

Reforming the Ground for Divorce: Experiences from Other Jurisdictions

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About this report

This report presents the findings from a Nuffield-funded project to explore the legal and procedural details of the divorce process in selected other jurisdictions. This brief comparative analysis was conducted to inform policy debates about how the law in England and Wales might be reformed in practice. It builds on three earlier reports from the *Finding Fault* study.

This report, and the three earlier ones, are available to download from www.nuffieldfoundation.org/finding-fault

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Contents

Acknowledgements.....	4
Key messages	5
1. Introduction.....	7
2. Convergence and context	9
3. Tabular summary of law and procedure in England & Wales and sample jurisdictions. 11	
4. Entitlement to divorce	19
5. Procedure	28
6. Service.....	30
7. Reducing conflict and supporting joint decision-making	33
Appendix 1 Questionnaire.....	34



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Key messages

- **Purpose**

This report is designed to inform the current Ministry of Justice (MoJ) consultation on reform of the ground for divorce and dissolution in England & Wales. The MoJ is proposing that the sole ground for divorce of irretrievable breakdown should be evidenced by a new notification system or waiting period. That would replace the current requirement to show irretrievable breakdown by reference to one of five facts: adultery, behaviour, desertion, two-year separation with consent or five-year separation. The MoJ is also proposing to remove the ability to defend a divorce. This report examines what lessons can be drawn from the experience of notification and/or separation-based divorce in other comparable jurisdictions. Eight jurisdictions are surveyed: Australia, California, Colorado, Finland, Germany, New Zealand, Spain and Sweden.

- **Convergence**

There is considerable convergence internationally towards recognition that a divorce must be granted where one or both parties insists that the marriage is over and away from scrutiny of a decision to divorce according to objective standards.

- **Grounds**

The MoJ's proposal to remove fault is fully consistent with international trends. There is a trend away from requiring any ground at all.

- **Stages**

The MoJ's proposed three-step process of petition, application for nisi and application for absolute is somewhat onerous compared to other countries. A process requiring only two positive opt-in occasions could be sufficient.

- **Joint applications**

All jurisdictions canvassed allow joint applications (or a functional equivalent).

- **Length of notification**

A six-month period would be in line with many other jurisdictions. All jurisdictions examined require the same waiting period for sole and joint cases. The only exception is Sweden, where no waiting period is required in joint cases where there are no minor children. Finland and Sweden do not require a waiting period if the couple have already lived separately for at least two years. There are pros and cons to this approach.

- **Defence**

In all jurisdictions it is possible to contest a divorce on the basis of jurisdiction, validity of the marriage, fraud and procedural compliance, i.e. service. In some jurisdictions, defence of the marriage remains possible in theory, but is futile in practice.

- **Registering opposition to divorce**

No jurisdiction has a specific provision to allow a respondent to register their wish to remain married.

- **Reconciliation provisions**
All jurisdictions enable the parties to withdraw applications. Only California has a specific provision to enable adjournment, albeit for only 30 days and now largely defunct.
- **Marriage bar**
A specific provision on the minimum duration of marriage is relatively unusual. There are functional equivalents in the form of mandatory separation periods.
- **Expediting the process**
Shortening a notification or separation period is not permitted in any jurisdiction. Exceptions (Spain and Germany) are tightly defined protective measures for victims of abuse, but of very limited relevance and effectiveness in practice.
- **Initiating a notification period**
In all notification-type jurisdictions, the clock starts with the filing of a joint application and for sole applications, on evidence of effective service or the equivalent.
- **Expiry of an application**
Finland and Sweden require the parties to complete a notification divorce within one year.
- **Service requirements**
These vary widely between jurisdictions. In the continental civil law jurisdictions, for example, residents must register their address and proof of delivery to that address is sufficient evidence of service.
- **Reducing service difficulties**
Contextual differences mean that there are no off-the-shelf solutions for services difficulties in the minority of cases in England and Wales where there are problems with service.
- **Terminology**
The adoption of more modern and accessible terminology such as 'applicant/application', 'dissolution' rather than 'divorce' and 'In the Marriage of X and Y' rather than 'X vs Y' should be considered.

1. Introduction

The Ministry of Justice (MoJ) is consulting on proposals to reform the grounds for divorce.¹ In broad outline, the government proposes to retain the sole ground of irretrievable breakdown. A new notification system, or waiting period, would replace the existing method of evidencing irretrievable breakdown by reference to one of five facts.² The consultation also proposes to remove the ability to defend a divorce, other than in relation to lack of jurisdiction, validity of the marriage, fraud and procedural compliance.

There remain, however, important technical questions about precisely how a notification procedure would operate in practice. The aim of the report is therefore to explore how the notification procedures (or functionally comparable procedures) work in practice in other jurisdictions to inform the policy process as it unfolds.

Method and sample

This report is the result of a rapid analysis³ of selected jurisdictions with experience of notification and/or comparable approaches in divorce/dissolution cases. The analysis identifies the relevant law or procedural rules and processes and, where possible, explores how these work in practice.

The tasks or stages were as follows:

1. Establishing the sampling criteria and provisionally selecting the sample after review of the relevant literature, allowing for further additions during the course of the fieldwork. Making contact with local experts.
2. Devising the questionnaire used to collect the substantive information from each jurisdiction and sending to local experts.
3. Analysing questionnaire responses and structuring information. Consulting local experts on specific issues.
4. Preparing a short thematic report with recommendations.

The jurisdiction canvassed were selected purposively to address the research questions. It was neither necessary nor practical to undertake a total sample. The sample consisted of the following jurisdictions:

- 'Notification jurisdictions': Sweden (no waiting period if a joint application and no minor children, otherwise six months), Spain (no waiting period), California and Finland (six months waiting period for all cases), Colorado (90 day waiting period)
- 'Separation jurisdictions': Germany, Australia, New Zealand

The notification jurisdictions were selected as the substantive law is closest to the MoJ proposals. The separation jurisdictions were chosen to provide insight into a wider range of approaches to procedure, including issues with service.

¹ Ministry of Justice, *Reducing family conflict: reform of the legal requirements for divorce*, (Ministry of Justice 2018) Available at <https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/>

² Namely, adultery, behaviour, desertion, two year's separation with consent, five year's separation (s.1(2) Matrimonial Causes Act 1973).

³ The study was conducted over a four-week period at the end of 2018/beginning of 2019.

Questions to address

Given a tight timetable, the focus of the study was drawn narrowly on law and procedures relating to a notification or functionally similar process. However, an understanding of the legal and procedural context was necessary to avoid misunderstanding. The main substantive, procedural and/or process questions addressed are as follows:

- What is/are the ground(s) for divorce and civil partnership dissolution?
- Whether ancillary matters (children/money) must also be considered and/or decided as part of the divorce process?
- What is the procedure? Can applications be sole or joint? What steps do the court/relevant authorities and the parties need to take, and at what stage, in sole and joint applications? What, if anything, occurs automatically? What reminders or triggers are sent to the parties?
- What mechanisms are in place, if any, to allow a sole notification to convert to joint and/or whether one can join or drop out of an application. Are online procedures available?
- For notification jurisdictions, what is required to trigger the notification clock/waiting periods (if any) in sole and joint applications? What is required to stop the notification clock/waiting period, if possible?
- How is notice/service effected? Who is responsible for effecting service and what is required for effective service (or an alternative)? What is needed to show evidence of a joint application? What mechanisms are used to notify the respondent in sole applications, specifically is a signed acknowledgement required? If not, what is sufficient?
- What mechanisms/factors are in place to reduce the risk of non-response from the respondent?
- What mechanisms, if any, are available to delay or prevent the divorce/dissolution?

2. Convergence and context

Before examining the detail of law and procedure in the eight jurisdictions, it is important to recognise both the degree of commonality between jurisdictions, whilst at the same time appreciating the importance of understanding local context.

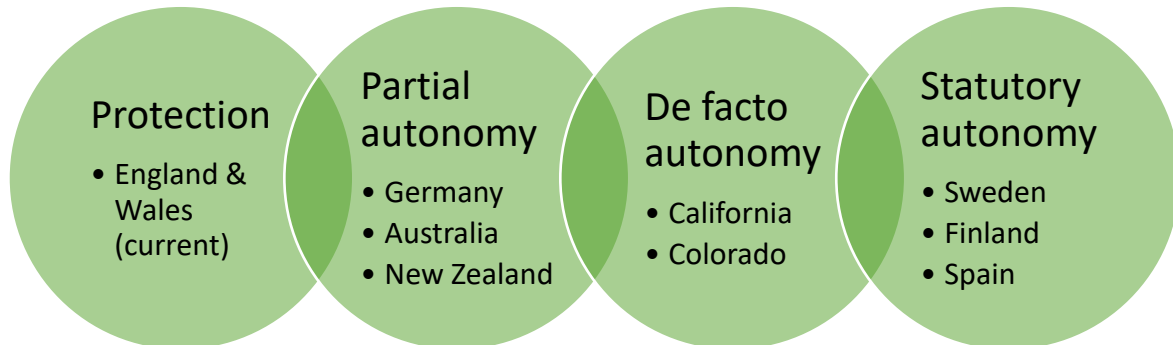
In terms of commonality, the eight jurisdictions were selected to illustrate and explore different approaches to substantive law and procedure in no-fault divorce systems. On paper, as the Summary Table (see page 11) indicates, approaches to specific questions are markedly different from each other, and in particular, different from the current law in England and Wales. It is notable that Sweden and Finland, two near neighbours with very similar legal traditions, differ on the length of notification periods for joint applications. Similarly, Australia and New Zealand differ widely on the requirements for effective service. California and Colorado differ on whether applications can be sole or joint. There are also very wide differences between the Spanish legislation where the sole time constraint is that divorce is not available where a marriage is less than three months old and the German law requiring a one-year separation before a divorce can be pronounced.

Despite these apparent differences, what is perhaps more striking is the very high degree of convergence between all the jurisdictions surveyed. What is evident is a clear shift away from the state as the arbiter of whether a marriage should be dissolved and towards an approach that emphasises the autonomous decision-making of the parties where marriage is a partnership based on consent. In practical legal terms, that equates to a move toward a more administrative approach to divorce and with no or minimal scrutiny against external standards, such as fault. As we discuss below, all of those themes are evident in the eight jurisdictions canvassed for this report, albeit expressed through different law and procedures.

The second, and related point, is that the divorce law of a jurisdiction, and indeed the law generally, always reflects its particular cultural and socio-legal context at a specific moment in time; in other words, divorce law is of a particular place and time. In practical terms, that can result in a gap between law and practice as the political constraints on law reform mean that the substantive law fails to keep pace with developments in practice. Although we have pointed to a strong degree of convergence towards autonomy and a right to divorce across jurisdictions, that convergence is strongest at the level of practice, rather than the substantive law. In some jurisdictions, the substantive reform of the divorce law dates back to the 1960s/70s when the concept of irretrievable breakdown was itself a radical departure. Since then, legal practice has developed so that there is a divide between 'law in the books' and 'law in action', with the latter reflecting the current social attitudes towards divorce more accurately. It is noticeable that of the jurisdictions canvassed who reformed their laws more recently, such as Spain and Finland, there is a clear tendency towards divorce becoming a right, i.e. not requiring a divorce ground at such, and towards not permitting defences against divorce petitions. However, even in jurisdictions which nominally maintain irretrievable breakdown as the sole ground of divorce, legal practice has effectively turned into one that accepts divorce as a right; essentially, the petition of one of the spouses for divorce is seen as conclusive evidence of marital breakdown that cannot be defended (e.g. California, Colorado, Germany). The extent to which the different jurisdictions have moved

towards an approach based on autonomy, both in law and in practice, is set out schematically in Figure 1.

Figure 1: Convergence and divergence in law and practice



The same caveat about context not only applies to the divorce ground but also to the procedural and other issues surrounding it. Hence one cannot understand (and certainly not transfer) many elements of procedure and substance without understanding the full context. Examples for this are: that the civil law jurisdictions operate with a clearly defined matrimonial property regime; that in many jurisdictions there are very limited duties for post-marital maintenance (but often mandatory sharing of pension rights) because of the provisions of the social welfare system and a functioning and subsidised housing market; or that in many jurisdictions there is a legal duty to register one's home address, meaning that service to that address is always deemed as valid.

Note. To avoid repetition, references to marriage and divorce in the Summary Table in Section 3, and the analysis that follows, should be understood as including civil/registered or domestic partnerships (where these are functionally equivalent to marriage) and dissolution. In none of the jurisdictions was there any substantive difference in law and procedure between divorce and dissolution, other than some differences in terminology. The sole exception is that summary dissolution of civil partnership in California is processed by the governorship, rather than the court.

3. Tabular summary of law and procedure in England & Wales and sample jurisdictions⁴

	E&W current	Germany	Australia	NZ	California	Colorado	Spain	Finland	Sweden
Date of last major reforms	1969/1973	1976	1975	1980	1969	1972	2005/2015	1987	1973/1988
Ground(s)	Irretrievable breakdown	Irretrievable breakdown	Irretrievable breakdown	Irreconcilable breakdown	Irreconcilable differences causing irremediable breakdown	Irretrievable breakdown	None	None	None
Evidence required for ground(s) in law	Adultery, behaviour, desertion, two year separation with consent otherwise five years	Irrebuttable presumption of irretrievable breakdown if one year separation with consent, or three years' separation	One year separation	Two year separation	Statement of irretrievable breakdown	Statement of irretrievable breakdown	None	None	None
Evidence required for ground(s) in practice	Limited scrutiny, evidence taken at face value	Petition for divorce is taken as evidence of irretrievable breakdown, but a year's separation is required in any event	Scrutiny on papers, rarely defended	Scrutiny on papers, rarely defended	Petition is taken as evidence of irretrievable breakdown	Petition is taken as evidence of irretrievable breakdown	None	None	None

⁴ References to marriage and divorce should also be read as references to civil or domestic partnerships and dissolution where these are functionally equivalent.

	E&W current	Germany	Australia	NZ	California	Colorado	Spain	Finland	Sweden
Mandatory time period (separation or notification)	Two years (with consent or desertion) or five years, unless adultery or behaviour established	One years' separation	One years' separation	Two years' separation	Six months from issue or service	91 days from issue or service	None	Reconsideration period of 6 months after petition or none if two years' separation	Reconsideration period of 6 months. Not required if joint application and no dependent children or two years' separation
Sole/Joint applications	Sole	Sole (but both can petition, making the divorce consensual)	Sole or joint	Sole or joint	Regular process only sole. Summary dissolution only joint	Sole or joint	Sole or joint (strictly, consensual or non-consensual)	Sole or joint	Sole or joint
Two-part process (court orders)	Decree nisi and decree absolute	No	Divorce order finalised automatically after one month and one day	Dissolution order finalised automatically after one month	No	No	No	No	No
Mandatory steps (or decision points) for applicant (<u>sole</u> applications). Italics where the step refers to particular case types only	1. Petition (court then serves) 2. Application for decree nisi 3. Application for decree absolute	1. Application (court then serves) 2. Personal hearing (and determination of pensions rights adjustment)	1. Apply 2. Service 3. <i>Hearing [only if dep. child]</i>	1. Apply 2. Service 3. <i>Hearing – defended, elected only]</i>	1. Petition 2. Service 3. File proposed or agreed judgment or attend hearing	1. Petition 2. Service 3. <i>Hearing [if minor children and/or contested]</i>	Non-consensual: 1. Application (court then serves) 2. Hearing	1. Application (court then serves) 2. Request to reopen proceedings if reconsideration period required	1. Application (court then serves) 2. Request to reopen proceedings after reconsideration period

	E&W current	Germany	Australia	NZ	California	Colorado	Spain	Finland	Sweden
Mandatory steps (or decision points) for applicant (<i>joint</i> applications). Italics where the step refers to particular case types only	1. Petition (court then serves) 2. Application for decree nisi 3. Application for decree absolute	n/a	1. Apply	1. Apply	1. Apply with financial agreement (summary dissolution only)	1. Petition [2] <i>Hearing [if minor children, and/or if money or children contested]</i>	If consensual: 1. Application (including ancillary matters) 2. Confirmation in court (separately by parties)	1. Application 2. Request to reopen proceedings if reconsideration period required	1. Application 2. Request to reopen proceedings if reconsideration period required
Court hearing required, if undefended	No	Yes	Only if sole application with dependent children	No	Only if divorce, money or children not agreed.	If dependent children and/or finances not agreed	No	No	No
DEFENCE AND EXCEPTIONS									
Possible defences (except validity, jurisdiction, fraud or coercion, service)	Facts and/or irretrievable breakdown (in theory) Exceptional hardship (5 year cases only, in theory) Religious divorce s10A	One year's separation required, but petition for divorce is seen as proof of irretrievable breakdown in practice	One year's separation requirement (in theory). Arrangements for children (delay only)	Two years' separation requirement (in theory) Arrangements for children (delay only)	Denying irreconcilable differences (in theory) Denying legal incapacity	Denying irretrievable breakdown (in theory)	None available	None available	None available

	E&W current	Germany	Australia	NZ	California	Colorado	Spain	Finland	Sweden
Numbers of defences (and success rates)	<0.5% of petitions (fact and irretrievable breakdown). Only one recent successful defence of the marriage		6 defences on irretrievable breakdown from 45k divorces (2018). 1 successful	Last reported case in 2013	Very rare. No reported successes	Very rare. No reported successes	-	-	-
Minimum length of marriage and exceptions	One year with no exceptions	One year separation required, with an exception for cases of unacceptable hardship (narrowly interpreted).	One year separation plus marriages shorter than two years must attend counselling	Separation of two years required with no exceptions	No	No	Three months, except where serious concerns for petitioner or children	No	No
Scope to reduce relevant waiting periods in individual cases	Rarely	No	Separation period - no. One month finalisation period – if special circumstances	Separation period - no. One month finalisation period – in theory	No	No	No	No	No
Provision to pause, rather than terminate the process	Unlimited adjournment for attempted reconciliation	No	No	No	Continuance for maximum thirty days for reconciliation	No	No	No	No

	E&W current	Germany	Australia	NZ	California	Colorado	Spain	Finland	Sweden
ANCILLARY MATTERS									
Requirement for court to approve or determine finances in <i>all</i> cases before a decree	No	No, only if one of the parties applies. But pension rights adjustment always have to be decided by the court	No	No	Yes. Common to bifurcate status from money & children	Yes. Bifurcation only for compelling reasons	Yes	No	No
Requirement for court to approve or determine child arrangements in <i>all</i> cases before a decree	No	Rarely, only if one of the parties applies, and then only if not detrimental to the child	Yes	Yes	Yes. Common to bifurcate status from money & children	Yes. Bifurcation only for compelling reasons	Yes	Yes	No
Broad approach to financial provision on divorce	Fairness	Community of accrued gains	Separate property regime	Deferred community of relationship property	Community property with equal division	Equitable division	Community of acquest (federal law) plus regional variations	Deferred community of property	Deferred community of property
PROCEDURE									
How instigate (joint process)	n/a	-	Single signed application and joint (sworn) affidavit [need to check the online format]	Single signed application and joint (sworn) affidavit	Single signed petition (summary dissolution)	Single signed petition	Single application (including proposed agreement for ancillary matters)	Single signed application	Single signed application

	E&W current	Germany	Australia	NZ	California	Colorado	Spain	Finland	Sweden
What triggers any waiting period	n/a	n/a	n/a	n/a	Date of service or filing of Response or respondent's FL-130 form	Date of filing of a joint petition or service	n/a	Date of filing of joint application or service	Date of filing of joint application or service
When must a confirmation request be completed	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Twelve months from application	Twelve months from application
Scope to switch to, or from, sole to joint application	No	No	No	No	No	No	Yes, if no agreement on ancillary matters or inactivity	No	No
Court retains jurisdiction for all cases	Yes	Yes	Yes	Yes	Yes	Yes	No, consensual proceeding with no children can be dealt with by notaries	Yes (but agreements regarding the children must be confirmed by the social welfare board)	Yes (but agreements regarding the children must be confirmed by the social welfare board)
Online process (other than downloadable forms)	Developing online system		Online system		e-filing system in development				
SERVICE									
First attempt at service undertaken by the court	Yes	Yes	No	No	No	No	Yes	Yes	Yes
Main methods of service	Mail	Mail	By mail or by hand	By hand only	By mail or by hand	By mail or by hand	By mail, otherwise by hand or by edict	Mail	Mail

	E&W current	Germany	Australia	NZ	California	Colorado	Spain	Finland	Sweden
Use of lay servers (incl. family or friends)	Discouraged	No	Yes, if over 18, not a party	Yes, if over 18, not a party	Yes, if over 18, not a party	Yes, if over 18, not a party	No	No	No
Evidencing a response to service by mail	Signed <i>Acknowledgement of Service</i> + petitioner identification of the signature	Proof of delivery at registered address	Signed <i>Acknowledgement of Service</i> + sworn <i>Affidavit of Service by Post</i> from applicant	n/a	<i>Acknowledgement of Receipt</i> (signed by both respondent and server) + signed <i>Proof of Service of Summons</i> from server	Sworn <i>Waiver and Acceptance of Service</i> by respondent	Proof of delivery at registered address	Proof of delivery at registered address	Proof of delivery at registered address
Evidencing response to service by hand	Signed <i>Acknowledgement of Service</i> + signature identified by the petitioner (but unusual for P to serve)	-	Signed <i>Acknowledgement of Service</i> + sworn <i>Affidavit of Service by Hand</i> by server ± sworn <i>Affidavit Proving Signature</i> from applicant.	Sworn <i>Affidavit of Service</i> from server. <u>Nothing</u> required from respondent.	Signed <i>Proof of Service of Summons</i> from server	Sworn <i>Return of Service</i> by server	Proof of delivery, including naming the person who received the documents	-	-
Evidencing service where party does not respond (without applying to court)	Signed <i>Statement of Service</i> from petitioner's lawyer or process server	Proof of delivery to registered address. NB: parties must be present at hearing (but see below)	Sworn <i>Affidavit of Service by Hand</i> from lay or professional server	Sworn <i>Affidavit of Service</i> from lay or professional server	Signed <i>Proof of Service of Summons</i> from lay or professional server	Sworn <i>Return of Service</i> from lay or professional server	Proof of delivery at registered address or to person obliged to pass on documents	Proof of delivery at registered address	Proof of delivery at registered address

	E&W current	Germany	Australia	NZ	California	Colorado	Spain	Finland	Sweden
Levers to encourage response from respondent	Limited. Ease of response under new online system?	Administrative fines in case of non-appearance at hearing(s). Ultimately decision can be made without personal hearing.	Use of personal (lay) service, where papers can be put down in front of person to avoid attempted refusal. Service can be dispensed with.	No response required	Use of no-cost personal service as first option. Form warning of liability for reasonable expenses if no acknowledgement within 20 days (service by post). Possibility of default judgment re children, money and status	Respondent signature unnecessary if served by hand. Summons warning of possible default judgment re children, money and status if no response within 21 days	Decisions can be taken in absence	No response required	No response required
Terminology: parties (sole)	Petitioner & respondent	Applicant & respondent	Applicant & respondent	Applicant & respondent	Petitioner & respondent	Petitioner & respondent	Applicant & respondent	Applicant & respondent	Applicant & respondent
Terminology: parties (joint)	n/a	n/a	Applicant 1 & applicant 2	Applicant 1 & applicant 2	Petitioner 1 & petitioner 2	Petitioner & co-petitioner	Applicants	Applicants	Applicants
Terminology: Outcome	Divorce	Divorce	Divorce	Dissolution	Dissolution	Dissolution	Divorce	Divorce	Divorce

4. Entitlement to divorce

The basis of divorce

We noted above that there has been a broad shift away from fault towards entitlement to divorce, based on the wish of one, or both, parties or following a period of separation. Spain, Sweden and Finland, can be classified as ‘notification’ jurisdictions, where divorce is a right and, in the absence of a divorce ground, no proof is required.

In the jurisdictions canvassed which nominally require the irretrievable breakdown of the marriage, there is very limited scrutiny. In Germany, California and Colorado an application for a divorce by one of the spouses is seen effectively as conclusive evidence of the breakdown of the marriage. In some instances, the law may make explicit that allegations of fault or conduct must not be used to evidence the ground.⁵ In these jurisdictions, any time periods are not required as proof of the ground, but are instead intended to provide for a period of time for reflection on the decision by the parties, including thinking about the arrangements for the children and the finances.

Germany in addition, operates an irrebuttable presumption of marital breakdown if the couple have lived separately for one year and agree on the divorce or have lived separately for three years. Similarly, Australia requires a separation of one year and New Zealand a separation of two years. Hence the periods of separation are seen as conclusive proof of the irretrievable breakdown, and thus the real basis for the divorce is the separation.

Implications: the MoJ’s proposals for irretrievable breakdown evidenced by a notification period are consistent with broad trends internationally. The approach is distinctive in that more recent reforms elsewhere have tended simply to remove the need for a ground such as irretrievable breakdown. However, evidencing breakdown through an objective notification process that cannot be challenged, aligns the approach with international trends, whilst offering reassurance to those concerned about marriage stability. It also reduces the need for wider reform of the existing law and minimises the legislative changes required.

Stages of the divorce process

It is noticeable that the procedure in the other jurisdictions canvassed is typically very simple, provided that there has been effective service (or equivalent). Typically, there is only one or two mandatory procedures/legal steps leading to the divorce. Interim decrees appear to be largely unknown. California abolished interlocutory decrees in the mid 1980s, partly based on concern that litigants in person were unaware of the need to apply for the final decree. The simplicity of the process elsewhere contrasts with that in England & Wales where the petitioner must reaffirm their desire to divorce on multiple occasions: at the application (petition) for divorce, the application for decree nisi and then with the application for decree absolute.

That said, England and Wales are not unique in having clearly distinct interim and final stages in the procedure. Australia and New Zealand both also have decrees that only

⁵ The California code, for example, states that “evidence of specific acts of misconduct is improper and inadmissible” (§2335).

become final after one month,⁶ although in New Zealand orders made by a judge at an undefended hearing come into effect immediately. The purpose of the delay of the order coming into effect is to allow the other party to appeal, but that seems to be extremely rare in practice. The main difference between the current law in England and Wales and Australia and New Zealand, is that in the latter two countries the divorce becomes final automatically without any further action or applications by the parties, whereas in England and Wales a positive (and unprompted) action is required for the decree nisi to be made absolute.

In Finland and Sweden, the applicant(s) must apply for divorce, and should a reconsideration period be required, reapply to restore proceedings after the completion that period. At most, that requires two steps, compared to three as in England and Wales.

The number of mandatory steps to achieve a divorce is greater in England and Wales than elsewhere. Compared to the 'triple opt-in' of applications for divorce, decree nisi and decree absolute in England and Wales, only one or two procedural steps are necessary (excluding service). Moreover, where there are additional steps required in addition to the divorce application, their function is typically related to arrangements for the children and finances, not the divorce itself. By contrast, in England and Wales those matters are dealt with separately and are not required steps that all petitioners must take. Indeed, only a minority of divorcing couples in England and Wales do make formal applications to the court regarding children and/or finances. The current multiple mandatory stages in England and Wales appears to be rooted in a very different approach to divorce, with an emphasis on the parties having to repeatedly prove to the state their entitlement to divorce, a concern about collusion between the parties and seemingly less confidence in the capacity of the parties to make their own decisions.

Implications

England and Wales are unusual in requiring the petitioner to make at least three applications to ensure that the divorce starts, continues and can be completed. Other jurisdictions typically require a single application at the start, particularly where all issues are agreed and/or there are no child arrangements to consider. In that case, the divorce can proceed automatically, without further applications from the petitioner(s), unless and until the applicant seeks to stop the process.

It might be worth MoJ considering the merits of reducing the number of required steps (or active opt-ins) from three to two, akin to the Swedish/Finnish approach, whilst still working within the decree nisi/absolute framework. The alternatives would be, for example:

- **Option A:** Petition (Step 1), six month waiting period ending in the automatic conferment of decree nisi unless the petition has been withdrawn. One or both parties must then apply for decree absolute (Step 2) which would then be made automatically six weeks after the application for decree absolute.
- **Option B:** Petition (Step 1), six month waiting period, application for decree nisi (Step 2) with the decree absolute made automatically six weeks after the application for

⁶ And previously termed decree nisi and decree absolute, based on the English model.

decree nisi has been received by the court.

- **Option C:** Petition (Step 1), court processes application and grants decree nisi automatically, six months' waiting period begins, one or both parties must apply for decree absolute when the six-month waiting period expires (Step 2) and decree absolute is then made automatically.

The two-step approach would reduce administrative burdens on the court. It would be particularly helpful for litigants in person who currently may not appreciate that they must apply for decree nisi and decree absolute to complete the divorce.⁷ Every additional stage is likely to frustrate the divorce through inertia. The two opt-in stages approach would be consistent with the approach of other notification jurisdictions. For those particularly concerned about marriage stability, it would still require more active consideration and ongoing consent than, for example, the one-step approach found for joint applications in other jurisdictions, such as Australia and New Zealand.

On the other hand, the retention of the three-step 'triple-lock' approach, of petition, application for decree nisi and application for decree absolute would offer further reassurance to those concerned that the removal of fault will encourage or enable parties to take the decision to divorce too lightly.

Sole and joint applications

All jurisdictions canvassed allow for joint applications for divorce (or, in the case of Germany, a functional equivalent).⁸ In California joint applications are limited to short, childless marriages with limited assets and where the divorce is by consent. This restriction probably reflects the specific views at the time when that last divorce reform was introduced in 1969. It is highly likely that if the law were to be reformed now that joint petitions would be available.

The main differences between sole and joint applications relate to procedural issues, i.e. whether there is a need for the application to be served or for a mandatory hearing to take place etc, rather than entitlement to a divorce.

Implications

There is a strong international trend towards making joint petitions or applications available. There is no evidence at all that joint petitions are associated with any problems and a consensus that a joint approach can facilitate post-divorce cooperation.

Specific time periods

There is a wide variety of time periods for various purposes in the jurisdictions canvassed. These relate to a separation period in Germany, Australia and New Zealand. In Finland,

⁷ A problem that prompted the decision in California to remove the requirement for a interlocutory decree.

⁸ In Spain, the distinction is strictly between consensual and non-consensual divorces.

Sweden, California and Colorado, a minimum waiting period period is/can be triggered by the application for divorce. The purpose of the minimum period is to provide a 'cooling off' period: of ninety days in Colorado and six months in California. Alternatively, the six months period in Finland and Sweden is set aside for 'reconsideration'. It is also possible in Finland and Sweden to divorce immediately on the basis of two years' separation, without the need for a reconsideration period if there is 'conclusive' proof that the parties have lived separately. There are no minimum time periods in Spain, other than a divorce cannot be granted within three months of the marriage.⁹

It is important to note that in many jurisdictions (including Spain) some or all issues regarding finances or the children must either be agreed and/or approved or determined judicially before a divorce can be finalised. Therefore, the actual times between the application for divorce and the granting of the divorce decree are much longer. Thus, even where divorce is 'immediate' in theory, or at least available very quickly, in practice it may take months, sometimes years.

Apart from Sweden,¹⁰ any mandatory waiting/reflection periods are the same, irrespective of whether the application for divorce is sole or joint. Finland, which reformed its divorce laws some time after its Swedish neighbour, adopted a very similar scheme, but chose specifically to have the same waiting periods for sole and joint applications to avoid giving a significant bargaining chip to one party.

Implications

The six-month period suggested by MoJ is in line with developments in other jurisdictions, particularly the Finnish approach of equal waiting periods for sole and joint applications. One question worth considering is the inclusion of a two-year separation provision alongside a (prospective) notification scheme, as in Finland and Sweden. The advantage would be that it would avoid the need for already-separated couples to wait for a further period. The disadvantage is that, in the absence of any objective method of establishing separation, such as the duty in Finland and Sweden to register one's home address with the authorities (see 'Service' below), the measure could potentially reintroduce the manipulation of separation dates, as well as requiring the retention of a defence where one party disputes the length of the separation. In any event, a six-month notification process would be little different in length compared to the six months average time to process a two years' separation with consent divorce under the current law.

Defending the divorce

In all jurisdictions it is possible to contest a divorce on the basis of lack of jurisdiction, validity of the marriage, fraud/coercion and procedural compliance, including service. These challenges are not about whether the grounds for the divorce have been satisfied. Rather,

⁹ Except where there are serious concerns for the health and safety of the applicant or children.

¹⁰ If the divorce is applied for by one spouse only, there is mandatory reflection period even if there are no children under 16 living with one of the spouses.

these 'defences' are that there is no marriage to dissolve, the court has no right to dissolve it, or the divorce could be granted if there was no fraud or procedural impropriety.

In those jurisdictions (Sweden, Spain, Finland) where divorce is a right, and thus there is no divorce ground as such, it is not possible to defend the divorce other than for the reasons noted above.

In all the other jurisdictions where the ground is irretrievable breakdown (or an equivalent), it is possible to defend the divorce, at least in theory. In practice, in all the 'irretrievable breakdown' jurisdictions, defence is very rare, or non-existent. Where irretrievable breakdown is evidenced by a period of separation (Australia, New Zealand and, to a certain extent, Germany), the only possible defence is to dispute the fact of, or length of, that separation. In practice, a defence based on separation will only ever provide a relatively short delay, even if the defence were to be successful. Consequently, the evidence is that defences on these grounds are very rare.¹¹

In the other jurisdictions (California, Colorado and, to a certain extent, Germany) practice has developed so that the irretrievable breakdown of the marriage is established by at least one of the spouses applying for a divorce and asserting that the marriage has broken down. Unless the spouse or spouses withdraw their application, then the case for irretrievable breakdown is established. In California and Colorado, if one or both of the parties wishes to terminate the marriage, and has signed a declaration or statement under oath that irreconcilable differences have led to the irremediable breakdown or irretrievable breakdown, then the court must grant the decree. In the past, California held 'prove-up' hearings in each case,¹² where the petitioner had to testify orally to breakdown. Those are no longer held. The written application form is sufficient evidence of breakdown. In both California and Colorado, the grounds are very rarely contested. If they were, they would be unsuccessful unless the petitioner is persuaded to change their mind.

Implications

The MoJ consultation paper proposes that it will remain possible to challenge the making of a decree on the basis of jurisdiction, validity of the marriage, fraud and procedural compliance, as is universal amongst the jurisdictions canvassed for this paper. It also proposes to remove the possibility of defending the divorce on substantive grounds, i.e. that the marriage has not broken down irretrievably. In this the consultation paper is very much in line with the law in the notification jurisdictions (Spain, Sweden, Finland), but also with what is the *reality* of practice elsewhere. In California, Colorado and Germany it is still

¹¹ The issue is considered so negligible that hardly any data is available. In Australia there apparently were eight disputed divorces in 2018, and only one was successful (period of separation not met). The last reported case of a defended divorce in New Zealand is *CC v DS* [2013] NZFLR 578 but concerned forum issues (and the dissolution of the marriage ultimately was granted). The only circumstances where a separation defence could have a significant impact would be where one of the parties was operating within very severe time constraints. See *Price & Underwood* [2008] FamCAFC 46 for an Australian example involving the impending death of the petitioner.

¹² A short oral hearing to establish certain basic facts about the case. In this context, the petitioner would be required to confirm that irreconcilable differences have led to the irremediable breakdown of the marriage.

possible to launch a defence, but in practice, it is not possible to successfully defend a divorce on the basis of irretrievable breakdown if the petitioner maintains that the marriage is over.

The MoJ proposals for a notification system would mean that a divorce could not be successfully defended if the procedural requirements for the divorce are met, i.e. any notification period has been completed and the applicant has applied for decree absolute. We think this is a more satisfactory position than continuing to offer the opportunity to defend, but with no hope of success. In terms of transparency and the rule of law, it is important that practice and the law are closely aligned. That clarity will also protect petitioners from worry about potential defence and remove from respondents the false hope that the divorce can be defended successfully solely because they do not wish to be divorced.

Recording a wish to preserve the marriage

No jurisdiction of those canvassed has a specific provision to allow a respondent to register their wish to remain married, instead in some jurisdictions where marriage is based on irretrievable breakdown, they can potentially raise a defence that will be actioned and then almost always refused.

In some jurisdictions, it is possible for respondents to informally indicate their opposition through how they complete the relevant forms, although this would have a purely symbolic effect. In California, for example, a respondent can tick a box indicating that they wish to separate, rather than to divorce, although that would have no legal effect as the court has no power to deny a petition for divorce.

Although there are no official mechanisms for recording a wish to preserve the marriage, there are some informal solutions. A Colorado attorney,¹³ for example, noted drafting agreements or having testimony to the effect that while the respondent does not believe the marriage has irretrievably broken down, they understand that the other party does believe that and that the case will move forward. Such wordings are used where one party cannot affirm irretrievable breakdown, typically for religious reasons.

Implications

We found no examples internationally where a wish to preserve the marriage could be formally recorded, whether in jurisdictions with no mechanisms for defence or those where defence is only a theoretical possibility. There is a risk that providing a forum or mechanism for such a statement could become a source of contention and conflict. It could also raise false hopes that a defence might be possible, after all. On the other hand, a Colorado-type formulation, as set out above, could be a means to acknowledge the genuine beliefs and feelings of a respondent, even if they cannot be put into effect. If any

¹³ Frances Fontana.

formulation were to be adopted, it would have to be made absolutely clear that it could not prevent or delay a decree. One way forward *might* be to include on the acknowledgement of service a general statement that “I [the respondent] believe that the marriage has broken down irretrievably or understand that the petitioner believes that it has”. The respondent must then sign the whole statement without being able to choose between either part of the sentence to avoid even the most minor symbols for the parties to fight over.

Reconciliation provisions

It is unusual for a divorce regime to include provisions to allow a pause in proceedings specifically to allow reconciliation, as in s.6(2) of the Matrimonial Causes Act 1973. In most jurisdictions such a provision is simply unnecessary, as the application can simply be withdrawn and then renewed. Alternatively, within a notification scheme such as Finland and Sweden, the parties can simply wait for a further six months after the expiry of any reconsideration period before deciding whether or not to proceed by renewing the proceedings.

The only jurisdiction with any provision similar to a s.6(2) adjournment is California where proceedings can be adjourned for up to a maximum 30 days (§ 2334 (a)).¹⁴ At the end of the period, either party can then move for the dissolution (§ 2334 (c)). The provision is seen as reflecting the current mores of the 1970s and few, if any, referrals are now made to marriage counselling. It is unlikely that a thirty-day adjournment would be effective in most cases.

We are not aware of any international equivalents to the duty on lawyers in England & Wales to certify whether or not they have discussed reconciliation with their clients under s.6(1).

Implications

MoJ proposes to continue with the provision to enable the court to stay proceedings where there is a prospect of reconciliation. The provision, alongside the minimum length of marriage (discussed below) is likely to have very little impact in practice.¹⁵ However, the retention of the provision can be a means to reassure those concerned about reform that there will continue to be significantly more statutory focus on reconciliation and marriage-saving in England and Wales than in comparable jurisdictions.

Minimum length of marriage

The MoJ consultation proposes to continue with the bar on petitions being presented in the first year of marriage, designed originally to protect early marriages and avoid hasty decision-making. There are no direct equivalents in other jurisdictions. However, the three jurisdictions where a separation is the only means to evidence irretrievable breakdown

¹⁴ Spain also has a provision where proceedings can be stayed or suspended for up to 60 days, upon joint application only. However, the provision is not restricted to cases involving a possible reconciliation.

¹⁵ There were no examples of the use of a section 6(2) amendment in the 300 undefended cases in the *Finding Fault* sample.

(Germany, Australia and New Zealand), in effect provide a functional equivalent. In Germany and Australia, divorce cannot be granted without a one-year separation, and in New Zealand it is two years.

In addition, Australia requires that the parties attend counselling where they have been married less than two years to discuss the possibility of reconciliation. The parties must file a certificate of attendance with the divorce application or ask the court's permission to excuse attendance on the basis of any special circumstances, such as domestic abuse. There is no data on the effectiveness of the provision.

As we discuss below, Spain also has a minimum marriage period of three months, however, this can be dispensed with and is almost always likely to be irrelevant given the requirement to resolve ancillary matters prior to divorce.

Implications

A specific provision in relation to the minimum duration of marriage is relatively unusual internationally, although there are functional equivalents elsewhere.

Shortening/expediting the process

There are international examples where it is possible to shorten the period required to secure a final decree in specific circumstances. These fall into two groups. The first group consists of those jurisdictions where a petitioner can apply to the court to shorten the period from the granting of an interim decree to it taking effect. This does not reduce or eliminate any separation or waiting periods required to evidence entitlement to a divorce. This is the current model in England and Wales where it is possible, though rare in practice, to apply to reduce the six weeks and one day period between decree nisi and decree absolute.

The same model was adopted in Australia and New Zealand. In both jurisdictions, it is possible to shorten, or eliminate, the one-month period from the making of a divorce/dissolution order to it taking effect, in both cases largely to provide time for any appeal against an order to be made. In Australia, this requires "special circumstances" and in the form of a joint request.¹⁶ Remarriage in itself is usually not sufficient given the requirement for "special circumstances" and, in the absence of consent by the other party, the shortening of the divorce is rarely granted. In New Zealand, a dissolution order made by a registrar (i.e. joint applications, or undefended sole applications without a court appearance) will take effect after one month. If the applicant(s) elect to attend court, then the dissolution order made by the judge will take effect immediately as a final order, without the one month wait (s42(1)). In practice, however, the likelihood is that waiting for a court hearing would take longer than one month so would not result in a shorter process.

¹⁶ s.55(2)(b). Guidance in determining such requests comes from the Marriage Regulations 2017 Schedule 3, but it is important to note that these will always be joint requests.

The second group are two jurisdictions (Spain and Germany) where it is possible to reduce the minimum requirements needed to establish entitlement to a divorce, rather than just reducing the waiting period after entitlement has already been established. In both Spain and Germany, any possible reduction in time is more theoretical than real. Furthermore, the provision is restricted to cases of serious welfare concerns. In Spain, no divorce decree can be granted where a marriage is of less than three months duration. However, a divorce can be obtained even earlier than that, at least in theory, in cases of domestic violence and/or risk of life, physical or moral integrity of the applicant and/or children. In Germany, it is possible for the one-year minimum separation period to be waived in cases where the separation would cause unacceptable hardship. As in Spain, the relevant provision is interpreted very narrowly and only applies to extreme cases such as domestic violence. It would not apply merely because of the impending birth of a child with another partner.

Leaving aside the narrow interpretation of the exceptions, these theoretical exceptions have limited practical relevance. In Spain the divorce can only be granted following the court's endorsement of arrangements for children and finances, likely to take longer than three months. Similarly, in Germany the court must first agree the time of divorce process (and particularly the mandatory pension rights adjustment), usually meaning that the separation requirement is fulfilled.

There is no scope for any exceptions to the required notification or waiting periods in any of the four jurisdictions where those operate (California, Colorado, Finland, Sweden).

Implications

The review would suggest that there is a significant move away from an individualised discretionary approach to divorce towards a more administrative approach. Any exceptions to the length of the divorce process are very tightly-drawn. None of the notification-type regimes allow any exceptions to the relevant waiting period. In separation-jurisdictions, the only exceptions are to the short period following an interim decree, not to the separation period establishing entitlement to divorce. There are only two countries which permit some exceptions to the minimum requirements to establish entitlement process. Both are very tightly drawn, are probably unworkable in practice and are designed primarily to enable victims of abuse to escape a marriage. This review would suggest that no exceptions should be available to any waiting period required to evidence irretrievable breakdown.

If the notification period were to precede decree nisi, then it would be a different question about whether that later period could be reduced or waived. The MoJ proposals are closest to the notification jurisdictions where no exceptions are available at any stage. If exceptions were allowed after decree nisi, then the approach of other jurisdictions is that they should be very tightly drawn and should focus on protecting victims of abuse. The risk here is that would introduce fault by the backdoor for little gain and be accessible only for those eligible for legal aid or those who can afford lawyers.

5. Procedure

When does the clock start?

There was a high level of consistency in relation to the question of when any relevant waiting or notification period should commence. In all jurisdictions where a time-period is relevant, for joint applications the clock starts on the filing of the joint application. In the case of sole applications, the waiting period is not triggered until both parties are, at least technically, aware of the application, either on evidence of effective service or following a court's decision to deem or dispense with service.

Implications

The unusual degree of international consensus on this question is persuasive. Starting the clock only once the second party is aware of the application ensures that all parties have the same minimum period of notice. This is an important safeguard where the divorce is an unexpected and unwelcome event. However, it does mean that the process for achieving service must be as efficient and accessible to all to avoid unnecessary delays in achieving the divorce where the second party is avoiding service.

When must any application be completed?

Only Finland and Sweden operate a notification system where the petition triggers a waiting period after which one or both of the parties must affirm their wish to continue with the divorce, similar to that proposed by the MoJ consultation. Both Finland and Sweden require that the reopening of proceedings following the six month's reconsideration period¹⁷ must occur within twelve months of the application, in other words, within six months of the end of the waiting period.

According to the available data, in Sweden between 2010-2017 some 8.5% of joint petitions and almost 20% of sole petitions were not reopened within the required period and thus lapsed;¹⁸ in Finland annually some 18,500 divorce petitions are started, but only some 14,000 of those directly lead to divorces and the others are not reopened within the time period.¹⁹ There has been no research on *why* these divorce petitions are, at least in the first instance, not continued. One explanation certainly is that, given the simplicity of the divorce process and the absence of and legal obstacles to overcome, people do not feel compelled or pressured to continue the procedure simply because they have started it.

¹⁷ Not required in Sweden for joint applications and in both countries where the divorce proceeds on a two year's separation.

¹⁸ Cf Anders Agell/Margareta Brattström, 'Äktenskap Samboende Partnerskap' (Iustus, 6th ed.2018), p. 45, based on statistics by Domstolsverket.

¹⁹ Marjukka Litmala, 'Families, Couple relationships, Children. Trends and Opinions about the Legal Phenomena in Family-Life' (English Summary. National Research Institute of Legal Policy, Publication no. 201, 2003) p. 96.

Implications

There are limited international precedents on this issue. Whilst it would seem appropriate that any time-based notification system should have an upper limit after which a fresh application should be made, it may be that the Finnish/Swedish six months from the end of the notification period is too narrow a window to require the parties to complete the process. This might be particularly relevant in England and Wales for cases where financial orders are under consideration.

Online processes

The relevant forms are publicly available for download in each jurisdiction.²⁰ Attempts have been made to provide easy to follow online information in each case. The downloadable packs used in Australia and New Zealand are particularly accessible and user-friendly.

There has been less progress in developing online interactive systems for initiating and completing the process. There are moves to introduce e-filing in California. Only Australia has developed an online system along the same lines as the 'apply for divorce online' service in England and Wales.²¹

²⁰ Those available in English are:

Australia: <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/how-do-i/divorce/apply-for-a-divorce/apply-for-divorce>.

California: <https://www.courts.ca.gov/1033.htm>

Colorado: <https://www.courts.state.co.us/Forms/SubCategory.cfm?Category=Divorce>,

New Zealand: <https://www.justice.govt.nz/family/separation-divorce/apply-for-a-divorce/divorce-forms-and-fees/>

²¹ <https://www.gov.uk/apply-for-divorce>

6. Service

What is required for satisfactory service?

All jurisdictions require evidence of service or an alternative for sole applications, but there is great diversity regarding methods and requirements.

The specific requirements for service in different circumstances are set out in the Summary Table in Section 3 above. In sum, the minimum requirements to evidence satisfactory service, without further application to court, are as follows:

No response is required from the respondent:

- Proof of delivery to registered address sufficient (Germany, Spain, Finland, Sweden).
- Sworn *Affidavit of Service by Hand* filed by the server, whether lay or professional (New Zealand).

Either a response from the respondent or evidence of service from the server:

- Sworn or affirmed Affidavit from the (lay or professional) server (Australia, California) or signed Affidavit (California).

In England and Wales, the court requires a signed (not sworn) Acknowledgement of Service and a signed application from the petitioner recognising the respondent's signature. If the respondent fails to return the Acknowledgement then personal service by a 'professional' inquiry agent with signed (not sworn) statement of truth is typically the next option, short of application to the court to deem or dispense with service.

How to prevent or address failure to respond

Problems with service affect about 15% of divorces in England and Wales, sometimes resulting in the divorce stalling.²² Service was not generally seen as a major issue in the other jurisdictions.

There are a number of reasons why service appears to be a particular problem in England and Wales, albeit for a minority of cases. There are four key factors that contribute to the issue, the combination of which means both that England and Wales have an entirely distinct approach to service to all other jurisdictions and also accounts for some of the difficulties.

The first concerns whether the court or the applicant takes primary responsibility for service, at least in the first instance. The European jurisdictions (England and Wales, Germany, Spain, Finland and Sweden) are different from the US states and Australia and New Zealand in that the court is responsible for effecting service. Where the court takes responsibility for service, the method is typically by mail. Where the petitioner takes primary responsibility, personal service by hand is generally recommended, rather than reliance upon mail, unless the parties are amicable and the respondent is likely to return any acknowledgement. In New Zealand, service may only be by hand. In England and Wales, of course, the default method of service is by mail.

²² Liz Trinder & Mark Sefton, *Taking Notice?* (Nuffield Foundation 2019).

The second consideration is that all four *continental* European jurisdictions require that all residents must register their current address with the relevant authorities. Consequently, proof of service to the registered address is evidence of effective service.²³ No formal acknowledgement is therefore required from the respondent, in contrast to England and Wales where the acknowledgement must be returned by the respondent or alternative evidence of effective service supplied.

The third variable is whether lay people known to the applicant are allowed, or encouraged, to effect service. In California, Colorado, Australia and New Zealand, personal service is typically conducted by a family member or friend of the applicant over the age of 18, but not the applicant themselves. Whilst professional process servers are available, lay service is preferred typically as it is low or no cost, readily available and likely to be effective, at least where the respondent's whereabouts are known.²⁴ In contrast, if the initial service by the court is ineffective in England and Wales, the usual approach is then for the petitioner to have to organise and pay for a process server or bailiff service or via their lawyer, if they can afford legal representation. Service by non-professionals is discouraged. The great advantage of using professionals is that it avoids the potential conflict generated by personal service by family or friends reported in some other jurisdictions. However, organising and paying for professional service is much more challenging to understand and organise and unaffordable to some petitioners. The result is that some petitioners are simply unable to proceed with their case.²⁵

The fourth factor is whether failure to respond to service or avoidance of service has financial and family consequences. In California and Colorado, not responding to a summons risks a default judgment against the respondent regarding children and finances.²⁶ There is, therefore a strong incentive for respondents to accept service built into the system as a whole. Australia and California include written warnings on court papers that the respondent may be liable for additional costs if they do not respond to the summons.²⁷

Looking at all these factors together, the greater difficulty in effecting service in England and Wales in a small number of cases is understandable. There is no system of registered addresses in England and Wales, as in continental Europe. The primary method of postal service in England and Wales is one that is discouraged elsewhere, unless the parties are amicable. English and Welsh respondents are required to acknowledge service and, other than a notional right to defend, there are no financial or familial consequences of not responding, unlike some other jurisdictions. Response to written communication may not be

²³ Whether the respondent has, in fact, seen the papers is not relevant. What matters is the proof of service to the current registered address that the respondent has a legal duty to ensure is kept up to date, and service to that address is deemed as effective.

²⁴ In Australia, for example, service is effective if the server puts down materials in front of the respondent where the latter is refusing to accept service.

²⁵ Liz Trinder & Mark Sefton, *Taking Notice?* (Nuffield Foundation 2019). It is worth noting that non-response cases do include a number of more vulnerable petitioners.

²⁶ The documentation includes wording to that effect. For instance, in Colorado In California, there is a 'default case with written agreement' track whereby the parties can reach agreement for consideration by the court without the respondent having acknowledged the summons.

²⁷ In the case of California, the warning applies to service by post only.

possible for some respondents with literacy or mental health problems, while some respondents may actively wish to disrupt the process. Where service by the court fails, responsibility for service then defaults back to the petitioner, but the current system for doing so is complex, expensive and inaccessible.

Implications

It is relatively easy to understand why there are problems with service in a minority of divorces in England and Wales by looking at the combinations of factors that facilitate service in other jurisdictions. It is harder to suggest solutions. There is no prospect of introducing a domestic registration requirement. Equally, we should recognise that the current method of court-initiated service by mail is effective in about 85% of cases. It does also have the particular advantage of reducing the burden on petitioners and, in particular, avoiding the use of service by hand which can be intrusive, upsetting and a source of conflict. There are no obvious off-the-shelf solutions from overseas.

The problem is that the method of service in England and Wales offers a fair, efficient and effective system for the great majority, but that the system does not work well where initial attempts at service have failed for the minority. The removal of fault should reduce some non-response that is triggered currently by anger about behaviour allegations. The introduction of online acknowledgement will make the effort of contacting and responding much less, potentially also reducing non-response. Otherwise, the solution may lie in trying to simplify alternative methods of service as much as possible, reducing their cost (or associated fees) and offering as much support as possible to petitioners. More prominent warnings on potential liability for any costs incurred, due to delayed or non-response, could also be considered.

7. Reducing conflict and supporting joint decision-making

Terminology

There is a marked tendency in the terminology used to make the divorce procedure more user-friendly and non-adversarial. For example, California and Colorado adopted in the 1970s the convention of referring to cases as “In the marriage of X and Y” instead of “X vs Y”. The relevant statutes also use the term ‘dissolution’, although in practice most people continue to use the more familiar ‘divorce’. The parties in more modern statutes are typically referred to as applicants or as applicant and respondent, and a divorce is applied for rather than petitioned for.

Implications

There is no empirical evidence from other jurisdictions that changing the language does reduce the degree of conflict, but also no evidence that it is harmful. Changing the language used to make the process more accessible and, potentially, less inflammatory, should be considered, particularly where this could be achieved relatively easily. It would, for example, be possible to adopt the “in the marriage of X and Y” in England and Wales, for example, without the need for statutory amendment. However, using the terms ‘applicant/respondent’ and ‘application’ would require extensive updating of MCA, including in Part II, so this may be more problematic.

Appendix 1 Questionnaire

I. Preamble/terminology

- What **terms** are used to describe (a) the person(s) **initiating** and (b) the person **responding** to the divorce and civil/registered partnership dissolution (e.g. petitioner/co-petitioner and respondent)?
- If there is provision for joint initiation of the divorce or civil/registered partnership dissolution, what **terms** are used to describe the parties?
- What term is used to describe the **instrument** used to apply for divorce/dissolution (e.g. petition or application)?

II. Ground(s) and evidence

- What is/are the **ground(s)** for divorce and civil/registered partnership dissolution, if any? If there are any differences between divorce and civil/registered partnership dissolution, please explain briefly.
- **When** were these ground(s) established (separately for divorce and civil/registered (if necessary)?
- What is required, if anything, to **evidence** that the ground is made out or satisfied? If the ground is irretrievable breakdown, what evidence is required to show irretrievable breakdown?
- If evidence is required to show irretrievable breakdown, what (if any) **objective scrutiny** of the evidence takes place and **how** does this take place (please explain briefly)?
- If a period of **separation** is required, how is such separation proved? Have there been examples of people fraudulently claiming to have been separated?
- What, if any, **notification or waiting periods** are required to secure a divorce/dissolution decree/court order? Is the notification or waiting period required to show evidence of the ground(s)? (Please feel free to answer this under V. if more appropriate).

III. Delaying, preventing and expediting divorce/dissolution.

- Is there a **minimum period** of marriage/partnership before an application for divorce/dissolution can be made?
- If so, are there any **exceptions** that reduce or disapply entirely this minimum period (if so, please explain)?
- Is it possible to **expedite or shorten** the divorce/dissolution process, by shortening any mandatory notification/waiting or separation period? If so, under what circumstances would that be possible, e.g. hardship clauses, terminal illness, impending birth of a child, proven domestic abuse?
- Are there any circumstances where a divorce/dissolution can be **delayed or paused** (e.g. to effect a reconciliation/agree on finances)?
- Is it possible to **extend the length** of the procedure or any mandatory notification/waiting or separation period? Under what circumstances would that occur/be necessary?
- In what, if any, circumstances can a divorce/dissolution be **prevented**, e.g. by arguing that a court has no jurisdiction, the marriage was invalid or by denying that the ground(s) are met?
- If it is possible, how common is it to attempt to prevent divorce/dissolution by **denying that the ground(s) are met**? What is the legal or procedural mechanism that is used? What (legal) principles guide how the court/other institutions must respond?

- Are there any mechanisms for the respondent to **record that they do not wish to divorce**, whatever the reason? If so, how is this information recorded, and has any assessment been made of the impact of the recording of this information?

IV. Ancillary matters

- Do ancillary matters such as **custody/residency of the children** and the **financial consequences** of divorce/dissolution (esp. matrimonial/partnership property and/or maintenance) have to be considered and/or decided as part of the divorce process/before divorce is finalised?
- If so, does this lead to **practical difficulties** (such as the financially stronger party exercising undue influence) or delays?
- Please also mention briefly what the **default matrimonial property regime** in your jurisdictions is (if applicable), and also if orders for **post-marital maintenance** are common and/or time-limited, and whether the **family home** is receiving special consideration.

V. Process

Please describe the procedure for instigating divorce/dissolution **generally**, and in particular:

- What are the main stages involved in divorce/dissolution? Is the divorce/dissolution pronounced as a **single decree/court order** or are there several stages, e.g. an **interim decree/court order first and then a final one**?
- Can applications be made **sole and/or joint**? If they can be made joint, can such joint applications for divorce/dissolution be made even if the parties disagree on the consequences regarding the children/the finances?
- What are the procedural requirements for **instigating** divorce/dissolution? Do the procedural requirements differ between joint/sole applications?
- For any **relevant legal time periods** in divorce/dissolution proceedings, what is required to **trigger the beginning** of time periods in sole and joint applications? What is required to **stop or reset the time period**, if possible?
- Are there mechanisms in place that allow **change to/from sole to joint applications and vice-versa**? Can inactivity of one party affect joint applications?
- Can applications be made **online**?
- Is the entire divorce process **court-based** or are/can elements of the process (esp. issues regarding the children/finances) dealt with by other public authorities?

VI. Service

What are the mechanisms for **service** of a divorce/dissolution petition/application?

Please describe in particular:

- Who is responsible for **effecting service** and what is required for effective service (or an alternative)?
- What is needed to show **evidence** of a joint application (and any consideration of the potential of abuse/coercion)?
- If joint applications are possible, what is needed to show **evidence of a joint application** in order to prevent abuse or fraud?
- What mechanisms are used for **service of the respondent in sole applications**, specifically is a signed acknowledgement or similar required? If not, what is sufficient or what are the alternatives? Please also state here if there is a legal duty to register one's place of residence and how that affects effective service (e.g. if the petition is served at

that address, but the recipient either wilfully or inadvertently fails to take notice of it).

- What mechanisms/factors are in place to reduce the risk of **non-response** from the respondent?

VII. Other

- Are there any other aspects of the divorce/dissolution process in your jurisdiction that you think anyone not familiar with it should know in order to understand it fully?