divorce should rule out its introduction.[55]

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54 HC Deb 13 October 2015 c192-4
55 HC Deb 13 October 2015 cc192-4

5.2 Coalition for Marriage

The Coalition for Marriage describes itself as follows:

> The Coalition for Marriage is an umbrella group of individuals and organisations in the UK that support traditional marriage and opposed its redefinition.
>
> Our supporters believe that marriage is between a man and a woman, to the exclusion of all others and for life…
>
> 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.[56]

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?[57]

5.3 Baroness Deech: reform financial provision law

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

Baroness Deech 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

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56 Coalition for Marriage, Our Mission [accessed 9 April 2019]
57 Coalition for Marriage, Five reasons why 'no-fault divorce' would be a disaster for marriage, 22 November 2017 [accessed 9 April 2019]

> 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.[58]

[58] Lords of the Blog, No Fault Divorce by Baroness Deech, 22 September 2017 [accessed 9 April 2019]

6. 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.[59]

In his Ministerial Foreword, David Gauke, Lord Chancellor and Secretary of State for Justice, referred specifically to the Owens case,[60] and said that it had generated broader questions about what the law requires of people going through divorce and what it achieves in practice.

6.1 Overview

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

> The breakdown of a marriage is a difficult time for families. The decision to divorce is often a very painful one. Where children are involved, the effects in particular where there is ongoing conflict, can be profound.
>
> Under current law in England and Wales, couples must either live apart for a substantial period of time before they may divorce, or else they must make allegations about their spouse's conduct. This is sometimes perceived as showing that the other spouse is "at fault".
>
> Both routes can cause further stress and upset for the divorcing couple, to the detriment of outcomes for them and any children. There have been wide calls to reform the law to address these concerns, often framed as removing the concept of "fault".
>
> The government therefore proposes to reform the legal requirements for divorce so that it is consistent with the approach taken in other areas of family law, and to shift the focus from blame and recrimination to support adults better to focus on making arrangements for their own futures and for their children's. The reformed law should have 2 objectives:
>
> - to make sure that the decision to divorce continues to be a considered one, and that spouses have an opportunity to change course
> - 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

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59 The consultation paper also deals with judicial separation during a marriage and to the equivalent processes of dissolution and separation orders for civil partnerships

60 See section 2 of this briefing paper

> irretrievably. This adjustment includes removing the ability to allege "fault".[61]

6.2 Consultation paper

The consultation paper set out problems associated with the present law,[62] and how the current law works against agreement and reconciliation.[63] It noted that, because petitioners might not know how much evidence would be sufficient to prove the particulars of the fact 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.[64]

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

The consultation paper set out the policy objective of the Government's proposals 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.[65]

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, [66] and there would still be a minimum timeframe for divorce.[67]

The Government believes that its reform proposals would make divorce law consistent with the principles of the wider law relating to family difficulties, and with the approach many family law practitioners take with their clients.[68]

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

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61 Gov.UK from the Ministry of Justice, Reform of the legal requirements for divorce, 15 September 2018 [accessed 9 April 2019]
62 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p5
63 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p20
64 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p20
65 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p29
66 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p26
67 Ibid
68 Ministry of Justice, Reducing family conflict Reform of the legal requirements for divorce, September 2018, p24

7. Government response

On 9 April 2019, the Government published its response to the consultation.[69] There had been 3,372 responses to the consultation.

7.1 Written Ministerial Statement

In a written Ministerial Statement on the same day, David Gauke announced that legislation would be introduced to change the law by removing the legal requirement to make allegations about spousal conduct or to have lived separately for up to five years.[70] The legislation would be introduced as soon as Parliamentary time allows.

David Gauke said that the Government would continue to support marriage:

> Families are the bedrock of society, and marriage has long proved its vital importance to family stability. The Government will always support marriage, and we want to ensure that the system as far as possible supports couples to remain married. In revising the legal process for divorce, we have also sought to maximise the opportunity for couples to reconcile if they can, by introducing a minimum period before the court grants the decree of divorce. Divorce should continue to be a considered decision.

The Lord Chancellor said 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.

7.2 Response document

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

> The Government's key policy objectives are to ensure that the decision to divorce is a considered one, with sufficient opportunity for reconciliation, and to reduce family conflict where divorce is inevitable. Our reform principles are to make divorce law consistent with the non-confrontational approach taken in wider family law and to recognise that a legal process that does not

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

70 HCWS1501 [on Divorce law reform], 9 Apr 2019

> introduce or aggravate conflict will better support adults to take responsibility for their own futures and, most importantly, for their children's futures.
>
> The current divorce law works against these principles. It incentivises an adversarial process which can undermine efforts to reconcile and which can fuel conflict when making arrangements for dividing assets or for the future care of any children.[71]

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

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

- Retaining the ground for divorce and dissolution, and replacing the requirement to evidence conduct or separation facts with a requirement for a statement of irretrievable breakdown:

  > We will retain the irretrievable breakdown of a marriage or civil partnership as the sole ground on which a divorce or dissolution may be granted. We propose that the legal process for divorce or dissolution should start with a statement of irretrievable breakdown, which will be provided to the court, and that the process for judicial separation should begin with a statement that this is sought. We are clear that the decision to grant a divorce remains a legal decision for the court to make, as divorce creates a fundamental change of legal status that alters people's rights and responsibilities. Where legal safeguards are met, we believe that this statement should be sufficient to satisfy the legal threshold for obtaining a divorce or dissolution.

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

  > This will be made up of a new minimum period of twenty weeks (between petition and decree nisi stages) and the existing minimum period of six weeks (from decree nisi to decree absolute). 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

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

> 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.

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

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

- Retaining the bar on divorce and dissolution applications in the first year, without exception.
- Modernising language used within the divorce process.[72]

Parallel changes will be made to the law governing the dissolution of a civil partnership which broadly mirrors the legal process for obtaining a divorce.[73]

7.3 Early reaction to Government's response

Early reaction to the Government's response includes the following:

Relate

Aidan Jones OBE, Chief Executive at relationship support charity, Relate, said:

> "This much-needed change to the law is good news for divorcing couples and particularly for any children involved. The outdated fault-based divorce system led parting couples to apportion blame, often resulting in increased animosity and making it harder for ex-partners to develop positive relationships as co-parents.
>
> "As a large body of evidence shows, parental conflict is damaging to children's wellbeing and chances in life, whether the parents are together or separated. It's good that the government has listened and taken action on this, demonstrating commitment to reducing parental conflict.
>
> "While divorce isn't a decision that people tend to take lightly, we do support the extension of the minimum timeframe which will allow more time to reflect, give things another go if appropriate, and access support such as relationship counselling or mediation."[74]

Resolution

Resolution[75] welcomed the Government's announcement of a new law to remove the need for divorcing couples to assign blame:

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72 Ibid, pp6-7
73 Gov.UK, Press release from the Ministry of Justice, New divorce law to end the blame game, 9 April 2019 [accessed 9 April 2019]
74 Gov.UK, Press release from the Ministry of Justice, New divorce law to end the blame game, 9 April 2019 [accessed 9 April 2019]
75 See section 1.2 of this briefing paper

> Resolution has been calling for change for over thirty years. Its former Chair and long-time campaigner for no fault divorce, Nigel Shepherd, said:
>
> "We welcome these proposals, which almost entirely reflect Resolution's response to the consultation, and we're pleased the government has listened to calls from our members and others to introduce these changes.
>
> "As someone who's campaigned on this issue throughout my career, I'm delighted that today we are a step closer to reforming our outdated divorce laws.
>
> "Resolution members will always try to help couples deal with the consequences of relationship breakdown with as little acrimony as possible, but the current divorce law makes this so much more difficult. With this new legislation, finally our divorce laws will be brought up to date – helping divorcing couples and, most importantly, any children they may have, avoid unnecessary conflict."[76]

Law Society

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

> "Divorce can be a highly stressful experience and the requirement for those divorcing in England and Wales to prove one of five fault-based reasons exacerbates tensions between separating couples.
>
> "For separating parents, it can be much more difficult to focus on the needs of their children when they have to prove a fault-based fact against their former partner.
>
> "Forcing couples to wait two years - or five years if they cannot agree on the terms of separation - only lengthens the divorce process and makes it all the more difficult for couples to move on amicably and co-parent.
>
> "Introducing a 'no fault' divorce and introducing a six-month time-frame allowing couples to reflect on their decision will change the way divorce works – for the better."[77]

Coalition for Marriage

The Coalition for Marriage[78] opposes the Government's proposals. Its Chairman, Colin Hart, said:

> "The Government is setting out to destroy the foundations of marriage by allowing cheating or bored spouses to walk away from a solemn, lifelong commitment whenever they choose and with the full support, and even encouragement, of the state.
>
> "It's all very well for the Minister to claim that he will always uphold the institution of marriage but marriage is being turned into an agreement with less security than a tenancy contract. This

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76 Resolution, Resolution welcomes move towards ending divorce 'blame game', 9 April 2019 [accessed 9 April 2019]

77 Law Society, 'No fault' reform brings divorce law into the 21st century, 9 April 2019 [accessed 9 April 2019]

78 See section 5.2 of this briefing paper

is not what people want. If it was they would not commit 'until death them do part'.

"It abandons the principle of the state supporting those who take personal responsibility. No-fault divorce could see a person divorced, have their access to their children ended, their assets divided and themselves removed from their home by court order, all despite being faithful to their marriage vows.

"What is particular concerning is the Government's own impact assessment conceded that these changes will lead to a spike in the number of divorces and broken families. Based on previous reforms, this spike is likely to become the new normal.

"Children do better in married households, even when there is conflict. It will be highly detrimental to outcomes for children to encourage more couples to end their marriages.

"The Minister's response to insert a cooling off period is wholly inadequate.

"Under our well established current system thousands of couples start legal proceedings, but don't go through with them. Some of these will be reconciliations. The marriage is given another chance. Most people know those who have been through very rocky patches in their marriage but stayed together.

"It is concerning that advocates of no-fault divorce are so dismissive of the possibility of reconciliation. The in-built delay allows calm reflection and for one or both sides to pull back from the brink. A more hurried divorce process makes reconciliation less likely. No amount of convenience to the legal system could possibly justify this.

"Rather than scrapping this, we should be adding in additional support, such as counselling to help more couples to stick together…[79]

[79] Coalition for Marriage, No-fault divorce is a "cheaters' charter" which will damage marriage, warns C4M, 9 April 2019 [accessed 9 April 2019]

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.[80]

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 doesn't agree to the divorce.
- Either party being issued with an interim gender recognition certificate.[81]

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.[82]

The shorter time periods for the Scottish separation-based grounds have proved to be significant in practice. Just 5% of divorces in Scotland now take place on fault-based grounds.[83]

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80 Scottish Government, Future of civil partnership: consultation, 28 September 2018, paragraph 2.06
81 Scottish Government, Civil Justice Statistics in Scotland 2016-17, 28 August 2018, p24
82 Accessed 9 April 2019
83 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 9 April 2019]

The Scottish Government's Civil Justice Statistics in Scotland 2016-17 notes the general downward trend in the number of divorces, with the year in which the separation periods were reduced being an exception. The commentary also notes the prevalence of the simplified procedure:

> The number of divorces has been slowly decreasing from around 13,400 in 1985 to 8,500 in 2016 (Figure 8).[84] 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 2016-17 was 7,938, 11% less than in 2015-16 (8,875) (Table 9). In 2016-17, 61% of divorces granted used the simplified procedure.[85]

In the 2015-16 Parliamentary session, the then Scottish Parliament Justice Committee reviewed the Family Law (Scotland) Act 2006 in a brief inquiry. Divorce was not one of the areas on which the Committee focused. Written responses from stakeholders did not highlight this as an area of particular controversy (relative to other topics).[86] All the written submissions from stakeholders are publicly available on the Scottish Parliament website.[87]

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84 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"

85 Scottish Government, Civil Justice Statistics in Scotland 2016-17, 28 August 2018, p25

86 Personal communication from SPICe, 12 October 2016

87 Scottish Parliament, Family Law (Scotland) Act 2006 [accessed 9 April 2019]

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