Divorce: The fault in the law and the new proposals for change

On the 13th of June 2019, the UK Government introduced the Divorce, Dissolution and Separation Bill into Parliament. If enacted the Bill would represent the biggest reform to the law on divorce in England and Wales for half a century. This article will consider the merits of the proposed changes, which are expected to command a wide measure of cross-party support.

The substantive law on divorce is currently contained within the Matrimonial Causes Act 1973. Section 1(1) permits divorce “on the ground that the marriage has broken down irretrievably”. This is the only ground for divorce in England and Wales. However, section 1 (2) provides that the ground must be evidenced by satisfying the court of 1 of 5 facts. Facts (a) to (c) are fault based: adultery, behaviour which is not reasonable to live with, and desertion. Until the mid-twentieth century, the Church of England only permitted innocent victims of a ‘matrimonial offence’ to divorce, and the fault-based facts are arguably an ongoing legacy of this. Facts (d) and (e) are based on periods of separation: two years with the consent of the Respondent to the divorce, and five years without this consent. These facts do not therefore attribute fault to any party involved in an irretrievable marital break down. The inclusion of facts (d) and (e) marked a significant social reform in 1973, and divorce law has remained in this mixed fault and no-fault based condition ever since. Why therefore is it suggested the law needs to change?

The present state of the law has been criticised for decades. In 1990 the Law Commission produced a report (Law Com No 192, 1990) which opined that the law was misleading and confusing, discriminatory and unjust, distorting of the parties’ positions, provoking unnecessary hostility and bitterness between them, potentially to the detriment of children. This author agrees with these criticisms.

The law is confusing to the public because it masquerades as judicial, a principally administrative system. Section 1 (3) of the 1973 Act, places a duty on the court to inquire “so far as it reasonably can” into the facts alleged by the parties. In practice however, petitions are considered by legal advisors, who scrutinise if court forms have been completed correctly and if the circumstances described in the form are capable of amounting to any of the required ‘facts.’ Therefore, in undefended divorce petitions there is no judge (as the public may think) scrutinising if the facts alleged are in fact ‘true’. Unsurprisingly, many Respondents’ feel a sense of injustice that facts have been found against them on this basis. However, the legal, financial, and emotional difficulties inherent in defending a divorce are such that only 0.7% of divorces are defended, even though studies have found that Respondents’ disagree with the facts alleged in the petition in over a third of cases. The present system is also unjust because it discriminates against poorer people. Certain financial remedies (such as pension sharing orders) cannot be obtained until a divorce is finalised. Those with greater means can more readily afford to wait two years to obtain a ‘no fault’ divorce compared to the less well off. In any case, it is unclear why the law should require people to put their lives on hold for at least two years in order to obtain a no-fault divorce.

Delay in obtaining a no-fault divorce causes many people to petition based on a fault-based fact. 60% of divorces in England and Wales are based on fault, whereas in Scotland (where, inter alia, the time delay is shorter) the figure is only 6%. The problem with fault-based divorce is that it risks
inflaming conflict between the parties at the precise moment when compromise may be necessary on other vitally important matters ‘ancillary’ to the martial breakdown, such as arrangements over finances and any children of the family. This problem has only been compounded by the cuts to legal aid following the Legal Aid, Sentencing, and Punishment of Offenders Act 2012. Lawyers appreciate that the courts have adopted a low threshold for what amounts to so called ‘unreasonable behaviour’ but research suggests that the public lack knowledge of this, unless they have had the benefit of legal advice. This problem could be exacerbated following the case of Owens v Owens [2018] UKSC 41 (which was a rare but well publicised example of a successfully defended divorce petition). Therefore, despite the best efforts of many in the legal profession, litigants in person often draft particulars of fault in more incendiary terms than is necessary to evidence the fault alleged. As a result, 21% of Respondents in fault-based divorces said fault had made it harder to sort out arrangements for children, and 31% said fault made sorting out finances more difficult. Whilst the process of divorce is always likely to be upsetting, the law currently inserts an additional source of conflict between the parties, which hinders the parties’ ability to constructively move forward with their lives.

In this context, the introduction of the Divorce, Dissolution and Separation Bill is a welcome development. Under clause 1 (1) “either or both parties to a marriage” may apply for a divorce “on the ground that the marriage has broken down irretrievably”. Readers will see therefore that no change is proposed to the sole ground for divorce (which will remain that the marriage has irretrievably broken down). For the first time however, the parties will be able to jointly apply for a divorce, potentially facilitating the parties to work together towards obtaining a divorce, rather than placing the parties in an adversarial situation. Even more importantly, under clause 1 (3) the court must “take the statement to be conclusive evidence that the marriage has broken down irretrievably”. Therefore, the requirement to place fault on one party to the divorce will be eliminated, avoiding the problems with the current law. On receiving the statement, the court must make a conditional order which may be made final after a period of six weeks (clause 1 (4)). Thus the ‘decree nisi’ and ‘decree absolute’ structure of divorce law will be preserved but with less arcane language. One hopes the procedural simplicity of the provisions will help the Bill pass quickly onto the statute book. This would be a positive modernisation, bringing the law on divorce in line with the pragmatic and child-focussed approach taken in other areas of family law.

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NB. The statistics relied upon in this article are sourced from the Nuffield Foundation’s 2017 report, titled ‘Finding Fault? Divorce Law and Practice in England and Wales’.