Nuffield Foundation
UNIVERSITY OF EXETER
BRIEFING NOTE
June 2019

Divorce, Dissolution and Separation Bill: What does research tell us?

Finding Fault is the first empirical study since the 1980s of how the divorce law in England and Wales is operating. This briefing summarises evidence from the *Finding Fault* study as it relates to proposals set out in the Divorce, Dissolution, and Separation Bill, including the reasons for reform and the likely impact.

The *Finding Fault* study was led by Professor Liz Trinder (Exeter University), the author of this briefing, and funded by the Nuffield Foundation. The study included interviews with people going through divorce, focus groups with lawyers, observation of the court scrutiny process and analysis of divorce court files, coupled with a national opinion poll and comparative analysis of divorce law in other countries.

OVERVIEW

- The Bill represents a pragmatic reform that reflects evidence from the *Finding Fault* study. The reform will remove the problematic elements of an archaic law and introduce a more transparent, fairer and less harmful process for families undergoing a difficult transition.
- The majority of divorce petitioners rely on the fault grounds of adultery or unreasonable behaviour to avoid a wait of at least two years, if the other party consents to the divorce, or five years if they do not.
- The divorce law, particularly the use of fault, has been subject to sustained criticism for decades, with three main problems:
  - Fault creates or fuels conflict which can have a negative impact on children and undermines a modern, problem-solving family justice policy that seeks to minimise the consequences of family breakdown for adults and children.
  - The hypocrisy of the system, with fault becoming little more than an empty legal ritual where petitioners assemble a suitable petition which the court can only rubber stamp.
  - The court's inability to test allegations can seem procedurally unfair to respondents who dispute the allegations but cannot afford to defend them.
- The Bill proposes to retain irretrievable breakdown as the sole ground for divorce and dissolution, but to change how it is evidenced. The proposal to replace the current facts (adultery, behaviour etc) with a declaration and a minimum six-month waiting period is entirely consistent with the research evidence and has been widely welcomed by experts.
- The Bill will also remove the right to defend the divorce if all other legal and procedural requirements are met.
- Concerns that the removal of fault will undermine marriage and prevent reconciliation are not consistent with the research evidence or international experience.
- Defence is already very rare and mostly triggered by anger about behaviour allegations which will not be relevant if the reforms are enacted. Defence can also be used as a means to perpetuate coercive control over individuals and/or family finances.

WHAT IS BEING PROPOSED?

Currently, the sole ground for divorce or dissolution is the irretrievable breakdown of the marriage or civil partnership. That irretrievable breakdown has to be shown by reference to a legal 'fact': adultery (for marriage only), behaviour, desertion, two year's separation with consent or five year's separation. The Bill would retain irretrievable breakdown as the sole ground, removing all reference to the legal facts (adultery, behaviour etc). Instead, one or both parties would be required to file a statement of irretrievable breakdown. That statement would then be confirmed after a minimum waiting period of six months. Providing that all the procedural requirements are met, it would no longer be possible to object to the divorce or dissolution.

WHY IS REFORM NEEDED?

The current divorce law - which is now nearly 50 years old - has been subject to criticism for decades. Parliament accepted the case for reform by enacting the Family Law Act 1996. The Act was never implemented. The *Finding Fault* research showed clearly that the major problems identified by research in the 1970s, 1980s and 1990s have not been resolved by the passage of time. We highlight here just three of the most serious problems with the current law: gaming of the system, conflict and unfairness.

Problem 1. Gaming of the system

For decades, petitioners have had to resort to using the fault facts to secure a divorce within a reasonable period. The alternative is to wait at least two years for a no-fault separation divorce or five years if the respondent does not consent.

The result is that nearly 60% of English and Welsh divorces are granted on a fault fact (adultery or behaviour), ten times more than neighbouring France and Scotland. Those national discrepancies cannot reflect actual marital behaviour. Instead it is an indication that fault is used instrumentally as the law effectively incentivises people to game the system to secure a divorce within a reasonable time frame.

Fact proven in sole party divorces (2016)	Percentage of divorces
Adultery	11%
Behaviour	45%
Adultery & behaviour	1%
Desertion	1%
Two-year separation with consent	27%
Five-year separation	15%

Source: Office for National Statistics

The production of behaviour petitions to secure a divorce has become fairly ritualised. As this lawyer explains: *"It's a farce, because you're just saying [to the client] 'All we have to do is get a form of words. As long as you're not telling any lies, we'll get it through' … You cobble up some words which will do the business". (Lawyer focus group)*

Our research found that the stretching of the truth was not confined to behaviour petitions. Adultery could be falsely claimed and admitted. Dates of separation could also be massaged to shorten wait times in two and five-year separation cases. Further, the fact used does not have to be the cause of the separation - 43% of respondents to a fault divorce in the *Finding Fault* survey reported that the fact used was not closely related to the 'real' reason for the separation.

The court has a duty to inquire into facts alleged, but in practice, the court has only an average 3-4 minutes to scrutinise each file. The possibility of refusal is minimal, despite often limited, implausible or boilerplate allegations. Only three of 300 undefended petitions were refused on legal grounds in the *Finding Fault* sample, and then only because the three petitioners had serious English language problems.

Problem 2. Creating and exacerbating conflict

Fault often fuels conflict and bad feeling between the parties, including where children are involved. The *Finding Fault* survey found 62% of petitioners and 78% of respondents to a fault-based divorce reported that fault had made their divorce more bitter. This runs counter to wider family law policy, where parents are encouraged to work together collaboratively in the interests of their children and to shield them from harmful parental conflict.

To work around the existing law, Resolution and the Law Society have a code of practice to try to limit the damage caused by fault. Whilst welcome, the *Finding Fault* research showed the limits of those harm-minimisation strategies, even where relationships were previously good:
"Having to come up with reasons [where] someone [is] already hurting - you've got to hurt them more to be able to fill the paperwork in – doesn't make you feel great, it doesn't make them feel great, and is already a very stressful time in your life". (Petitioner husband)

The petition could also be an opportunity to lash out to the detriment of future relationships. The irony is that once allegations have been made to start the divorce process, those allegations will have no bearing on sorting out finances or child arrangements and the parties will be encouraged to look to the future.

However, once conflict and emotion has been heightened, interviewees reported that it could be very difficult to switch it off again with long-term consequences.

"What my husband decided to write was that I was 'emotionally abusive'. That was a hurtful thing to read and that will have an effect on our relationship which will [not] benefit the children" (Respondent wife).

Problem 3. Unfairness to the respondent

The majority of divorces involve allegations of fault, but the court has no ability to test allegations. The upside is that amicable divorces can get

through quickly. The downside is that it can feel very unfair to the respondent where the court accepts behaviour allegations at face value. Defence is prohibitively expensive, procedurally complex and unlikely to succeed, with the *Owens* case the only known recent exception. Not surprisingly, defence is very rare – we estimated less than two in every 10,000 cases proceed to a full trial. The only option for a respondent is to record that they do not accept the allegations, but the court will still grant the decree. The acceptance of untested allegations and the lack of an effective or accessible remedy is procedurally unfair, as this respondent interviewee argued forcefully:

"[The petition] doesn't need to be true, it doesn't need to be fair, it doesn't need to be just, it doesn't need to be anything that stands up to rigour… it serves no purpose other than to in my case cause upset and I would much prefer that she actually be forced to substantiate the claims rather than just wildly vomit bile onto a page and click submit."

WHAT DOES THE RESEARCH TELL US ABOUT THE IMPACT OF THE REFORM?

There are always a range of questions and concerns about the likely impact of any reform. This is particularly the case for marriage given its fundamental role in society. The research evidence does provide some clear answers to a range of concerns that have been raised.

Will a change in the law increase the rate of family breakdown?

No. There is a clear distinction between a relationship ending and any subsequent legal divorce. Marriages break down because of problems in the relationship, not because of what the law says about how the grounds for divorce are proved. The *Finding Fault* interviewees reported knowing little about the grounds for divorce until they became relevant only after the marriage had broken down.

The consensus from a large body of international research is that there is no long-term link between fault-based law and divorce rates. The removal of fault does not increase divorce rates overall. To illustrate, Scotland has only a tenth of the fault-based divorces found in England & Wales, but an identical divorce rate. It is possible that any reform will produce a *temporary* spike in divorce as those waiting out a two- and five-year separation period bring their legal divorce forward. The likelihood is that the divorce rate will then revert back to normal, just as happened in Scotland following reforms in 2006. To be clear, the rate of family breakdown is unlikely to change.

Will this make divorce too 'easy'?

It is a myth that fault makes divorce 'hard' to obtain. On the contrary, the research has shown that fault is used so often in England & Wales precisely because it is the means to get a faster and 'easy' divorce. A behaviour divorce can take just three or four months, sprung on the respondent with no notice and based on allegations cut and pasted from the internet that the court cannot test.

Does not having to give 'a reason' for the divorce treat marriage as disposable?

Divorce and dissolution will still require the same ground or reason as before – irretrievable breakdown. The only difference will be how irretrievable breakdown is evidenced. As the research has shown, making allegations of fault has become a largely empty legal ritual.

It is also a myth that people treat marriage and divorce casually. The *Finding Fault* study confirmed previous research that people take marriage very seriously, with the decision to split up being painful, difficult and usually very protracted. There was no evidence that having to set out allegations of fault did anything to save marriages, encourage reconciliation or to strengthen the institution of marriage more generally.

Is the proposed six-month period too short to allow parties to reconcile?

The evidence shows that most people have thought long and hard before proceeding with a divorce and so reconciliation is uncommon. This was tested with the Family Law Act 1996 Information Meeting Pilots. Few couples reconciled having been given information about divorce. The lead researcher, Professor Janet Walker noted that internationally "There is a general consensus that saving marriages at the point of divorce is not particularly effective". A long waiting period would not mean more attempted reconciliations, just longer before the parties can finalise their finances and arrangements for their children and move forward.

It has been argued that up to 10% of petitioners each year abandon the divorce due to reconciliation. Whilst the official statistics show consistently that 10% of petitions issued each year do not reach decree absolute, it is a mistake to confuse non-completion with reconciliation. In the nationally representative court file analysis for the *Finding Fault* study, only one of 300 cases ended with an (attempted) reconciliation. The other non-completions in the study occurred for a wide range of reasons, including petitioners giving up as the process was too technically complex, reissue under a different file number, death and delay for finances etc.

The average length of divorce proceedings is currently six months. A six-month minimum period would therefore mirror current practice. A longer period would be punitive for those who do need to divorce quickly. This would include those experiencing domestic abuse, with 15% of *Finding Fault* petitioners citing physical violence. It would also include those already separated, sometimes for years before initiating the legal divorce.

Further, in contrast to other jurisdictions, the proposals will still require the applicant(s) to actively reaffirm their intention to divorce on three separate occasions. This 'triple lock' will contrast with comparable jurisdictions where the applicant(s) must only actively confirm their intention to proceed on one or two occasions.

Is it fair to deny 'innocent' parties the chance to have the court attribute responsibility for divorce?

This argument misunderstands the law – evidence of behaviour or adultery is required to establish the reality of irretrievable breakdown, not to show a causal connection to the reason for the separation. In any case, the court cannot accurately apportion 'blame', nor can it accurately identify mistaken or vexatious allegations. The parties may be (rightly) angry, hurt and upset, but the court cannot be an effective or appropriate forum to address those personal emotions.

In practice, a demand for this type of 'justice' was rare amongst *Finding Fault* interviewees. More commonly, personal moral codes focused on trying to have a 'good divorce' to protect their children. Interviewees were frustrated that the law undermined that goal.

Is it fair to deny respondents the opportunity to defend the divorce?

It will still be possible to challenge the divorce if there is evidence of fraud, lack of jurisdiction or other procedural irregularities. However, the removal of fault will significantly reduce the already tiny number of respondents who might have wished to defend.

The *Finding Fault* research found that the majority of intended or actual defences were not principled defences of the marriage. Instead they were caused by fault itself: disputes about who should be blamed for the divorce or the specific allegations.

The research also uncovered evidence of abuse of the process. The few claims that the marriage was saveable were mainly attempts by one party to continue to exercise power and control over the other person and/or the family finances. The reaction to the *Owens* case indicates that, rather than supporting defence, the public views it as unfair that a divorce cannot be granted where there is evidence that the marriage has broken down irretrievably.

Will it leave (older) women more vulnerable?

No. Fault does not protect marriage. Removing fault and defence will not make women (or men) any more vulnerable. The Bill only addresses the ground for divorce. It does not affect the law on financial provision or child arrangements.

CONCLUSION

The Bill proposes a modest technical change in how irretrievable breakdown is evidenced. That change will ensure the law reflects the reality of what happens in practice, where divorce is already available at the request of the parties. The current process involves an often painful, and sometimes destructive, legal ritual involving fault that has no obvious benefits for the parties or for society. The proposals will bring divorce law into line with wider family policy and with international trends. The proposals are entirely consistent with the messages from research and have widespread support from those who know how the system works in practice: including judges and lawyers, and relationship support organisations such as Relate, Marriage Foundation and One Plus One. Importantly, echoing the findings of the *Finding Fault* research, recent polling by YouGov (9 April 2019) shows that the reforms have the weight of support from the general public as well as those with direct experience of fault divorce.

ABOUT *FINDING FAULT*

Finding Fault? is a major research study of how the current divorce law works in practice. The study was funded by the Nuffield Foundation. It was led by Professor Liz Trinder (Exeter University) in collaboration with Bryson Purdon Social Research, Kantar Public UK, OnePlusOne, Mark Sefton and Jens Scherpe (Cambridge University). The findings are reported in a series of four reports (with summaries), available at www.nuffieldfoundation.org/finding-fault

Methodology

- A national opinion survey of 2,845 individuals in England & Wales, including 1,336 divorcees
- In-depth interviews with 81 people going through divorce
- Observation of 292 divorce applications being scrutinised by the court
- Court file analysis of 300 undefended divorces
- Court file analysis of 142 contested cases, including 71 formally defended cases
- Interviews with 21 judicial officers
- Interviews and focus groups with family lawyers in four regions
- Comparative legal analysis of divorce law and process in other jurisdictions

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Further details

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