Divorce, Dissolution and Separation Bill: Report stage 17.3.2020

Briefing on the academic evidence for the tabled amendments

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This short briefing summarises what the research evidence can tell us about the amendments tabled at Report Stage 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.

Key message: leaving aside Amendment 4 (Henry VIII powers), none of the amendments are supported by the research evidence

Amendment 1- Divorce stages

This amendment would mean that sole applicants would file a statement that their marriage may have broken down at application and the court would only find irretrievable breakdown being proven after a second statement to that effect, following completion of the twenty-week period to conditional order.

Recommendation: The research evidence does not support this amendment.

A similar amendment was rejected at committee stage and for sound evidence-based reasons. 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.

The amendment does not extend to 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. The amendment would also introduce different rules for sole and joint applications. 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. Introducing

different rules for sole and joint applications would introduce a new bargaining chip with the potential to create conflict.

The amendment would create three entirely different legal regimes for joint divorce applications, sole divorce applications and civil partnership. That is not supported by the research evidence. 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 are critical components of the rule of law and are particularly important when the majority of the parties will not be legally represented.

Amendments 2, 5A, 6, 6A, 7, 8, 9, 11, 12 – Duty to inquire, fault and separation

This group of amendments would establish irretrievable breakdown on the basis of one-year separation (joint applications only), or (unreasonable) behaviour including adultery, two year's separation or desertion (sole applications only). The court would have a duty to inquire into the facts alleged by the parties.

Recommendation: The research evidence does not support these amendments.

These amendments are entirely at odds with three or four decades of research into the problems of a divorce law based on allegations of fault (behaviour, adultery) and separation. Those well-documented problems - gaming of the system, creating and exacerbating conflict, and unfairness to the respondent – led first to the Family Law Act and now to the Divorce, Dissolution and Separation Bill. The amendments would reintroduce those problems at the expense of children and adults and the integrity of the family justice system. They would do nothing to prevent relationship breakdown.

Gaming of the system, nearly 60% of English and Welsh divorces are granted on a fault fact (adultery or behaviour), ten times more than neighbouring France and Scotland. Those national discrepancies show how fault is used instrumentally as the law effectively incentivises people to game the system to secure a divorce within a reasonable time frame, i.e. months rather than the one or two years proposed by the amendments.

The production of behaviour petitions to secure a divorce is a legalistic ritual: *"It's a farce, because you're just saying [to the client] 'All we have to do is get a form of words. As long as you're not telling any lies, we'll get it through' ... You cobble up some words which will do the business". (Lawyer focus group).* Further, the fact used does not have to be the cause of the separation - 43% of respondents to a fault divorce in the *Finding Fault* survey reported that the fact used was not closely related to the 'real' reason for the separation.

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

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

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

Separation periods rather than notification. Separation is very difficult to achieve for those who cannot afford to run two households, especially before family finances are resolved. It is possible to live separately under the same roof, but the current law requires, for example, that parents do not share family meals with their children to create a normal family atmosphere. That is entirely contrary to family policy. In addition, the Finding Fault research showed that dates of separation are massaged or even fabricated entirely to shorten wait times. The notification process set out in the Bill is, in contrast, clear, simple and transparent and will support confidence in the justice system.

Amendments 4, 9 - Defining the start of proceedings

Would define the start of proceedings at application for joint cases and at service for sole applications. Allows for the possibility of abridgement of the 20-week period where there is evidence of deliberate evasion of service.

Recommendation: The research evidence does not support these amendments.

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 proposed abridgement process is not a solution to the documented problem of service evasion. It is a complex legal solution that would not be accessible to litigants in person, especially those subject to coercive control. It would also place burdens on an already stretched family justice system. The amendment also introduces different processes for sole and joint applications which is likely to result in bargaining and trade-offs at the expense of the weaker party.

Amendment 5 - Information about divorce

Would require a concise statement of the main findings from the relevant social science disciplines about the impact of divorce on different aspects of a child's wellbeing to be sent to applications with children under the age of 18.

Recommendation: The research evidence does not support this amendment.
The implication of this amendment is that parents are not aware of the impact of family change on children. The evidence is that that is not the case. Parents do think long and hard about these issues.

Amendment 13 - Information about relationship support services, mediation and domestic abuse

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

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.

This amendment is more widely defined than the earlier version that excluded domestic abuse. It is still narrowly defined, however. It still only applies to marriage. It does not include the full range of information that will necessarily be most helpful. The research on child wellbeing would 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 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.

Amendment 14 - Impact on Marriage

Would insert a new Clause stating "Nothing in this Act changes the understanding of marriage as established by law."

Recommendation: The research evidence does not support this amendment.

The Bill deals with the process for divorce, dissolution and separation. It is not addressing marriage. The purpose and effect of the provision is unclear. No justification is given for the exclusive focus on marriage, rather than civil partnership.

Amendment 15 - Report on effect of children of divorce/dissolution in low conflict families

Would require the Secretary of State to publish a report on the impact of divorce or dissolution on children of a marriage or civil partnership ending when there is either no conflict or low conflict between the parties.

Recommendation: The research evidence does not support this amendment.

This is a question that can only be credibly addressed by independent academic researchers, not government. It is difficult to see the relevance of the impact of breakdown of low conflict marriages/CP to a Bill that addresses the legal procedure for divorce and dissolution of relationships that have already broken down irretrievably.

Amendment 16 - Report on impact of this Act

Would require the Secretary of State to publish an annual report on the impact of the Act.

Recommendation: The research evidence does not support this amendment.

A similar version of this amendment was withdrawn at committee stage. 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.

Amendment 17 - Report on reconciliation

Would require the Secretary of State to publish a report drawing from multiple peer reviewed academic sources comparing the scope for reconciliation under a fault based divorce system with a no-fault based divorce system.

Recommendation: The research evidence does not support this amendment.

The research is very clear that reconciliation is highly unlikely for people who have already made the difficult decision to divorce and have started divorce proceedings. That message was echoed at Committee Stage by those with experience of advising the parties, including Lord Mackay and Baroness Shackleton.

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 http://blogs.exeter.ac.uk/findingfault/findings-and-outputs/

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