

Taking Notice?: Non-standard Divorce Cases and the Implications for Law Reform

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About this supplementary report

The Finding Fault project aims to explore how the current law regarding divorce and civil partnership dissolution in England and Wales operates in practice, and to inform whether and how the law might be reformed.

Taking Notice? contains supplementary analysis of the Finding Fault dataset which informed *Finding Fault?*, published in October 2017 and *No Contest*, published in April 2018.

All three reports are available to download from www.nuffieldfoundation.org/finding-fault

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Contents

Summary of the report	3
1. Introduction	5
2. Methodology	6
3. Notification and administrative processing	6
3.1 The government's proposals.....	6
3.2 Administrative variation in processing times to decree nisi	7
3.3 Implications for the timing of the notification period.....	8
4. Notification and problems with service	9
4.1 The legal requirements	9
4.2 Service difficulties and their consequences	11
4.2.1 The extent of service difficulties	11
4.2.2 The reasons for service difficulties	11
4.2.3 The impact of service difficulties on case progress.....	12
4.3. Accessibility and effectiveness of methods to address service problems	13
4.3.1 Accessibility	13
4.3.2 The effectiveness of efforts to effect service.....	15
4.4 Implications for the timing of the notification period.....	16
4.5 Implications for reform of service	16
5. Understanding the reasons for case non-completion.....	17
5.1 Notification and the potential for reconciliation	17
5.2 Completion and non-completion in the Finding Fault undefended sample	18
5.3 Cases not reaching decree nisi.....	18
5.4 Cases not reaching decree absolute.....	20
5.5 The five Facts as barrier and a cooling off opportunity	21
6. Five years' separation as defence by proxy	22
6.1 The numbers and nature of defended cases.....	22
6.2 Five years' separation cases and defence	23
6.3 Five years' separation and the undefended cases	24
6.3.1 The petitioner and timing of the petition.....	25
6.3.2 The cooperation of the respondent.....	25
6.4 Why do some people take so long?	26
7. Conclusion	29

Summary of the report

Context: In September 2018 the Ministry of Justice issued a consultation on reforming the divorce law in England & Wales. The government proposes to retain the sole ground of irretrievable breakdown, but to evidence breakdown by a system of sole or joint notification, followed by a minimum waiting period – six months is proposed. The notification would replace the current five ‘Facts’ of adultery, behaviour, desertion, two years’ separation with consent or five years’ separation.

Questions and methodology: This short report addresses three technical questions arising from the consultation: whether the minimum waiting period should precede or follow decree nisi, whether a notification system would limit the potential for reconciliation to occur and whether there are larger numbers of respondents wishing to defend than the government has recognised given that 15% of divorces are granted on the basis of five years’ separation. The report is based on further analysis of data from three court file samples collected for the Finding Fault study: a national sample of 300 undefended divorce cases, a sample of 100 contested¹ divorce cases (including 29 Answers) and a 42 Answers boost sample.

Variation in processing times to decree nisi: In 2015 the average time taken to reach decree nisi was four months, but with significant regional variations. The imminent introduction of a single national divorce processing centre will eliminate regional variations, but the processing time from application to decree nisi is likely to be subject to continued seasonal and staffing variations. In the long-term, it is impossible to predict what demographic, technological or administrative changes might influence processing times in future. That potential variation would not be an issue where the minimum waiting period could run alongside the administrative processing. It would introduce an element of uncertainty and unfairness, however, if a six-month waiting period only started after an (indeterminate and variable) period to decree nisi.

Problems with service: No acknowledgement of service was returned by the respondent in 14% of cases. Our findings suggest that non-response was significantly more likely to occur in cases featuring allegations of domestic abuse/coercive control. Nearly half of the no acknowledgement cases failed to reach decree nisi. Those that did, took 7.5 months to do so. Those petitioners would be significantly disadvantaged if the six-month waiting period only started after nisi had been finally reached. In contrast, the pre-nisi option would enable the court to effectively ‘backdate’ service in deemed service cases. Either way, the analysis highlights problems with the accessibility and effectiveness of the system to address service difficulties. The digitisation of the divorce process must address this issue.

The reason for non-completion: There are over 10% more petitions issued than decrees absolute each year. It has been suggested that this is due to significant numbers of

¹ A ‘contested’ case is where the respondent states that they intend to defend the divorce. A smaller proportion of those respondents do go on to file a formal ‘Answer’, which is the mechanism to initiate the defence.

reconciliations, facilitated by the current law. Analysis of the 51 non-completions in the sample indicated, however, that reconciliation was rare. Instead, the majority of those petitioners not reaching decree nisi appear to have been defeated by procedural and legal difficulties, largely caused by the non-cooperation of the ex-partner; while most cases not reaching decree absolute were due to protracted negotiations over finances.

Five years' separation and irretrievable breakdown: It has been suggested that the use of the five years' separation Fact indicates a lack of consent from the respondent to the principle of the divorce. The argument is therefore that the ability to defend should be retained given that the numbers of would-be defenders are significantly larger than the government has acknowledged. Further analysis of the Finding Fault data suggests, however, that this view is mistaken. There are very few five years' separation cases amongst the defended sample. Those that are defended are almost all accepting that the marriage has broken down and there is very little sign amongst the undefended cases that respondents wish the marriage to continue. There are, however, suggestions that the five years' separation group are somewhat different demographically than other groups, indicating that they may be less concerned about achieving a quick divorce or are less equipped to achieve that, given their limited access to legal advice.

Conclusions: The analysis reinforces the case for reform of an overly-complex law that can fuel conflict. The notification process would provide a clear, accessible but also a considered legal mechanism for those whose marriages or civil partnerships have already broken down irretrievably. The analysis points clearly to the advantages of timing the start of the minimum waiting period to precede, rather than follow, decree nisi. An unexpected finding is also the importance of addressing problems of service, regardless of what action is taken on substantive law reform.

1. Introduction

In September 2018 the Ministry of Justice (MoJ) issued a consultation document on divorce law reform in England & Wales entitled *Reducing family conflict: Reform of the legal requirements for divorce*. The document proposes to retain irretrievable breakdown as the sole ground for divorce and civil partnership dissolution. However, how irretrievable breakdown would be evidenced would change. Instead of reference to one of five ‘Facts’, that is adultery, behaviour, desertion, two years’ separation with consent or five years’ separation, irretrievable breakdown would be evidenced by an application by one or both parties and a minimum wait before a final decree could be obtained – six months is proposed. The proposal for a notification-based divorce echoes the recommendations of Resolution² and the Nuffield Foundation *Finding Fault* and *No Contest* reports.³ Indeed, the consultation document cites both reports in support of its recommendations.

This short report is designed to feed into the current MoJ consultation. It presents findings from further analysis of the Finding Fault dataset on two questions raised by the consultation. The first question concerns how the notification (or waiting) period for entitlement to divorce or civil partnership dissolution should be measured. The MoJ have proposed that the notification period of about six months could start either before, or after, pronouncement of decree nisi. This report explores that question by examining the Finding Fault data on (a) regional variations in case processing times from issue to decree nisi (section 3), and (b) the extent of problems with service and the impact on achieving decree nisi (section 4). It concludes that the notification period should start to run before, rather than follow, decree nisi because of case processing variability and problems with effecting service.

The second question that the report explores concerns whether the five Facts should be replaced by a notification process, more specifically whether notification would limit the potential for reconciliation to occur. The Coalition for Marriage have noted that the official family court statistics typically show a gap of about 10% between the number of petitions issued and the number of decrees absolute.⁴ They argue that this gap is due to a “significant proportion” of couples choosing to reconcile during the divorce process to “save” their marriages.⁵ This report tests that assertion by exploring the reasons why 51 of the 300 Finding Fault cases did not reach decree nisi or decree absolute. The analysis indicates that the majority of non-completions were due mainly to the obstruction of the respondent or lengthy proceedings reflecting ongoing conflict between the couple. This additional analysis of non-completion cases therefore reinforces, rather than undermines, the case for replacement of the five Facts with a notification system.

² Resolution, Manifesto for Family Law (Resolution 2015). Available

at http://www.resolution.org.uk/editorial.asp?page_id=979&displayMode=preview

³ Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017); Liz Trinder & Mark Sefton, *No Contest: Defended Divorce in England & Wales* (Nuffield Foundation, 2017). Both reports are available at <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>

⁴ *Family Court Statistics Quarterly* published by the Ministry of Justice. Available at <https://www.gov.uk/government/collections/family-court-statistics-quarterly>

⁵ Coalition for Marriage. *No Good Reason: The Case Against No-Reason Divorce*. https://www.c4m.org.uk/wp-content/uploads/2018/03/C4M_NoReasonDivorce.pdf

2. Methodology

The findings presented here are based on further analysis of the data from the Finding Fault dataset of undefended and contested divorce cases. ‘Undefended’ cases are those where the respondent has not stated that they intend to defend the divorce. A ‘contested’ case is where the respondent has stated that they do intend to defend the divorce. A smaller proportion of those respondents go on to file a formal ‘Answer’, which is the mechanism to initiate the defence.

The undefended cases are a representative sample of 300 divorce cases drawn from four of the eleven regional divorce centres (RDCs). Those petitions were all issued either in the last quarter of 2014 or during 2015. The files were extracted between December 2016 and July 2017, a median 22 months since the petition was lodged. Of the 300 cases, 28 had not reached decree nisi, 23 had reached decree nisi but not absolute and 249 had reached decree absolute. A full description of the court file study can be found in the Technical Appendix published in 2017.⁶

The contested cases consist of a representative sample of 100 cases drawn from each of the same four RDCs. Consistent with the national statistics, the sample of 100 included only 29 Answers, or formal defences, too few to develop a really in-depth understanding of these cases. The researchers therefore generated a booster sample of a further 42 Answers. The boost sample was drawn from a list supplied by HMCTS Courts & Tribunals Directorate, of cases in which divorce petitions were issued at any RDC, and an Answer was recorded as filed between 1 October 2015 and 30 September 2016. As the filing of an Answer typically generated a transfer out to individual courts, it was agreed that to maximise the efficient use of researcher resources, and keep the burden on HMCTS to a minimum, the booster sample should be based on cases transferred to three receiving courts. Fieldwork for the booster sample was conducted in October and November 2017. As the Contested and Answer samples were generated on a different basis, any quantitative analysis of the data is either of all contested cases or of all Answer (Contested and boost sample) cases, rather than combining all defended and all boost samples together.

The data sources available on each case, whether undefended or contested, varied depending upon the stage reached, but typically included, the divorce petition, acknowledgement of service and any answer, application for decree nisi and statement in support, application for decree absolute and decrees made, as well as the court’s record of its decisions.

3. Notification and administrative processing

3.1 The government’s proposals

The consultation paper proposes that the sole ground for divorce and civil partnership dissolution will continue to be irretrievable breakdown, as currently. What it proposes to

⁶ Available at <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>

change is how ‘irretrievable breakdown’ should be evidenced. Currently, it is evidenced by one of the five ‘Facts’ of adultery, behaviour, desertion, two years’ separation with consent or five years’ separation.⁷ The proposed reforms would replace the five Facts with a new notification process whereby one, or both, parties would register their intention to divorce, followed by a waiting period of about six months.⁸

The consultation paper sets out two broad options for the sequencing of the notification period. These are sketched out below, but in broad terms provide for a six month’s notification ending in decree nisi (the *pre-nisi* scheme) or six months notification from decree nisi (the *post-nisi* scheme).

Pre-nisi notification scheme	Petition	Acknowledgement of service (unless joint notification)	6 month notification period + simultaneous court processing	Decree nisi	(6 week) waiting period	Decree absolute
Post-nisi notification scheme	Petition	Acknowledgement of service (unless joint notification)	Court processing of application (indeterminate)	Decree nisi	6 month notification period	Decree absolute

We re-examined the processing times for the undefended Finding Fault cases to identify some of the possible implications for the sequencing of a notification period. We look first at regional variations in processing times and, in section 4 below, at cases where there were problems with service.

3.2 Administrative variation in processing times to decree nisi

One of the potential problems with the *post-nisi* notification scheme is that the period to nisi would be indeterminate. This does have the potential to introduce unfairness between cases if that period amounted to more than a few weeks and were to vary significantly based on factors outside of the control of the parties.

In the Finding Fault sample, there were significant differences between the four regional divorce centres⁹ (hereafter RDCs) in the speed with which, a) they could issue petitions, and b) consider entitlement for decree nisi. As table 3.1 shows, RDCs 2 and 3 were typically able to issue petitions on the same day compared to at least a week in RDCs 1 and 4. Even more importantly, there were significant differences in the time taken to pronounce decree nisi. Cases at RDC 4 took two months longer on average, to reach decree nisi than at RDCs 2 and 3, whether measured from receipt or issue of the petition.

⁷ Section 1(2) of the Matrimonial Causes Act 1973 and s 44 Civil Partnership Act 2004. Note, ‘adultery’ is not available as a fact to evidence irretrievable breakdown of a civil partnership.

⁸ The minimum length of the waiting period is one of the questions being consulted upon.

⁹ Eleven regional divorce centres now process all 100,000 or so undefended divorces and civil partnership dissolutions in England & Wales. The RDCs were set up in 2014 and 2015 taking over responsibility from local courts.

Table 3.1: Differences in processing of petitions and applications for decree nisi (DN), by regional divorce centre

Regional divorce centre	Receipt to issue (median days) n=298	Receipt to DN (median weeks) n=271	Issue to DN (median weeks) n=272
RDC 1	7	17	15
RDC 2	0	13	13
RDC 3	0	13	13
RDC 4	11	22.5	20.5
All cases	3	17	16

Source: Finding Fault main court file review study

3.3 Implications for the timing of the notification period

We should note that the Finding Fault data was collected prior to the implementation of the apply for divorce online process. In addition, the regional divorce centres are to be replaced by a single national divorce processing centre. The introduction of the national centre should eliminate any regional discrepancies. The digitisation of the petition phase has reduced the error rate significantly,¹⁰ which *may* reduce the overall processing time. The completion of digitisation, and the removal of the need to evidence and scrutinise any of the s1(2) Facts, may also mean that the overall duration will reduce over time. Whilst we can be reasonably confident that regional variations will disappear, it is less certain what the implications are for the overall duration of the petition to nisi administrative processing period. In the short term, processing time from application to decree nisi is likely to continue to be subject to seasonal and staffing variations. In the long-term, it is impossible to predict what demographic, technological or administrative changes might influence processing times in future.

Any variation in processing times raises three issues. First, the uncertainty about timings will limit the ability of couples to plan for the future in relation to settled arrangements for children, but especially regarding the timescale for applications for financial orders. Second, there is potential for a perception of unfairness where some couples would have a significantly longer wait for their decree nisi than others, but would not then be able to claim any ‘discount’ with a fixed notification period starting at nisi. It is likely, however, that the parties’ perceptions of fairness will hinge on the length of the whole divorce process, rather than just the formally designated ‘notification period’. Third, the absence of a clearly defined pre-nisi period also makes it very difficult for policy-makers to take a principled or fully-informed approach to determining the minimum notification period. If the initial processing period can stretch to six months or more, then a subsequent six month’s notification might seem too long; whereas if the initial phase is only a matter of days or a few weeks, then six months might appear too short to some.

In contrast, any administrative variations could be easily accommodated within a *pre-nisi* notification system, particularly once the digitisation process is complete. The processing centres would have the whole six months of the notification period to be simultaneously processing each application in the background. By the time that the parties were able to

¹⁰ <https://insidehmcts.blog.gov.uk/2018/05/08/online-divorce-application-national-rollout-will-be-just-the-beginning/>

apply for decree nisi, the administrative process should be completed in all but exceptional cases. That would offer a high level of certainty and predictability to the parties as well as being entirely fair between cases.

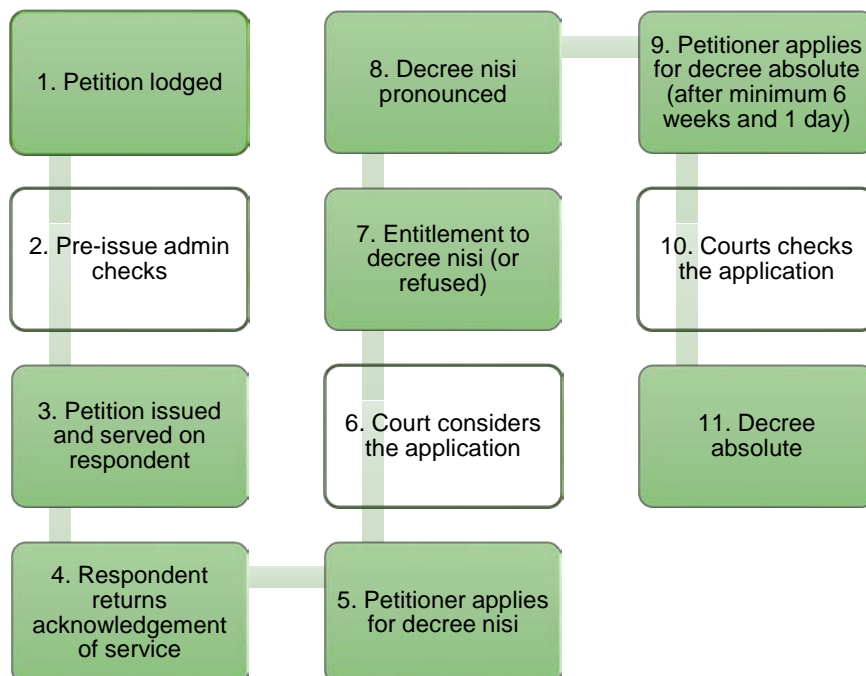
4. Notification and problems with service

4.1 The legal requirements

The second factor influencing the timing of decree nisi is the promptness with which the respondent returns the acknowledgement of service.

The current process for divorce is set out in figure 4.1.¹¹

Figure 4.1: The principal stages of the divorce process and scrutiny



12

The process begins with the petition filed by the petitioner. After basic administrative checks, the respondent is then served with the petition and the appropriate acknowledgement of service form.¹³ Every respondent must be served.¹⁴ The respondent (or their legal

¹¹ The process is identical for civil partnership dissolution, although the terminology differs slightly.

¹² If the respondent states an intention to defend and subsequently files an Answer then the court should schedule a case management hearing when the petitioner applies for decree nisi. If no Answer is filed then the process continues as normal.

¹³ The D10 form varies slightly depending upon the fact relied upon. The two year separation version, for example, includes a question about whether the respondent consents to the divorce.

¹⁴ The rules governing service are set out in Part 6 of the Family Procedure Rules

https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_06

representative¹⁵) must acknowledge service of the petition by returning a signed copy of the acknowledgement of service. It is not sufficient (as in Scotland¹⁶ for example) for the papers simply to be sent to the respondent – the respondent must respond. The respondent has seven days from receipt of the petition to respond, although there are no automatic sanctions if they fail to do so.

Table 4.1 Methods of effecting service

Method	Description	Court permission required	Form	Fee (unless exempt) ¹⁷
Service via alternative methods	Service attempted, for example, by email or at an alternative address etc.	Yes	D11	£50
Address search	RDC search for respondent's current address via other government departments	Yes	D11	£50
Process server	Paid for, and privately arranged, service to attempt to serve the papers on the respondent. The process server will produce a report for the petitioner to submit with the application for decree nisi	No	None	Cost varies, but will be approximately £100
Bailiff service	Service to attempt to serve the papers on the respondent by the court bailiff and to produce a report for the petitioner to submit with the application for decree nisi. Generally reserved for litigants in person	Yes	D89	£110
Deemed service	Petitioner asks the court to accept alternative evidence provided by the petitioner that the respondent has been served, e.g. by a text or email from the respondent	Yes	D11	£50
Dispense with service	Petitioner asks the court to dispense with the requirement to serve the respondent, typically where the respondent cannot be traced. The petitioner must provide detailed documentary evidence of what inquiries have been undertaken, including via family and friends, employers, banks, child support agency/maintenance service, etc.	Yes	D13B	£50

¹⁵ The legal representative can sign on behalf of the respondent for behaviour, desertion or five year separation cases. The respondent's signature is required for adultery or two year separations as admission of adultery, or consent to the divorce, must be shown.

¹⁶ The problems with that approach were illustrated in a case where the papers were posted by bailiffs through a letter box and then subsequently removed before the respondent could see them - *Raj Jandoo vs Nerinder Jandoo or Kaur* [2018] CSOH 14 A299/16.

¹⁷ As of December 2018.

If the respondent does not return the acknowledgement of service, it is the responsibility of the petitioner, and not the court, to take action to effect service. It is not a straightforward process. First, the petitioner has to identify which of a range of options is appropriate in the circumstances (see table 4.1) and then, second, they have to complete the paperwork to pursue that option, including supplying additional evidence. Both selecting the option and completing the paperwork would appear to be challenging for many litigants in person, (LIPs) particularly those with communication difficulties. Each option attracts additional costs, with either a court application fee or a process server charge. Represented clients will also have legal costs.

In addition, the court may refuse to grant the application, and even if it does grant it, the resulting action may still not result in effective service.

4.2 Service difficulties and their consequences

4.2.1 The extent of service difficulties

In the majority of cases in the Finding Fault sample, respondents did return the acknowledgement, and did so in a median eight days. However, a tenth took two months or more and a handful took more than a year.

No acknowledgement of service was returned by the respondent in 41 of the 300 undefended cases, 13.7% of the total. Extrapolated nationally, that would amount to about 14,000 cases annually.

4.2.2 The reasons for service difficulties

It was not always possible to determine from the evidence on the files why the acknowledgement had not been returned. Very few, however, appeared to result from any difficulty in locating the respondent, even those living overseas. Instead, the majority of the 41 non-returns appeared to reflect a decision of the respondent not to cooperate with the process, whether they were opposed to the divorce on principle, to the reason given for the divorce or they simply wanted to make the process difficult for the petitioner.

When considering the behaviour Fact, there was evidence that non-response was significantly more likely to occur in cases featuring allegations of domestic abuse/coercive control. This was true for both allegations of physical violence (table 4.2) and for allegations meeting the government's broader definition of domestic abuse,¹⁸ including emotional and financial abuse and coercive control (table 4.3). Whilst it is invidious to categorise the 'seriousness' of abuse, in eleven cases we judged that the allegations were particularly strong, including coercive control and sexual violence. The disproportionate numbers of

¹⁸ The cross-governmental definition of domestic violence and abuse includes "any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse ... including psychological, physical, sexual, financial, emotional". The full definition is available at <https://www.gov.uk/guidance/domestic-violence-and-abuse> The researchers took an expansive view of what that would include. For further details of the coding, see the Finding Fault: Technical Appendix at <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>.

domestic abuse/coercive control allegations amongst the non-return sample, suggests that non-response was being used as a further instance of controlling behaviour.

Table 4.2: Return of acknowledgement by allegations of physical violence to petitioner (behaviour petitions only)

	No AoS	AoS filed	Total
No allegations of violence	15 13%	100 87%	115 100%
Allegations of violence	8 40%	12 60%	20 100%
Total	23 17%	112 83%	135 100%

Source: Finding Fault main court file review study. $p = 0.003$

Table 4.3: Return of acknowledgement by allegations meeting the cross-government definition of abuse (behaviour petitions only)

	No AoS	AoS filed	Total
No allegations of abuse	9 12%	69 88%	78 100%
Allegations of abuse	14 25%	43 75%	57 100%
Total	23 17%	112 83%	135 100%

Source: Finding Fault main court file review study. $p = 0.047$

There were cases where the non-returns appeared to reflect a high level of conflict between the parties, including cases where specific allegations about behaviour were reported to have triggered the respondent's resistance.¹⁹ There was also an example where the respondent refused to return the acknowledgement until a sum of money was paid.²⁰ One additional advantage of moving to a notification system would be that it should reduce the level of non-response triggered by the use of fault-based Facts, particularly behaviour.

In a small number of cases, the non-response did not appear to be a deliberate choice of the respondent. Some respondents had mental health difficulties and/or chaotic lifestyles and returning the form promptly proved difficult.²¹

4.2.3 The impact of service difficulties on case progress

Whilst service is an essential element of the process to ensure that respondents are aware of the divorce, it can cause significant problems in the minority of cases where the respondent is not reachable, or responds only slowly or not at all. Nearly half (44%) of the 41

¹⁹ L196 – a process server reported that the respondent was not returning the acknowledgement as they “did not agree with the reasons for the divorce”.

²⁰ L055 – the respondent alleged that the money was owed following an informally agreed property division.

²¹ Including case M150 where the parties had already been separated for six years. It took nearly 18 months for the respondent to return the acknowledgement.

non-return cases in the Finding Fault sample failed to reach decree nisi, compared to only 3% of cases where the acknowledgement had been returned. Further, the non-return cases that did manage to reach decree nisi, took twice as long to get there as cases where the acknowledgement was returned, a median 30 weeks (or 7.5 months) compared to 15 weeks.

Extrapolated nationally, that would amount to about 6,000 cases annually failing to reach decree nisi which involve non-response and 8,000 taking twice as long to reach nisi as 'acknowledged' cases.²² That is a substantial number. We discuss the implications for law reform of this delay in or failure to reach decree nisi in section 4.4 below.

4.3. Accessibility and effectiveness of methods to address service problems

4.3.1 Accessibility

About one in seven petitioners are faced with the legal and financial challenge of what to do about the non-return of the acknowledgement of service. We noted above that petitioners will have to select first from a potentially confusing range of options. They (or their lawyer) will then have to instruct a process server or complete a fairly challenging application form for the court to consider. Our data suggests that LIPs, in particular, experienced significant problems with the accessibility and effectiveness of the process to effect service.

Table 4.4: Any action taken to effect service by representation

	Represented petitioner	In person (or 'advice' only)	Number (% of all undefended cases)
No action required	130 83%	129 90%	259 (86%)
Effective pursuers	18 12%	3 2%	21 (7%)
Ineffective pursuers	4 3%	3 2%	7 (2%)
Non-pursuers	4 3%	9 6%	13 (4%)
Total	156 100%	144 100%	300 (100%)

Table 4.4 sets out whether or not petitioners took action in the face of the non-response. As can be seen, about two-thirds of petitioners pursued some form of action to effect service where the acknowledgement had not been returned, whilst a third were 'non-pursuers'. Table 4.4 also gives some clue as to what factors shaped whether or not the petitioner took things further. Whilst one or two of the non-response cases may have reflected a change of circumstances,²³ most of the thirteen non-pursuer cases seemed to result from the petitioner having limited choice but to give up on the process of pursuing service. Given the complexity of navigating between the various options and the challenge of completing the relevant forms, it appears that access to legal advice, support and encouragement are significant

²² HMCTS may be able to produce more recent data based on a significantly larger sample.

²³ For example an attempted reconciliation, decision not to pursue the legal divorce at that time or death of one of the parties. We explore this question in section 5 below.

factors. It is telling that 22 of the 28 pursuers were legally represented, while nine of the 13 non-pursuers were LIPs.

Looked at in more detail, the non-pursuers contained two main groups. The first were petitioners who had got themselves into a double legal trap: the lack of an acknowledgement meant no service, but it also meant that they could not make out the two years with consent or adultery Facts.²⁴ Some of these, particularly represented petitioners, may have decided that it was not worth pursuing service in those circumstances.²⁵

The second group were those where there was evidence that the petitioner still wanted to pursue the divorce, but where the petitioner had additional vulnerabilities or was less able to take on the task of pursuing service without support. There were at least six of the thirteen non-pursuers in this group. They included two cases where the petitioner wife had limited English language skills and where the respondent lived overseas. Case M030, for example, concerned a wife who had already been separated for more than seven years, but where the papers sent by the court were returned undelivered twice. The six apparently frustrated non-pursuers also included four unrepresented women where the petitioner reported a background of serious domestic abuse. In M119, for example, the petition alleged serious physical and sexual abuse and coercive control, accompanied by a GP letter confirming multiple appointments because of domestic abuse. In that case, the unrepresented petitioner emailed the RDC on several occasions asking for advice on what she should do to move the divorce on. There was no evidence, however, of further progress. It is conceivable that there may have been other petitions issued under different case numbers, but the concern is that those women may have had no alternative but to reconcile with an abusive partner or to remain separated but unable to legally divorce.

It is worth noting that addressing service was very challenging for the unrepresented, but could be difficult for professionals to navigate too. In M054, another case with a background of serious domestic abuse and police intervention, the lawyer had arranged for the respondent to be personally served by a process server, but mistakenly also applied for deemed service, having been so advised by court staff. Equally, in L075 a litigant in person applied for, and was granted, deemed service by a deputy district judge even though the petition was based on two years' separation and there was no evidence of consent without the acknowledgement.²⁶ Given the difficulties that the professionals face with service, it is difficult to imagine how LIPs, particularly those with additional vulnerabilities, can navigate the process with the very limited assistance that is currently available.

²⁴ The acknowledgement for two years' separation cases includes a question asking the respondent if they consent to the divorce; the adultery form asks the respondent if they admit to the adultery.

²⁵ The risk that the respondent may not, after all, be willing to consent to the divorce despite any assurances to the petitioner, was one of the reasons why solicitors in the focus groups conducted for the main study generally preferred to use the behaviour Fact. See especially section 3.6. Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017) available at <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>

²⁶ The application for decree nisi was later refused by another DDJ as there was no evidence of consent. The LIP did then manage to apply to amend the petition to behaviour. There was no acknowledgement of the amended petition either and the LIP appeared then to give up (case L075).

4.3.2 The effectiveness of efforts to effect service

Petitioners in 28 of the non-response cases attempted to take action (table 4.2 above). The most common approach was to try again to effect service, by using a process server (nine of 28 cases), bailiff service (four of 28 cases) or at an alternative address (one of 28 cases). A more challenging approach was to ask the court to treat the respondent as already served, with twelve applications for deemed service. There were also two applications to dispense with service.

The majority of the 28 were classified as 'effective pursuers' in that their attempts to effect service were ultimately successful and they went on to achieve decree nisi, albeit taking twice as long as where the acknowledgement had been returned promptly. The chances of pursuit, and effective pursuit at that, appeared to be greatly increased where the petitioner was represented. As table 4.2 above indicates, 18 of the 22 represented pursuers were ultimately successful, compared to only three of the six unrepresented pursuers. Taken together with the nine non-pursuer LIPs, the upshot is that of the 15 LIPs where there was no acknowledgement returned, only three, or one-in-five, reached decree nisi. That is a worryingly low proportion.

The complexities of the process and the evidential requirements mean that taking effective action can be challenging, for LIPs especially. In total, five applications for deemed service or to dispense with service were refused. In each case the refusal did appear to be legally justified as the petitioner had failed to provide any, or sufficient, evidence as to why the application should be granted.²⁷

However, it has to be recognised that very little guidance and support is available currently for what is a fairly complex legal challenge. The petitioner in M150, for example, had made two unsuccessful attempts to serve papers on the respondent who was reported to have mental health issues. She then applied for deemed service (noting in the application that she could not afford a lawyer). The application was refused. The refusal letter, setting out that the petitioner had provided insufficient evidence that the respondent had been served, was drafted in standard legalese, making no allowances for the petitioner's lack of legal knowledge. The letter was entirely misinterpreted by the petitioner who then reapplied, but by submitting evidence of how the application for deemed service, rather than the petition itself, had been served on the respondent. The application was again (correctly) refused. There was no further action in the case and the petitioner appeared to have given up. The parties had already been separated for six years at that point.²⁸

In the absence of effective and accessible support, there is the risk that desperate LIPs rely on services offered by individuals or organisations that do not have a good (or any) understanding of what is required to progress these non-standard cases. This happened for two of the 'ineffective pursuers' in the sample. The petitioner in M027 paid a 'consultant' for help with the divorce. The consultant made a terrible mess of the case, including applying for decree nisi at issue and completing the acknowledgement themselves. The petitioner was

²⁷ One case was refused as the petition was based on two years' separation (L055, cf L075 above).

²⁸ The second refusal letter was also couched in technical legal language that would be likely to be inaccessible to the petitioner: "The statement does not indicate how the Court can be satisfied the petition and associated documents have come to the attention of the R... Please file further evidence as necessary".

then left in limbo after the RDC challenged whether the consultant was legally qualified to conduct litigation on behalf of the petitioner. Thereafter, the petitioner made a vain attempt to get the divorce on track, but again appeared forced to give up without reaching decree nisi. Similarly, the petitioner in M083 used an online divorce service. An application to dispense with service was filed with the petition, but provided very little evidence of efforts to have traced the respondent. The application was refused. The court then tried to explain to the LIP what would be required, something that the online divorce service appeared to have failed to do.²⁹

None of the petitioners in the five cases involving refusals were able to progress their petitions. Four cases ended in apparent stalemate with no further activity on file. One case did reach decree nisi, but only after the wife's application for deemed service had been refused and the divorce proceeded on a petition issued by the husband.³⁰

There were also two cases where the alternative methods of service failed and the petitioner remained unable to progress the divorce. Once more, one of these cases involved very serious domestic violence. The petitioner in L168 was represented. Her petition alleged serious physical violence and extremely controlling behaviour. Bailiff service was attempted unsuccessfully three times. The file ended there, with no signs of further progress.

4.4 Implications for the timing of the notification period

The analysis of the problems caused by non-response, and the difficulties of effecting service, especially for LIPs, does have implications for the timing of the notification period.

Under the current law, a petitioner who does eventually reach decree nisi after problems with service has to wait only a further six weeks and one day before applying for their absolute. However, the same petitioner would be *significantly* disadvantaged if the six month's notification only started after nisi had been finally reached. The court *might* be able to award costs against the respondent, but the petitioner would not be able reduce or recoup any of the time delay.

In contrast, the advantage of the pre-nisi notification approach would be that the court would be able, in effect, to backdate service to close to the date of issue. So, for example, if a petition is issued in early March 2020, the petitioner might apply in August 2020 for deemed service, the court could treat service as having occurred in mid-March 2020, meaning the notification period would run from mid-March and expire in mid-September 2020. The petitioner would not be disadvantaged compared to the current law.

4.5 Implications for reform of service

The 'backdating' solution to the start of the notification period, set out in section 4.4, would apply for deemed or dispensed with service cases, and potentially in cases where there were delays involving the use of a process server, the most common response to problems

²⁹ The information given was that the court would only dispense with service where it was impracticable to serve the application by any other method and if the court was satisfied that full enquiries have been made as to the Respondent's whereabouts, including evidence of social media searches and an inquiry agent's report.

³⁰ This was another case where the wife had alleged serious domestic violence. The non-return of the acknowledgment meant that the husband was able to achieve the divorce on his terms.

with service. Nor would it work where the petitioner is unable to pursue service, because of lack of money or lack of information or confidence. As we saw above, about a third of the non-response petitioners appeared to give up, apparently defeated by the financial, legal and emotional demands of pursuing service, especially without legal advice. It is of particular concern that some of those forced to give up included cases where the petitioner had alleged coercive control and/or very serious emotional, physical or sexual abuse.

Regardless of the approach to law reform and the timing of the notification period, this additional analysis has highlighted the wider issue of the need to overhaul and simplify the process of effecting service in divorce cases. It would be very helpful if the user-design approach that has been so effective in developing the 'apply for divorce online' service could be used to address problems with service. This could include, for example, the use of automatic system-generated reminders, and very user-friendly guides and, ideally, a dedicated support service for unrepresented parties. Consideration should also be given to whether the responsibility for effecting service could be shifted more towards the court, and away from the petitioner, particularly given that so many petitioners will be in person.

5. Understanding the reasons for case non-completion

5.1 Notification and the potential for reconciliation

The second major question to explore in this report concerns whether the five Facts should be replaced by a notification process, more specifically, whether notification would limit the potential for any reconciliations to occur. It has been argued that the annual gap of at least 10% between petitions issued and decrees absolute shown in the official *Family Court Statistics Quarterly*,³¹ is due to "couples abandoning" a divorce.³² While the report notes that it is not possible to say "all such couples are reconciled", the authors go on to assert that "a significant proportion of marriages do appear to be saved".³³ No evidence is given to substantiate this claim.

It is also argued that it is the current law, specifically that breakdown must be evidenced by one of the five Facts, that is responsible for what are considered to be reconciliations. Thus, "Each year at least 20,000 people remain married because of our reason-based divorce system" and "the cooling off period built into the current system".³⁴ The authors argue that the interests of what they see as 'reconcilers' should be balanced against any change to the law that would "expedite divorce proceedings or remove cause for reflection".³⁵

The fact that there is an annual 'completion gap' between petitions issued and decree nisi and decree absolute is not in question. The Family Court quarterly statistics published by the Ministry of Justice are derived from Her Majesty's Courts and Tribunals Service FamilyMan management information system. What this report does test, however, is the interpretation of

³¹ <https://www.gov.uk/government/collections/family-court-statistics-quarterly>

³² Coalition for Marriage. *No Good Reason: The Case Against No-Reason Divorce*. https://www.c4m.org.uk/wp-content/uploads/2018/03/C4M_NoReasonDivorce.pdf

³³ *No Good Reason*, p. 2.

³⁴ *No Good Reason*, p. 2.

³⁵ *No Good Reason*, p. 3.

those official statistics, specifically the claim that a “significant proportion” of marriages appear to be ‘saved’ and that the current law provides a cooling off period.

5.2 Completion and non-completion in the Finding Fault undefended sample

Fifty-one of the 300 undefended Finding Fault cases, or 17% of the total, had not reached decree absolute by the end of the fieldwork period.³⁶ The 51 included 28 that had not reached decree nisi, or 9% of the total sample. The completion figures for the Finding Fault sample are very similar to the national statistics. In 2015, the number of decrees nisi made nationally was 93% of the total number of petitions started nationally, comparable to the 91% of the Finding Fault sample that reached decree nisi.³⁷ Similarly, the number of decrees absolute made nationally in 2015 was 83% of petitions started, the same as 83% of the Finding Fault sample. Analysis of the Finding Fault cases should therefore give a reasonable indication of the reasons for non-completion nationally.

5.3 Cases not reaching decree nisi

Focusing on the 28 cases in the Finding Fault sample that did not reach decree nisi, table 5.1 indicates the cases faltered at different stages, with the largest group getting no further than the issue of the petition.

Table 5.1: Last stage reached, Finding Fault court file sample

Last stage reached	Number	Percent
Case stopped after issue due to non-payment	1	0.3
Petition issued	16	5.3
Acknowledgement of service received by RDC	4	1.3
Application for nisi refused	7	2.3
Nisi pronounced, no application for absolute	23	7.7
Decree absolute made	249	83.0
Total	300	100.0

Source: Finding Fault main court file review study.

There was a wide range of reasons why cases did not proceed. It was not always possible to tell from the case file exactly what had happened, but in the majority of cases it was relatively straightforward to work out. What was clear was that there was little evidence of a

³⁶ The median period between the issue of the petition and the data collection was 2.3 years.

³⁷ The source of the national statistics is table 11, Progression of divorce cases started for England and Wales, annually 2003 - 2016 and quarterly Q1 2009 - Q1 2017, *Family Court statistics quarterly: January to March 2017*, available at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2017>. It should be noted that the method of calculation for the two samples are different, although the completion rates are very similar. The figures for The Finding Fault non-completions refer to the outcomes of individual cases, on average two years and three months from issue. In contrast, the national statistics compare the total number of petitions issued in that year with the total number of decrees made in that year, regardless of when the petition had been issued. The numbers of decrees for previous years are updated in each subsequent edition of the Family Court Tables to include any new decrees made (since the previous edition) by the date of extraction of that quarter's statistics. The Finding Fault sample consists of petitions issued in Q4 2014 and Q1 2015, with data extraction conducted between December 2016 and July 2017, with a median 2.3 year gap between issue and fieldwork. Consequently, the closest match to the Finding Fault sampling parameters are the 2015 figures as reported in the Q1 edition of the 2017 Family Court Tables.

joint decision by couples to give up on a divorce and to seek reconciliation. Instead, the majority of petitioners not reaching decree nisi appear to have been defeated by procedural and legal difficulties, largely caused by the non-cooperation of the ex-partner.

Twenty one of the 28 petitioners in cases where the respondent did not acknowledge service did try to take further action of some kind after submitting the petition, indicating that they did wish to proceed with the divorce. Those actions included contacting the RDC about what they should do next, appointing a solicitor, seeking to effect service, proceeding on an alternative petition and applying for (but being refused) decree nisi.

In practice, however, 22 of the 28 cases were not actionable on the basis of the original petition, either because of lack of service, a Fact not being made out or a procedural problem, or a combination of all three. The most common obstacle was the failure (or refusal) of the respondent to return the acknowledgement of service, present in 19 cases.³⁸ The difficulties for addressing lack of acknowledgement, particularly for unrepresented parties, were identified in section 4 above. In fact, six petitioners tried to effect service but failed, with four applications for deemed/to dispense with service being refused and attempts at personal and at bailiff service ineffective. The legal Fact was not made out in ten of the cases, mostly because the absence of the acknowledgement meant that there was no admission of the respondent's adultery or consent to two years' separation. In one case an unrepresented petitioner with limited English had an application for decree nisi refused twice as the particulars of behaviour did not meet the threshold.

The technical rejections included a case where the respondent was able to persuade the court that a petition had been issued previously in another jurisdiction. There were also two cases where the petitioner stuck with a clear inept 'advisor' who charged for a service but whose incompetence meant long delays without either case resulting in a decree. One was the 'consultant' described in section 4.3.2 above. Another was an online divorce company³⁹ where the case was stopped shortly after issue as the company's cheque for the fee bounced. The petitioner clearly continued to want the divorce as more than a year later the same advisor, albeit presenting themselves as a different company, contacted the RDC to inquire about the whereabouts of the petitioner's marriage certificate and seeking to have the petition reissued. The RDC stated that a new petition would be required. There was nothing further on file. One of the potential advantages of a reformed and clearer divorce law, coupled within the online process and assisted digital support, is that more LIP should be able to complete the process themselves, without having to rely upon advisors of variable competence.

Six of the non-decree nisi cases were capable of proceeding, in that there was an acknowledgement and the fact appeared to be made out. However, it would seem very unlikely that five of the six would have reconciled. The reasons were various. They included an elderly couple who had already been separated for nine years but who encountered repeated technical problems (L147), a case where the respondent had been sectioned under the Mental Health Act following an extremely grave attack on the petitioner (M069), an odd case where the court treated the petition as defended and the divorce became mixed up

³⁸ In two others, the acknowledgement was returned more than twelve months late.

³⁹ A different online company from the one mentioned in section 4.3.2.

and forgotten in ongoing contested financial proceedings (M165), and two cases where one of the parties lived abroad and there were repeated and protracted technical difficulties (L008 and M031).

That leaves one proceedable case with no obvious reason evident from the file as to why the divorce had not proceeded (case M125). There was also one other currently non-proceedable (no acknowledgement) case, but where both parties were represented and therefore it should have been possible to effect service. It is not clear what happened in either case. It is possible that the parties had attempted a reconciliation, they may have been taking their time or one of the parties could have passed away.

However, it is clear from the files, that far from a 'significant' number of cases being abandoned in favour of reconciliation, the majority of cases told a story of petitioners faced with insurmountable difficulties with the original petition. Some struggled on with attempting to make the petition work, others appeared to give up sooner. Some of these may have pursued an alternative petition, which would have been issued under a different case number.⁴⁰ Others may have simply continued with an informal separation. Only two cases *might* have attempted a reconciliation, but even there, it was far from certain.

5.4 Cases not reaching decree absolute

Twenty-three cases reached decree nisi, but there was no decree absolute on file. For these cases, non-completion was not generally an issue about whether the petition was capable of proceeding in legal terms. Once decree nisi has been pronounced, then the petitioner can apply for decree absolute after six weeks and one day.⁴¹ As with the no decree nisi cases, there were a wide range of factors that appeared to explain why these 23 cases did not reach decree absolute. The most common factor, however, was that the proceedings were still ongoing, as table 5.2 indicates.

Table 5.2: Likelihood of reconciliation in cases reaching decree nisi (DN) but not absolute

Likelihood	Number of cases
Attempted reconciliation: DN set aside	1
Unclear: no indication either way	4
Unlikely: ongoing (religious divorce)	1
Unlikely: ongoing (contested finances)	5
Unlikely: ongoing (finances and Children Act)	2
Unlikely: protracted finances and technical difficulties	5
Unlikely: recent decree nisi	2
Unlikely: technically challenged	1
Unlikely – alternative petition issued	1
No reconciliation - death of respondent	1
Total	23

In 13 cases the parties were not reconciling, but still attempting to settle matters arising from the dispute, whether a related religious divorce, the finances or child arrangements. Two

⁴⁰ The case files do not ordinarily contain details of any subsequent proceedings.

⁴¹ Very rarely, the Queen's Proctor may intervene, for example, in cases of suspect fraud. There were no such examples in our sample of defended or undefended cases.

cases had only recently reached decree nisi and in one other, the unrepresented parties had experienced ongoing technical difficulties at decree nisi stage and had then applied too soon for decree absolute. One other case was proceeding on the respondent's petition and the respondent had died in another.

That leaves five cases remaining from the 23. In one there was indeed an attempted reconciliation. In that case the parties had failed to halt the pronouncement of decree nisi at the very last minute, but instead had the decree set aside.

The four other cases are unclear. Two cases could be possible reconciliations. They shared some similarities with the set aside case, as they involved retired couples where both parties were represented. On the other hand, there was no evidence of setting aside the decree and in one case there had been a quite fierce dispute over costs. The other two cases concerned two sets of LIPs. Again, these could be reconciliations, or equally could be death, delay or, as does occur, LIPs not realising that decree nisi is not the final decree and that they must apply for decree absolute.

5.5 The five Facts as barrier and a cooling off opportunity

The analysis of the case files cannot be definitive in all cases. There is simply not enough information on the file in some cases. That said, it is quite clear that very few of the cases were failing to complete because of an attempt at reconciliation. The majority of non-completions appeared to reflect a state of ongoing conflict between the parties, rather than reconciliation, with obstruction by the respondent or ongoing proceedings being the most common reason for non-progression.

There was only one definite attempt at reconciliation out of 300 cases, just 0.3% of the total. In addition, there were two possible pre-decree nisi and up to four possible decree nisi cases that *might* have attempted reconciliation. Equally, those cases may not have proceeded because of death, delay, not understanding the process or no sense of urgency. Even if all six possibles and the set aside decree nisi case were indeed reconciliations, that would still amount to only 2.3% of the sample, which is by no means a significant, or even particularly notable, proportion.

Further, even if the figure is 2.3% instead of the known 0.3%, it is important also to note that we are talking only about *attempted* reconciliations. We do not know if the attempt at reconciliation was *successful* in that the parties resumed cohabitation, let alone whether the marriage became happy and fulfilling for the parties or whether the parties resumed married life in the fairly toxic climates described in the petitions concerned.

More broadly, there is limited evidence that the current 'reason-based' system provides the 'brake' that forces the parties think again. As the *Finding Fault* report found, the disproportionate use of the adultery and behaviour Facts in England & Wales is precisely in

order for the parties to get a quicker divorce, rather than having to wait.⁴² And there is very limited evidence that the use of fault, or “having to give a reason” provides the ‘cooling off’ period that facilitates reconciliation. Indeed, in the only confirmed ‘reconciliation’ case, the very opposite was true. In that case, the parties had longstanding marital difficulties, but then had had a major argument resulting in a behaviour petition being issued within days, the acknowledgement signed within a fortnight, the application for decree nisi three weeks later and decree nisi pronounced three months after issue of the petition. The parties then had to scramble to have the decree nisi set aside, but fortunately had the benefit of lawyers to do so.

In contrast to the speed of a fault-based petition under the current law, such a rapid move from a major argument to decree nisi would not be possible under the proposed reforms. Indeed, a further advantage of having the six months notification period running before decree nisi is that it would offer the extended cooling off period that the current fault-based system fails to deliver.

6. Five years’ separation as defence by proxy

6.1 The numbers and nature of defended cases

Alongside the removal of fault, the MoJ consultation paper proposes that it should no longer be possible to defend a divorce where the court has jurisdiction, there is a valid marriage and no evidence of fraud or coercion. That proposal is based on the principle that marriage must be based on consent and that it is wrong to force someone to remain in a marriage that they have stated consistently that they wish to leave. The public reaction to the *Owens* case⁴³ in 2018 illustrated that very point.

A second argument is that, in any case, the numbers of defences are extremely low and have been so for decades. This makes any right to defend in principle, largely illusory in practice. Our analysis in the *No Contest* report, for example, indicated that fewer than 2% of respondents registered an *intention* to defend.⁴⁴ Then only a third (29%) of those intentions to defend resulted in an Answer being filed, representing less than one half of one per cent of all divorces. Finally, most of those defences resulted in some form of compromise to achieve the divorce, such as toning down behaviour allegations or proceeding on cross-petitions where both parties divorce each other. The result is that there are only about 18-20 contested trials per year, amounting to about 0.018% of all divorce cases annually.

However, it has been suggested that the number of formal defences understates the extent to which respondents really oppose the divorce and would wish to remain married. In particular, it has been argued that the 15% of divorces granted annually on the basis of five years’ separation should be added to the total numbers of those respondents who are

⁴² Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017) Available at <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>

⁴³ *Owens v Owens* [2018] UKSC 41

⁴⁴ Liz Trinder & Mark Sefton, *No Contest: Defended Divorce in England & Wales* (Nuffield Foundation 2017). Available at <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>

opposed to the divorce, on the basis that the case would otherwise have proceeded on the manifestly quicker two-year separation Fact. In this section therefore, we explore the Finding Fault five years' separation cases in more depth. We seek to identify whether there is any evidence that the selection of that Fact does stem from the respondent's opposition to divorce or whether it may simply be the most accurate, or easiest, method to achieve the divorce when the parties have already been separated for a long period. In simple terms, are five-year cases mainly long separations where the parties are finally getting around to finalising the legal divorce or are they cases where the respondent has sought to frustrate the divorce from the beginning as they are opposed to divorce in principle?

6.2 Five years' separation cases and defence

We start by looking at five years' cases where there is evidence of dispute in the form of an intention to defend or a formal Answer. If five years is an indicator of respondent opposition to divorce, then we would expect a disproportionate number of five years' separation cases involving defences. In fact, that was not the case, as shown in Table 6.1. There were disproportionate numbers of *behaviour* cases in the Genuine Dispute but no Answer (GD-NA)⁴⁵ and the Answer samples. However, the proportions of five years' cases were broadly in line with the undefended (main) sample. On the face of it, therefore, there is no evidence of widespread attempts to block the divorce by respondents in five years' cases.

Table 6.1 Fact relied upon in the petition, by case type

	Main (n=300)	Error (n=19)	GD-NA (n=52)	Answer (n=71)	Total
Adultery	33 11%	1 5%	2 4%	4 6%	40 9%
Behaviour	135 45%	5 26%	40 77%	63 89%	243 55%
Desertion	3 1%	0 0%	1 2%	0 0%	4 1%
Two years' separation with consent	86 29%	11 58%	4 8%	1 1%	102 23%
Five years' separation	43 14%	2 11%	5 10%	3 4%	53 12%
Total	300 100%	19 100%	52 100%	71 100%	442 100%

Source: Finding Fault main and contested samples

Further, inspection of the five years' separation GD-NA and Answer files indicated clearly that only one of the eight respondents was denying that the marriage had broken down irretrievably. In three of the five GD-NA cases the respondent wanted the divorce to proceed, but was arguing that the parties had not been separated for the full five years. Respondent M009, for example, wanted to divorce on the basis of 'irreconcilable differences'

⁴⁵ Genuine dispute but no Answer (GD-NA) refers to those contested cases where the respondent stated on the Acknowledgement that they intended to defend, but no Answer was ever filed. They contrast with the 'Error' cases in the contested sample where all the evidence pointed to the respondent's stated intention to defend being a mistake. This occurred typically in two years' separation cases where the respondent gave their consent to the divorce and stated that they also intended to defend.

and “NOT on five years separation which is a total lie!”. The two other GD-NA respondents appeared to want to make the process difficult for the petitioner, rather than attempting to save the marriage. The respondent in L084, for example, stated that the parties had not been separated for five years, but then took no further action when the petitioner’s lawyer promptly filed documentary evidence to support the five-year claim.

The three five years’ separation Answer cases included one case where the parties had been separated for about twenty years, and the respondent wanted the divorce to proceed, but in a different jurisdiction. A second case involved the respondent wanting to have the petition amended from the current five years’ separation to two years with consent. The respondent made clear on the Answer that the request was to protect his alleged financial interest in the former matrimonial home, not an issue in relation to the status of the marriage.

Only case M085 involved the respondent husband denying that the marriage had broken down irretrievably. This was a sad case involving a long marriage, but where the husband had apparently longstanding mental health issues. He had held onto entirely unrealistic hopes of a reconciliation, even though the parties had been separated for five years and the wife was in a long-established relationship with a third party. She had also taken a range of steps to ensure that the respondent had no means to contact her. The divorce went through eventually despite the respondent husband’s multiple attempts to thwart it.

With the sole exception of the M085 case therefore, the ‘defended’ five years’ separation cases were not about respondents trying to save the marriage, but rather attempts to change the factual basis of the petition or to protect one’s financial position. In this, they were similar to the defences of other Facts, especially behaviour. As we showed in section 4 of the *No Contest* report, only 12% of GD-NA cases and 18% of Answers involved respondents denying that the marriage had broken down irretrievably. The great majority were cases where, as with the five years’ separation cases, the respondent was challenging the Fact or specific particulars, but was otherwise also wanting the divorce to proceed.

6.3 Five years’ separation and the undefended cases

There were 43 petitions based on five years’ separation, or 14% of the 300 undefended cases, the same proportion as for the national statistics.

The general perception of the family lawyers who took part in focus groups for the Finding Fault study was that five years’ separation cases were typically ones where the parties had been content to let their legal status drift, but then sought a divorce when one of them wanted to remarry. A solicitor from focus group A, for example, referred to a case where a separation agreement provided for the parties to petition after two years:

And we provided in the agreement for them to come back after two years, and they just didn’t. And now one of them wants to remarry.

There is generally less information on file about the motivations and circumstances of the petitioners and respondents in the undefended five years’ separation cases, compared to the GD-NA and Answer cases. However, the data does suggest that while there may be some respondents who are opposed to divorce completely amongst the five year’s separation cases, for others it would appear that the parties have simply not prioritised

formalising their legal status. Whilst speed is an important consideration for many petitioners, and indeed drives the disproportionate use of the behaviour Fact to avoid a two or five year wait,⁴⁶ there seemed much less sense of urgency amongst the five years' separation cases.

6.3.1 The petitioner and timing of the petition

One indicator of the sense of urgency of the petition – or lack thereof, is the timing of the petition after separation. If the petitioner had felt forced into relying on five years' separation because of the perceived, or actual, opposition of the respondent, then we should expect most petitions to be filed as soon as the five-year period expired. In practice, the median period from physical separation to filing was 76 months, or 6.3 years. A quarter of petitions in these cases were filed after 120 months (ten years). Only four of the 43 five years' petitions were filed on, or by, month 64 (5.3 years). The figures for the date of the mental separation were very similar.

No doubt petitioners will be careful to ensure that the dates submitted are not too close to the five-year cut-off to avoid the risk of rejection. Even so, the figures do suggest that only a minority of petitioners may have been waiting impatiently for the clock to run down.

6.3.2 The cooperation of the respondent

There was also little sign of active resistance from most five years' separation respondents during the process. As table 6.2 shows, the majority of five years' respondents cooperated with the process by returning the acknowledgement of service. They were also prompt in doing so, in a median five days from receipt to signing. On both measures, there was no statistically significant difference between the five years' and other respondents. That said, there was a small minority of five years' respondents who were slower to return the acknowledgment, hence the higher standard deviation for that category. However, that is not necessarily a sign of dissent. The five years' cases included cases where the respondent's current address was not known and/or the respondent lived overseas.

Where the acknowledgement was returned, there was also limited dissent evident. Only one of the five years' separation cases included any comment or protest on the Acknowledgement, compared to more than a third of behaviour cases.⁴⁷ Even there, the single dissenter was a respondent who stated that she had already issued a petition in another jurisdiction, following a six-year separation. Again, she was not opposing a divorce, just wanting it on her terms.

⁴⁶ See especially section 3 of Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017).

⁴⁷ The behaviour comments or rebuttals in undefended cases, typically denied the specific allegations but accepted that the marriage had broken down. However, they could include other statements such as in case L092 where the respondent stated that they were only agreeing to the divorce to support the petitioner's recovery from depression. The petitioner had alleged domestic abuse.

Table 6.2 Indicators of cooperation and conflict by the respondent, by Fact relied upon in the petition (excluding desertion)

	Return AoS (% yes) (n=297)	Median days to sign AoS (Std.Dev) (n=253)	Rebuttal AoS (% yes) (n=239)	Object to costs (% yes) (n=242)
Adultery	31 94%	8 (24.2)	3 10%	5 17%
Behaviour	112 83%	10 (39.4)	38 37%	31 29%
Two years	79 92%	9 (88.7)	2 3%	14 19%
Five years	35 81%	5 (140.0)	1 4%	9 28%
All Facts	257 87%	8 (76.7)	44 18.4%	59 24%

Source: Finding Fault main sample

6.4 Why do some people take so long?

The analysis so far has suggested that there is limited evidence of dissent amongst five years' respondents, or at least, no clear signs of opposition to the divorce. If the use of the five years' separation Fact is not a clear indication of opposition to the divorce, then why are the petitioners in these cases not seeking an earlier divorce, using a fault Fact or two years' separation with consent?

There are some tantalising suggestions that the five years' separation group are somewhat different demographically than others in the undefended sample. As table 6.3 indicates, the five years' petitioners and respondents were both significantly older than the fault and two years' separation cases, even notionally allowing for the additional years attributable to the wait for the separation period to end. Five years' respondents were also significantly more likely to have been married previously, compared to all other groups. Five years' separation petitioners and respondents were least likely to be legally represented and also least likely to make applications for financial orders.

Interpreting that data is quite challenging. One possible interpretation is that for this older age group, a quick divorce in order to remarry is less relevant or necessary than it might be for younger adults. That might be particularly so, as here, where a disproportionate number of five year's respondents were divorcing for the second time and might be less inclined to want to rush into a third marriage.

Table 6.3 Median ages, previous marriage⁴⁸ legal representation and whether financial application made, by Fact relied upon in the petition (excluding desertion)

	Median age P (years)	Median age R (years)	P previous marriage (yes %)	R previous marriage (yes %)	P lawyer (yes %)	R lawyer (yes %)	Financial orders (yes %)
Adultery	39	38	2 6%	2 6%	12 36%	9 27%	15 46%
Behaviour	40	43	25 22%	20 16%	91 67%	39 29%	59 44%
Two years	43	45	13 17%	14 18%	39 45%	7 8%	21 24%*
Five years	48*	48.5*	8 20%	15 38%*	13 30%	5 12%	8 19%*
All Facts	42 N=297	44 N=295	48 18%	51 19%	155 52%	60 20%	103 35%

Source: Finding Fault main sample

The low rate of representation and financial applications may also indicate that these are cases with limited financial resources. If so, the relatively high cost of pursuing a legal divorce may not have been a financial priority, particularly given the other costs of a physical separation. Case L147, for example, concerned an older couple, both with low-paid jobs, both unrepresented and where the separation occurred about nine years previously. The separation was attributed to “a breakdown in the relationship and being unable to live together”. There was no sign from the file that the long delay in initiating the divorce was because one, or both, thought that a reconciliation was possible.

The qualitative comments on the files do not give any definitive answers, but they do illustrate some of the reasons why these couples did take so long to file for divorce. In 20 of the 43 cases, the statement of case simply included a date of separation and a statement that the parties had not lived together since. The respondent added nothing more.

In some cases, the choice of the five years’ Fact appeared to result from a Hobson’s choice where the respondent was not willing to cooperate with the petitioner to end the marriage quickly. These were cases where the respondent appeared to be wanting to exercise control, or just to make life difficult for their ex-partner, even though they clearly had no intention of returning to the marriage or defending the divorce. In the absence of legal advice, the petitioners may not have been aware that they could rely on the behaviour fact. The petitioner in case L110, for example, reported that the respondent had two children with his new partner and had clearly abandoned the marriage, but at the same time, refused to agree to adultery or two years’ separation with consent. The respondent in L029 was similarly obstructive. He was reported as saying “I ain’t signing it” in relation to the Acknowledgement. However, after deemed service and decree nisi had been granted, he then attempted to apply for decree absolute before the petitioner, suggesting that his opposition was not to the principle of divorce.

⁴⁸ Undercounts some overseas marriages where the previous marital status of the spouse is not recorded on marriage certificates and so unavailable for the research.

There were also two cases where the respondent objected to paying for the costs of the divorce. There was not enough information on file to be definitive, but both appeared to be cases where it was one party who was pushing to finalise the legal process and the other was willing to go along with it as long as they did not have to pay any costs.

In other cases, there was just no obvious sense of urgency and initiating the divorce would mean either re-engaging with a difficult former partner and/or would pose logistical problems as time passed. In case L005, for example, the parties had separated seven years previously as the petitioner stated "I could no longer cope with the stress of his alcoholism and our rows". She noted that both parties had "moved on with our lives", but she had now met someone new, which presumably had triggered her belated decision to divorce. Similarly, there were several cases where the respondent lived overseas and the petitioner was unrepresented. In case L072, the respondent had returned to his home country, married again (polygamously) and had further children. The petitioner was very clear that there was no prospect of a reconciliation, but she was unrepresented. We cannot know why she had waited for the divorce, but the logistical and legal challenges may have been a factor, as could emotional, moral or religious reasons.

There were also cases where the parties appeared to get on well, but to simply be in no hurry to conclude the legal formalities. The five years' separation Fact does not require consent, but that does not mean that the respondent would not consent, if asked. The petitioner in case L053, for example, stated that the parties had lived separately for five years, "have mutually agreed to divorce" and had "workable arrangements for co-parenting". The lack of urgency was also evident in case L059 where the parties had separated eight years previously as "My wife wanted to be free of marriage so she can pursue her career. I wanted to travel. Once we separated, we grew further and further apart and getting back together ceased to be an option."

There was only one of the five years' undefended cases where the choice of fact may have reflected the respondent's hopes for a reconciliation. This was a case that proceeded to a contested final hearing on the finances. The judgment in the case noted the respondent wife's evidence that she had taken a very long time to accept that the marriage was over and had hoped for a reconciliation.

In sum then, there is very limited evidence to suggest that all, or even many, five years' separation cases stemmed from the respondent's opposition to the principle of divorce or a desire for reconciliation. There were very few five years' separation cases amongst the defended sample, in those that were defended almost all respondents were accepting that the marriage had broken down and there was very little sign amongst the undefended cases that respondents wished the marriage to continue. There were, however, suggestions that the five years' group are somewhat different demographically than other groups, indicating that they may have been less concerned about achieving a quick divorce or less equipped to achieve that, given limited access to legal advice.

7. Conclusion

This additional analysis of the Finding Fault dataset has reinforced the case for law reform set out in the previous *Finding Fault* and *No Contest* reports and in the Ministry of Justice's consultation document. The analysis of problems with service and reasons for non-completion have underlined once more that the law is overly-complex, particularly for LIP. There is no evidence that the current law, especially the need to evidence irretrievable breakdown by reference to one of the five Facts, saves marriages. Rather, the evidence is that the technical complexities of the law can make it too procedurally difficult for the parties to exit a dead marriage, particularly where they cannot afford lawyers. A notification process would provide a clear, accessible and also a considered legal mechanism for those whose marriages or civil partnerships have broken down irretrievably.

The analysis has also explored some of the specific issues raised by the government's consultation on divorce law reform. In particular, the evidence points clearly to the advantages of timing the notification period to precede decree nisi, rather than to start at decree nisi. The pre-nisi option will reduce or eliminate the impact of the variation in processing times, and consequent unfairness and uncertainty, that are a likely feature of a post-nisi scheme. The pre-nisi notification option would also mean that petitioners where the respondent has obstructed service will be less likely to be penalised than if the notification period can only start once the case has finally reached decree nisi. The analysis of non-completions has indicated that a six-month period for reflection and decision-making at the start of the process might have advantages over both the current law, and a post-nisi notification process for the seemingly small number of cases where the decision to divorce may have been taken precipitately. Finally, the analysis of five years' separation cases has indicated that that group do not appear to contain hidden numbers of respondents who are opposed to the principle of divorce and would seek a reconciliation. There is no reason therefore to change the government's proposals to remove the possibility to defend divorce, other than for reasons of jurisdiction, validity and fraud.

An unexpected finding of this additional analysis is the need to address problems with service, regardless of what action is taken on substantive law reform. It cannot be right that where a marriage has broken down irretrievably, respondents can continue to obstruct the divorce simply by refusing to engage. This is a particular concern given the large number of marriages featuring coercive control and domestic abuse amongst the non-responders. The digitisation of the divorce process presents a very good opportunity to address these issues. We recommend strongly that the re-design of the acknowledgement incorporates every possible means to *prevent* non-response, including clearer information for the respondent on how to respond and the consequences of not doing so. The support available to the petitioner where there is non-response also needs a major rethinking and overhaul. Attention should be given to the use of automatic reminders and far simpler information and procedures to address problems. Consideration should also be given to a dedicated support service for cases where there are issues with service.