

Divorce, Dissolution and Separation Bill

Committee stage | 17.06.2020

What is the academic evidence for the tabled amendments?

This short briefing summarises what the research evidence can tell us about the amendments tabled for the Divorce, Dissolution and Separation Bill. It draws primarily on the *Finding Fault* research - the only recent large-scale study of divorce law in England and Wales.

The *Finding Fault* study was led by Professor Liz Trinder (Exeter University), the author of this briefing, and funded by the Nuffield Foundation. The briefing also draws on the comprehensive research by Professor Janet Walker on the never-implemented Family Law Act 1996.

What the briefing does

The briefing starts by summarising the research evidence that underpins the Bill.

It then examines the evidence for amendments related to the divorce process, as follows:

- Doubling the minimum period from six months to one year (*Amendment 1*)
- Defining the start of proceedings (*Amendments 2 & 4*)
- Bar on financial provision proceedings (*Amendments 3 & 5*)
- Funding for marriage support services (*NC1 & Amendment 7*)
- Reporting on the impact of law reform (*NC2*)
- Retention of fault with one year (with consent) and five years separation (*NC3*)

The numbering of amendments refers to notices of amendments as at 15 June 2020.

The Bill is based on a robust evidence base

The Divorce, Dissolution and Separation Bill is built on a very firm research base. The Law Commission's research in the 1990s and the *Finding Fault* research in 2017/18 both highlighted how the fault-based law stokes unnecessary conflict and is unfair to respondents. The Bill is a modest and pragmatic reform. It retains the sole ground of irretrievable breakdown, but changes how that is evidenced. Instead of the five facts (including adultery and behaviour) that have been shown to cause so much harm, irretrievable breakdown will be established with a sworn declaration at the start of the process.

The Bill is informed by the experience of past failed attempts at divorce law reform. The never-implemented Family Law Act 1996 was based on the mistaken assumption that many marriages could be 'saved', even at the point of divorce. The research evidence showed that that belief was mistaken. Professor Walker's research showed that the decision to divorce is not taken lightly or impetuously. Indeed, it is a typically protracted decision based on months, if not years, of painful and difficult consideration. However, once that decision has been reached, the parties need to move forward without lengthy delays. The current Bill recognises this reality with a six-month minimum period that allows the parties to use the time as they see fit. In effect, the government has accepted the lesson of the Family Law Act, that you cannot revive a corpse by delaying the funeral.

Amendment 1: Doubling of minimum period from 6 months to one year (for divorce only)

Would extend the minimum legal period for a divorce (but not a civil partnership) from six months to one year.

The amendment is designed presumably to increase the number of possible marital reconciliations. There is no evidence, however, that that would be the case. Indeed, the evidence is that this would be a punitive measure for those in an already stressful situation. The research is clear that:

1. Reconciliation is highly unlikely for people who have already made the difficult decision to divorce and have started divorce proceedings. Very few people accepted relationship counselling in the Family Law Act pilots; those that did used it to focus on the future, rather than reconciliation. Suggestions that people make impetuous decisions to start proceedings and then reconcile are unfounded. About 10% of divorces do not complete, but mainly because of obstruction by the respondent, rather than because of the applicant's change of heart. In the nationally representative Finding Fault study only one of three hundred cases was known to have ended in an attempted reconciliation.
2. The twelve-month period would be applied to a very wide range of families, including those who have already been separated for many years and those who need to escape from domestic abuse. Very few of those would have the remotest chance of reconciliation, however long they were required to wait.
3. A long waiting period would be unwelcome, unnecessary and, in some cases, possibly dangerous. Once the decision to separate has been made, the evidence is that families need to finalise the legal aspects quickly, to reach settled arrangements for children, to sort out finances and, for some, to remarry. Prolonged uncertainty is not helpful.
4. About 60% of divorces in England & Wales are based on behaviour or adultery, compared to about 6-7% in Scotland and France. That disproportionate use of fault is because people are seeking to avoid long waiting periods. The very high use of fault facts in England & Wales is compelling evidence that the parties need and want to move on after a relationship has broken down and once the decision to divorce has been made.
5. The six-month waiting period is in line with recent reforms in other jurisdictions, such as New York State and Finland.
6. The divorce process will still be more onerous than similar jurisdictions. The Bill retains the existing 'triple lock' of the current law. A divorce will only be granted if applicant(s) actively confirm their wish to proceed with the divorce on three separate occasions: at the initial application, at application for conditional order and at application for final order. That is very far from being an automatic or rushed process and contrasts with similar jurisdictions where divorce can be granted after only one or two steps by the applicant(s).
7. The six-month period is a minimum. The applicants can choose to take it slower. If there are financial remedies applications, it is almost certain that the process will take longer than six months.
8. As the amendment applies only to marriage, it would create a two-tier system that would be discriminatory as well as confusing. It would mean, for example, that a wife seeking to leave an abusive marriage would have to wait twice as long as a woman in a civil partnership. That cannot be justified.

RECOMMENDATION: The research evidence does not support this amendment.

Amendments 2 & 4: Definition of the start of proceedings

Would define the start of proceedings at application for joint cases and at service for sole applications.

The Bill proposes that the twenty-week period to conditional order starts when the application is made, for both sole and joint cases. That was based on the research evidence that starting the clock at service could risk very significant delays or no divorce at all. This is because in England & Wales, 'service' requires the respondent's active cooperation with the process by returning a signed copy of the acknowledgement of service. Unfortunately, some respondents will exploit their ability to control the progress of the case. In the *Finding Fault* research, some respondents took more than a year to return the acknowledgement. A further 14% of respondents did not respond at all, meaning the divorce was never achieved or was very delayed because the applicant had to pursue alternative methods of service. Extrapolated nationally, the 14% of cases where the respondent did not return the acknowledgement would amount to about 6,000 applicants annually being unable to divorce and 8,000 cases where the divorce was greatly delayed.

This is a particular problem for more vulnerable applicants. The *Finding Fault* research showed that non-response was more likely to occur in cases featuring allegations of domestic abuse/ coercive control. The Rules do permit the applicant to pursue alternative methods of service (process server, deemed service etc.), but that is expensive and technically demanding, particularly for those without lawyers. Nor is alternative service guaranteed to work.

The amendment proposes instead that the clock starts when the application is 'received' in sole application cases. The argument is that this would ensure that the respondent has the 'benefit' of the full twenty-week period, assuming that all respondents wish to have the full period, rather than for the divorce to proceed as quickly as possible. Whilst this argument may be true in some cases, in practice the evidence is that very few respondents are served

late, and even fewer very late in the current system. Consequently, this has never been raised as an issue before by professional groups.

In contrast to the large numbers of non-response to service, the very small numbers of late service are because the applicant has no incentive to delay service. They also have no real opportunity to do so. The standard practice is that in non-international cases, it is the court that initially serves the application, not the applicant.

Concerns have also been expressed that a respondent might receive a divorce or dissolution application out of the blue, with no knowledge that the relationship was in trouble and (possibly) with limited time to react. Further analysis of the *Finding Fault* data showed that would also be a very rare occurrence. Most breakups are not sudden events, but occur over time. In the minority of the *Finding Fault* cases where the breakup was unexpected, it was the *non-initiator* of the breakup who later went on to initiate the legal divorce.

The evidence of the relative risks to applicants and respondent very clearly point to starting the clock at application. That said, it is important to identify all possible means to eliminate or mitigate the risk of very limited notice to the respondent. The government has stated that a conditional order will not be granted without satisfactory evidence of service (i.e. return of the acknowledgement of service) and that it will explore safeguards to protect the interests of respondents where there are difficulties with the service of documents. This could also include amending the Family Procedure Rules to require that service can *only* be conducted by the court at first instance in non-international cases.

It is important to note that Section 10(3) of the Matrimonial Causes Act also provides an important

It is important to note that Section 10(3) of the Matrimonial Causes Act also provides an important safeguard. It enables respondents to apply to the court to prevent the final order for divorce being made until financial arrangements are satisfactory. It might be possible to extend that to cases where the respondent can argue that very late service meant that they were disadvantaged more generally.

A second argument against the amendment is that it introduces different rules for sole and joint applications. The main purpose

of the Bill was to eliminate the unnecessary conflict and harm created by the fault-based system. The provision for joint applications was designed purely to facilitate a constructive approach to the divorce for the benefit of the parties and their children, not to confer different rights and entitlements. However, introducing different time frames for sole and joint applications would introduce a new bargaining chip with the potential to create conflict. The law cannot repair broken relationships, but it should support people to be their best selves at a very difficult time, not give them tools to be their worst selves.

RECOMMENDATION: The research evidence does not support this amendment.

Amendments 3 & 5: Bar on financial provision proceedings in the first 20 weeks of sole application cases

Would prevent financial provision proceedings in sole application cases for the first twenty weeks from the start of proceedings.

The research evidence is clear that the final decision to separate has generally been taken well before the legal process is started. The twenty-week period will therefore be used in most cases to begin the potentially difficult process of agreeing future arrangements for finances and children. It is neither appropriate, nor desirable, for the state to prevent the parties from planning for their future by barring financial applications during this period, not least as it can take many months to reach an outcome due to court delays.

The amendment would be particularly damaging for the most vulnerable parties. It would, for instance, require a woman trying to leave a violent marriage

to get the agreement of the abusive and controlling spouse to start financial proceedings immediately. That clearly further empowers the abuser at the expense of the victim. Alternatively, those applicants who simply cannot wait might be forced to give up on the prospect of pursuing financial orders at all or to trade an unfair financial division to secure the spouse's agreement to commence financial proceedings as soon as possible. Each scenario is unfair, potentially dangerous and unjustifiable.

RECOMMENDATION: The research evidence does not support this amendment.

NC1 & Amendment 7: Funding for marriage support services

These amendments would replace the existing power of the Secretary of State to make grants in relation to marriage support and research on marital breakdown with a duty to do so. It would extend the provision to civil partnerships.

These amendments would replace the existing power of the Secretary of State to make grants in relation to marriage support and research on marital breakdown with a duty to do so. It would extend the provision to civil partnerships.

Additional funding for relationship services would be very welcome. Too often, those with limited means are unable to start, or continue with, counselling (see <https://www.relate.org.uk/investinrelationships>). However, the restriction of research and support

services to marriage and civil partnership is counter-productive and unfair. All relationships – whether formalised or cohabiting – could benefit potentially from relationship support. Indeed, cohabitants may have greater need for support, given the evidence of a higher relationship breakdown rate, as well as less capacity to be able to afford relationship support services.

RECOMMENDATION: The research evidence does not support these amendments unless cohabitants were included.

NC3: Retention of fault and one-year separation with consent

The intention behind the amendment would appear to be to retain the existing five facts (adultery, behaviour, desertion, separation with consent and five year separation) but to reduce the separation with consent period from two years to one. The conduct and five year separation facts would remain unchanged.

It is highly unlikely that this would reduce fault significantly in England and Wales because a behaviour divorce can be secured in as little as three months and does not require the cooperation of the respondent. Scotland's historically lower use of fault is due to wider legal and procedural factors that could not be replicated in England and Wales without major reform of other areas of family law. Without those vital technical and procedural elements of the complex jigsaw surrounding divorce, it is likely that a large proportion of English and Welsh divorces would remain fault-based with all the problems involved.

The amendment would empower those who wished

to use the giving or withholding of consent for a one year separation. It would give them the upper hand in negotiations about children or money.

The amendment would not address the unjust situation of petitioners like Mrs Owens forced to wait for five years for a divorce even though her marriage had broken down irretrievably. Defence of divorce would remain a possibility for abusers to continue to exercise power and control.

This amendment is at odds with several decades of research into the problems of a divorce law based on allegations of fault (behaviour, adultery) and separation. Those well-documented problems - gaming of the system, creating and exacerbating conflict, and unfairness to the respondent – led first to the Family Law Act and now to the Divorce, Dissolution and Separation Bill. The amendments would reintroduce those problems at the expense of children and adults and the integrity of the family

justice system. They would do nothing to prevent relationship breakdown.

Gaming of the system, 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 show how fault is used instrumentally as the law effectively incentivises people to game the system to secure a divorce within a reasonable time frame, i.e. months rather than the one or two years proposed by the amendments.

The production of behaviour petitions to secure a divorce is a legalistic ritual: *"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). 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 chance 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.

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*

RECOMMENDATION: The research evidence does not support this amendment.

Research references

Janet Walker et al (2001) Information Meetings and Associated Provisions within the Family Law Act 1996. Newcastle University. Available at <http://blogs.exeter.ac.uk/findingfault/files/2019/07/FLA-information-meetings-summary.pdf>

Liz Trinder et al (2017) *Finding Fault: Divorce Law and Practice in England and Wales*. Nuffield Foundation. See also *No contest: Defended Divorce in England & Wales* (April 2018), *Taking Notice: Non-standard Divorce Cases and the Implications for Law Reform* (January 2019) and *Reforming the Ground for Divorce: Experiences from Other Jurisdictions* (March 2019), all available at <https://www.nuffieldfoundation.org/project/finding-fault-divorce-law-in-practice-in-england-and-wales>

For Liz's *Finding Fault* blog series, see: <http://blogs.exeter.ac.uk/findingfault/findings-and-outputs/>

CONTACT

For further information contact: Professor Liz Trinder | e.j.trinder@exeter.ac.uk