

Divorce, Dissolution and Separation Bill

Committee stage | 03.03.2020

What is the academic evidence for the tabled amendments?

This 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 each amendment in turn, as follows:

- Divorce stages (*Amendment 1*)
- Children and divorce (*Amendments 2 & 14*)
- Information (*Amendment 3*)
- Length of the minimum period (*Amendment 4*)
- Defining the start of proceedings (*Amendments 5 & 15*)
- Henry VIII powers (*Amendments 6 & 16*)
- Bar on financial provision proceedings (*Amendment 7*)
- Minimum period for service (*Amendments 8, 9, 11, 12, 13, 17 & 18*)
- Consent (*Amendment 10*)
- Reporting on the impact of law reform (*Amendment 19*)
- Review of financial remedies law (*Amendment 20*)
- Funding for marriage support services (*Amendment 21*)

The Bill is based on a robust evidence base

The Divorce Bill draws heavily on a strong 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 government has also learnt from previous 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: Three stage process

Would replace irretrievable breakdown being proven on the basis of a sworn statement made at application, to only being proven after a second sworn statement following completion of the period to conditional order.

The Bill sets out that irretrievable breakdown is established solely by a sworn declaration to that effect at the point of application. The subsequent twenty-week period resulting in the application conditional order does not provide any, or further, evidence of irretrievable breakdown, rather it is evidence on an intention to proceed with the legal divorce.

The choice to evidence irretrievable breakdown by declaration is supported by the research evidence. In practical terms, the court has never been able to test effectively whether a relationship has broken down irretrievably. More fundamentally, the current view of marriage is one based on consent. If one party considers that the marriage has broken down irretrievably, then that is the reality. A marriage cannot continue without the participation and consent of both parties.

In contrast, the amendment would seek to establish a period of time over which the applicant(s) would have to prove to the state that their marriage had broken down irretrievably. At the first stage, the applicant(s) would only be able to state that “they think that the marriage may have broken down irretrievably”. Irretrievable breakdown would only be

proved conclusively after completion of the second stage. This approach appears infantilising and it flies in the face of the evidence. Both Professor Walker’s research and the *Finding Fault* study established beyond doubt that taking the decision to initiate a legal divorce is a very serious step and not one that is taken lightly. People do not start legal proceedings unless they are already sure that their marriage is over. A strong message from the Finding Fault interviewees was that the state should respect, not second-guess that decision. It is particularly important that the law helps those attempting to leave abusive relationships, and does nothing that might undermine the resolve of victims.

This amendment applies only to marriage, not civil partnership. The effect would be to break a fundamental principle, upheld by successive governments, that marriage and civil partnership should be treated as functional equivalents. It would create two entirely different legal regimes for marriage and for civil partnership. It would also be a recipe for confusion. One of the many advantages of the Bill is that it removes the complexity of the current system. Legal clarity and transparency is a critical component of the rule of law and is particularly important when the majority of the parties are not legally represented.

RECOMMENDATION: The research evidence does not support this amendment.

Amendments 2 & 4: Children and divorce/dissolution

Would require the courts to take the wellbeing of any children in the family into account before granting a divorce/dissolution order.

These amendments run counter to a key principle of family law and policy that parents are the best people to make decisions about their children. The amendments also disregard the research, including Walker’s evaluation of the Family Law Act pilots, that parents are very mindful of the impact of family separation on their children and do what they can to mitigate it.

There are no mechanisms to enable the court to assess the wellbeing of any children of the family in these cases. There are no criteria against which the court could make an assessment. Even if the court could undertake any assessment, it is highly unlikely that the court’s refusal to grant a legal divorce or

dissolution would force the parents to reconcile, let alone create a happy and positive environment for their children. No state is able to order adults to love each other. Instead, it is likely that the marriage would continue in name only, existing purely as a dead or ‘limping’ marriage with adverse consequences for all, including children. Alternatively, we would return to the situation of the 1960s/early 1970s where the inability to secure a divorce and remarry meant that new families had to be created outside of the context of marriage. The amendments would be impossible to operate in practice and would undermine, not support, child welfare.

RECOMMENDATION: The research evidence does not support this amendment.

Amendment 3: Information about relationship support services and mediation

Would require information about relationship support services and mediation to be sent to both parties.

Although information is potentially beneficial, the type of information proposed is very narrow. Peers need to be mindful of very diverse family circumstances. More than a third of behaviour divorces in the nationally representative *Finding Fault* study included allegations of domestic abuse, some of an extremely serious nature. Those victims would be better supported by information about protective measures (e.g. non-molestation orders) and legal help and advice, than relationship support and mediation. The research on child wellbeing would also suggest that families would benefit from information and advice

about practical matters, particularly on housing, child support and benefits.

Putting information provision on a statutory basis also seems unnecessary and potentially inflexible. Gov. uk and the Apply for Divorce Online service already include clear and succinct information, including a link to Relate and also to child arrangements and finances. That information could be made available in paper form for non-digital users. Rather than a restricted and inflexible statutory approach to information, a commitment from the Lord Chancellor to ensure that HMCTS draws on expert advice would be preferable.

RECOMMENDATION: The research evidence does not support this amendment. Suggest instead that a broader range of information be made available on a more flexible non-statutory basis.

Amendment 4: 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. Recent claims by the Coalition for Marriage and the solicitor David Hodson that people make impetuous decisions to start proceedings and then reconcile are unfounded. About 10% of divorces do not complete, but because they are unable to do so, 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. The very high use of fault facts in England & Wales is evidence that the parties want to move on once the decision to divorce has been made. About 60% of divorces are based on behaviour or adultery in England & Wales, compared to about 6-7% in Scotland and France. That disproportionate use of fault is because people are seeking to avoid long waiting periods.
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. The applicant(s) must 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. Indeed, it is more onerous than similar jurisdictions where divorce can be granted after only one or two actions 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 only applies 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 5 & 15: 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 litigants in person. Nor is it guaranteed to work.

The amendment proposes instead that the clock starts at service (or more accurately if and when the respondent returns the signed acknowledgement of service). 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 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 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 6 & 16: Henry VIII powers enabling the Lord Chancellor to reduce the minimum period

Would remove the provisions enabling the Lord Chancellor to reduce the minimum periods for divorce and dissolution.

RECOMMENDATION: None for this briefing. The Delegated Powers and Regulatory Reform Committee has commented on these powers and no doubt the government will set out its response in debate.

Amendment 7: Bar on financial provision proceedings in first three months (for divorce only)

Would prevent financial provision proceedings in sole application divorce cases for three months 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 entirely unjustifiable.

The provision would also apply only to marriage. The effect would be that more vulnerable married women would have less protection than their civil partnered equivalents.

RECOMMENDATION: The research evidence does not support this amendment.

Amendments 8, 9, 11, 12, 13, 17 & 18: Minimum period for service

This group of amendments would require an individual applicant to serve notice of the application upon the other party within a maximum of six weeks or to apply for an order dispensing with service or deeming service to have been effected.

By starting the clock at application, these amendments do recognise the research evidence that whilst there is some risk of harm to respondents through unwanted late service, the greater likelihood of harm is from the respondent avoiding service (see comments above on Amendments 5 & 15).

What is not clear from the amendments is what would constitute 'serving notice'. It would be helpful to have a minimum period within which the notice of application must be sent out, whether by the court (in the vast majority of cases) or by the applicant. However, if 'serving notice' refers to receipt or response, then the likelihood is that it would give rise to disputes as well as providing respondents, including abusers, with a means to unduly delay or block a divorce.

The other challenge is that it is not realistic to expect

that an application to deem or dispense with service could be achieved in six weeks. It generally takes some time to conclude that the respondent is not going to comply. Taking action is expensive and technically difficult, if not impossible, without a lawyer to assist. In the *Finding Fault* court file study, it took a median twelve weeks from the start of proceedings to when an application for bailiff service, deemed service or dispense with service was issued (n=26 cases). The six-week deadline would therefore not be achievable in most cases. That could trap applicants in a marriage that they could not leave due to non-response. Or it would encourage applicants to file pre-emptive applications for deemed or dispense with service at the start of proceedings. That would be likely to provoke conflict as well as being expensive for both the applicant and the justice system.

RECOMMENDATION: Further clarity is needed on what constitutes 'serving notice'. A six-week period within which the court (or applicant) must send notice of the application in non-domestic cases would be consistent with the research evidence. It is not realistic to expect applications for deemed or dispense with service to be made within six weeks.

Amendment 10: Recording lack of consent

Would enable a respondent to a sole application to formally record their lack of consent to the divorce (but not to a civil partnership dissolution), if they so choose.

Relationship breakdown can be a very fraught and conflictual time. No law can prevent that, but a good law will reduce the opportunity to weaponise the process and create or deepen the hurt. Currently, there are instances of parents who threaten to show a behaviour petition to children. Providing an official written record of non-consent could be used

in exactly the same way to fuel conflict, contrary to public policy and the aims of the Bill.

Whether someone opposes a divorce is a very significant but private matter between the parties. It should not be recorded as part of a court process. The *Finding Fault* review of similar jurisdictions found

no examples where a wish to preserve the marriage could be formally recorded.

marriage and civil partnership, contrary to policy of successive governments.

The amendment would create a distinction between

RECOMMENDATION: The research evidence does not support this amendment.

Amendment 19: Report on impact on divorce applications and marriage support

Would require the Secretary of State to report annually to parliament on the impact of reform on divorce proceedings and marriage, including statistics on divorce applications, numbers seeking marriage counselling etc.

Post-legislative scrutiny would be a far more effective mechanism to assess whether the Act was working as intended and whether there were any unforeseen or undesirable effects to address. The amendment is far too vague to enable parliament to assess adequately

the impact of reform. The Office for National Statistics does also already publish comprehensive annual statistics on divorce and civil partnership dissolution, including by marriage duration, age and gender of the parties etc.

RECOMMENDATION: The research evidence does not support this amendment.

Amendment 20: Review of financial remedies law

Would require the Lord Chancellor to establish a review of the operation of certain sections of the Matrimonial Causes Act 1973 in relation to financial provision.

There is widespread recognition the law on financial remedies is not working as well as it should. A wide-ranging review of the area, setting out the fundamental principles on which the law should be based, would be very welcome. The amendment

would instead produce a narrowly-defined review based on Baroness Deech's private member's bills. Those Bills have attracted a high level of opposition from academics and the legal profession.

RECOMMENDATION: The research evidence does not support this amendment.

Amendment 21: Funding for marriage support services

The Schedule: Page 19, line 4. This amendment 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 this amendment unless cohabitants were included.

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/>

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