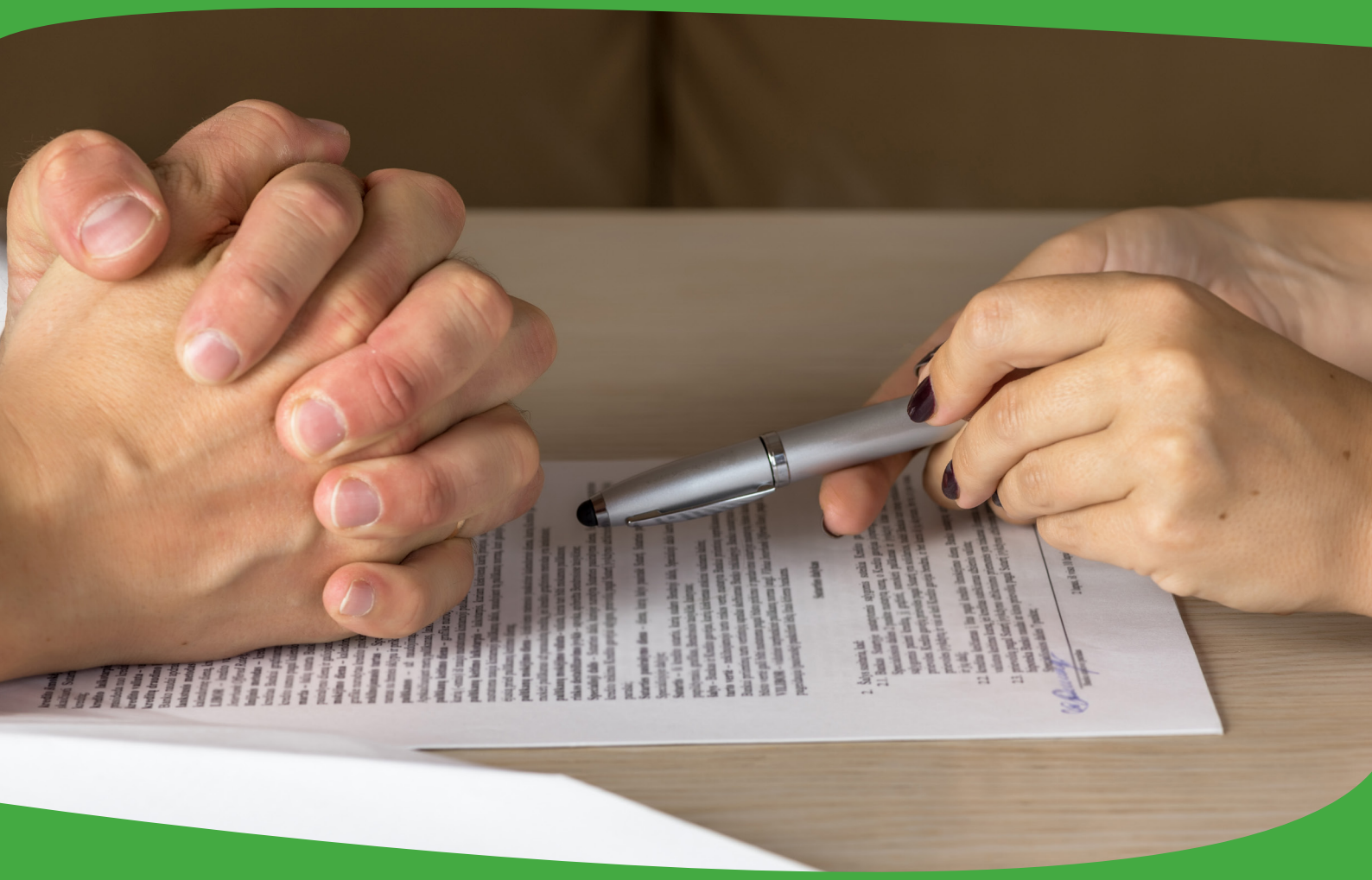
Nuffield Foundation

Finding Fault? Divorce Law and Practice in England and Wales

Summary report

Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton



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Foreword from the Nuffield Foundation

The failure to implement the Family Law Act 1996 has left the divorce law in England and Wales untouched since 1973, and out of step with similar jurisdictions in Europe and North America in its heavy reliance on 'fault' as a basis for divorce.

This report summarises findings from an empirical study – funded by the Nuffield Foundation in 2015 – that explored how the current law regarding divorce and civil partnership dissolution operates in practice. The researchers conclude that there is a mismatch between the law in the books and in practice, potentially bringing the law into disrepute. They also identify ways in which the divorce law is failing to meet the principle of being 'intelligible, clear and predictable'. Moreover, there is a discrepancy between the law (whether in books or in practice) and the realities of people's experiences. Relationship breakdown and separation can be complex and messy. It cannot be readily 'categorised' or 'date stamped', and the perspectives of those involved can differ legitimately.

These issues have been brought into sharp relief by the recent defended case of *Owens vs Owens*. While defended cases account for only two per cent of divorce petitions, this study shows that the current divorce law is also problematic for the majority of 'routine,' undefended divorces. Many of these problems were first highlighted in the 1990 Law Commission report that led to the attempt to reform the law over twenty years ago. Nuffield-funded research from the 1980s featured in that Law Commission Report, and this new study shows for the first time how the problematic nature of divorce law has been exacerbated by more recent changes in the system. These include the way courts scrutinise undefended petitions, with the role now being undertaken by legal advisers rather than judges, and the removal of legal aid for most divorce cases.

In addition, the dominance of 'fault' within divorce law is at odds with the thrust of wider reforms in the family justice system, which have focussed on reducing conflict and promoting resolution. Despite the efforts of all those involved in the process to reduce harm, the evidence from this study shows that the reliance on fault still has the potential to cause distress and escalate conflict.

We would like to thank Liz and her research team for undertaking this important study and bringing together the findings in this accessible and engaging report. We would also like to thank everyone whose participation made this study possible.

Teresa Williams
Director, Justice and Welfare

Key Messages

The law of divorce in England and Wales has been subject to criticism for decades, most recently following the rare defended case of *Owens v Owens*. This major research study aimed to explore how the law is working in practice.

The current law and use of fault

The sole ground for divorce in England and Wales is the irretrievable breakdown of the marriage. But a divorce may be granted only if one of five 'Facts' is proved. Whilst many people might assume this is required, it is not necessary to prove that that 'Fact' was a cause of the breakdown. Three Facts are fault-based: adultery, behaviour, and desertion. Two Facts are based on separation: two years if the other spouse consents to divorce, five years if they do not. In 2015, 60% of English and Welsh divorces were granted on adultery or behaviour. In Scotland, where different procedural and related legal rules create different incentive structures, it was just 6%. Elsewhere, fault has been abolished or is just one option, and often a practically insignificant one, among several divorce grounds.

The continuing problems of fault

Academic research and Law Commission reviews from the 1970s onwards reported serious problems with the divorce law, including the lack of honesty of the system, with the parties exaggerating behaviour allegations to get a quick divorce, while the court could do little more than 'pretend' to inquire into allegations. This study found that those problems continue and have worsened in some respects.

Fault, especially behaviour, continues to be relied on to secure a faster divorce. The consequence is that parties often feel under pressure to exaggerate allegations or retro-fit the reasons for their separation into one of the legal Facts, even though the court's expectations of what is required to make out each Fact is now actually very low, particularly for behaviour. The court has a duty to inquire into allegations but in practice in undefended cases only has the capacity to take the petitioner's allegations at face value. That is procedurally unfair for the great majority of respondents who cannot defend themselves against the allegations.

Parties embarking on the process might reasonably assume that the law is underpinned by a fault-based logic: that petitions should reflect who and what was to blame for the relationship breakdown. Yet whilst the law invites parties to rely on fault-based Facts, it does not require the court to adjudicate on responsibility in that way – not least because it will very often be impossible to allocate blame accurately in this context. Yet respondents on the receiving end of fault-based petitions inevitably feel cast as the 'guilty' party.

The study found no evidence that fault prevents or slows down the decision to divorce and some evidence that it may shorten the time from break up to filing. We also found, as previously, that producing evidence of fault can create or exacerbate unnecessary conflict with damaging consequences for children and contrary to the thrust of family law policy.

The current divorce law is now nearly 50 years old. Its apparent rationale and operation are at odds with a modern, transparent, problem-solving family justice system that seeks to minimise the consequences of relationship breakdown for both adults and children.

The need for law reform to finally remove fault

The study shows that we already have something tantamount to immediate unilateral divorce 'on demand', but masked by an often painful, and sometimes destructive, legal ritual with no obvious benefits for the parties or the state. A clearer and more honest approach, that would also be fairer, more child-centred and cost-effective, would be to reform the law to remove fault entirely. We propose a notification system where divorce would be available if one or both parties register that the marriage has broken down irretrievably and that intention is confirmed by one or both parties after a minimum period of six months.

Why is fault a problem?

A majority of divorces in England and Wales rely on the use of fault, with 48% of divorces in 2015 based on behaviour and 12% on adultery. That 60% of divorces are based on fault is very high in international terms. Some jurisdictions have removed fault entirely from their divorce law. Where fault remains, its use is generally low. In France and Scotland, for example, the use of fault is a tenth of that in England and Wales.

The reason for the high use of fault is not a peculiarly high level of marital infidelity or misbehaviour in England and Wales. It stems instead from the fact that once a couple have been married one year, fault-based divorces can be instigated immediately, avoiding the wait for separation periods of two or five years to expire. Different procedural rules and other legal context in Scotland create incentive structures that do not have this effect.

The problems with the law were mapped out in a series of highly critical reports from the 1970s onwards. Summarising these in its 1990 report, the Law Commission highlighted the lack of honesty of the system, with parties exaggerating behaviour allegations to get a quick divorce, while the court could do little more than 'pretend' to inquire into allegations.[1] Parliament was persuaded to act. The Family Law Act 1996 set out a new, purely no-fault regime based on irretrievable breakdown evidenced by a notification process and passage of time. However, this regime was never implemented because of perceived problems with complex procedures added to the system. The principle of no-fault divorce was never tested.

The abandonment of the 1996 Act meant that the much-criticised mixed fault/no-fault regime of the Matrimonial Causes Act 1973 has remained in force. There have continued to be calls for reform by the senior judiciary and legal profession. These were given a boost in 2017 by the case of *Owens v Owens*, in which Mrs Owens was denied a divorce by the Court of Appeal although her marriage had undeniably broken down irretrievably.[2] There has been no research since the 1980s, however, on how the law is or is not now working in practice.

The Finding Fault study methodology

Finding Fault is a major research study designed to explore how the current divorce law works in practice and to inform discussions about whether, and if so how, the law might be reformed. The study used quantitative and qualitative methods to explore the two core processes of petition-production and petition scrutiny, as well as public and professional views on the current law and options for reform. The data collection included:

- National opinion survey of 2,845 adults in England and Wales on divorce law, including a boost of 1,336 divorcees.
- Qualitative interviews with people going through divorce (110 interviews from 81 participants, including 57 petitioners, 22 respondents, and two pre-petition).
- Focus groups with family lawyers in four locations.
- Analysis of 300 undefended divorce court files – from four regional divorce centres.
- Observations of the scrutiny process – 17 sessions covering 292 cases.
- Interviews with 16 legal advisers and judges scrutinising divorce cases.
- Comparative law reform study of 13 European and North American jurisdictions.

The study also included analysis of 100 court files where there was an intention to defend, a booster sample of a further 50 cases where an Answer to defend the

1 Law Commission, The Ground for Divorce (Law Com No 192, 1990) para 2.11.

2 *Owens v Owens* [2017] EWCA Civ 182. The case is being appealed to the Supreme Court.

divorce was filed, and interviews with 14 family lawyers about high conflict cases. This data will be published in a separate Nuffield Foundation report later in the year, *No Contest: Defended divorces in England and Wales*.

Finding a Fact to fit? How 'true' are petitions?

One might reasonably assume that the whole rationale for a fault-based law is that the petition, as endorsed by the court, accurately apportions responsibility for who and what caused the marriage breakdown. But what the law in fact requires, and people's experience of the law in practice, is often quite different. In our national opinion survey, only 29% of respondents to a fault divorce said the Fact used had very closely matched the reason for the separation. Petitioners were twice as likely as respondents to state that the breakdown was reflected in the Fact relied upon. The gap between petitioner and respondent reports illustrates the difficulty that the court would face if having to adjudicate between accounts.

What is important in choosing the Fact? Circumstantial factors, such as the need for speed and certainty are veryimportant. Lawyers and petitioners interviewed for the study made clear that it was not often economically or emotionally possible to wait for two years (in order to use the separation Fact) to sort out family finances or to keep children in limbo.

The behaviour Fact was generally the best vehicle to achieve speed and certainty. But that calls for the production of allegations about the other spouse's conduct. That could be a routine or formulaic process, possibly using off-the-shelf examples or "you cobble up some words which will… do the business" (Lawyer focus group C). This retro-fitting of the Facts to the law was illustrated by one interviewee who, once he understood how low the court's behaviour threshold was, gamed the system by 'volunteering' to be the respondent:

> *It's the only option that we have available to us to actually make the progress in the sort of timescale that I have in my head and that probably suits my wife… So I agreed, to a certain extent reluctantly, I'll be the recipient [respondent] and you are the one that puts that forward [petitioner]. (Qualitative interviewee WK11)*

What might be regarded as stretching of the truth in such cases is not confined to behaviour petitions. Adultery can be falsely claimed and admitted. Dates of separation may also be massaged to shorten wait times in two- and five-year separation cases.

In practice, therefore, divorce petitions are best viewed as a narrative produced to secure a legal divorce. They are not – as a lay person might suppose they should be – an accurate reflection of why the marriage broke down and who was 'to blame': that is not what the law requires. These are not new problems. The manipulation of Facts is now more routine and prosaic than the staged or bogus 'hotel adulteries' with strangers of the 1930s, but it remains an issue.

The court's scrutiny: administrative rubber-stamping?

The law places a duty on the court "to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent".[3] In practice, the ability of the court to investigate in the 99% of cases that are undefended has long been very limited, given the paper-based nature of the procedure and the volume of cases involved.[4]

We found from our case file study, observations and interviews that scrutiny is thorough, but it is primarily an administrative process, not a judicial inquiry into the truth. Indeed, scrutiny is generally no longer done by judges but by legally-trained legal advisers employed by HMCTS. In the four minutes or so available for each file, scrutiny is focused on ensuring the paperwork is completed correctly and that the petitioner has described circumstances that meet the requirements of one of the five 'Facts'. Scrutiny in practice does not (cannot, in reality) include whether that Fact alleged is true. In none of the 592 cases in our file or observation samples did the court raise questions about whether the petition was true. Only 1% of file sample cases failed to make progress on substantive legal grounds, but because the unrepresented petitioner could not understand the law, not because of doubts about the contents of the petition. And whatever the parties might have assumed, no determination will have been made about whether the Fact was a cause of the breakdown.

In practice, the petitioner's allegations are taken at face value in undefended cases. This is so even where the respondent denies or rebuts the allegations, as occurred in 37% of behaviour petitions in our file study, without formally defending the case. All rebuttals are ignored if the case is undefended.

3 Section 1(3) of the Matrimonial Causes Act 1973.

4 There were over 100,000 divorces in England and Wales in 2015.

Finding the floor: what is a Fact in practice?

Inquiry is also limited in so far as the interpretation of what is required to make out four of the five Facts has reduced since the 1980s. This is particularly evident for the behaviour Fact. A Law Commission study in the early 1980s reported that 64% of behaviour petitions were based on allegations of violence to the petitioner; in our study, only 15% of petitions involved such allegations. Assuming no change in patterns of violence over time, that large drop reflects a significant lowering of expectations of what is required for behaviour. Our analysis of behaviour cases, confirmed by interviews with judges and legal advisers, indicated that even the most minimal or trivial allegations aresufficient to meet the threshold for behaviour, as long as one element is attributable to the respondent.

The reduction in expectations of what is required appears to reflect a collective shift in attitude of the courts. Qualitative interviews with legal advisers and judges underlined that, like family lawyers, courts take a pragmatic stance that if one party has decided the marriage was over then that was the reality. It was then the court's task to try to facilitate the divorce – "looking to make the petition work" – not to place hurdles in the way. As a matter of law as well as logistics, it is clearly not for the court to engage in what are usually inherently non-justiciable issues about who was to blame.

The Great Pretender: is the law clear, understandable and predictable?

Lord Bingham's first principle of the rule of law is that the law must be intelligible, clear and predictable. Four significant issues emerged in this study, casting doubt on whether the current divorce law meets that principle:

1 The language and processes used are archaic: in our file study, 14% of petitions were returned owing to technical problems. A current HMCTS project to digitise the application process and modernise the forms should assist. However, the potential for achieving cost-savings and a user-friendly process will not be realised if the substantive law is not itself clear and understandable.

2 The substantive law is so complicated that some unrepresented people are simply unable to get a divorce within a reasonable timeframe. In our file study, 1% of cases were stuck in this legal trap. Though a small proportion, extrapolated nationally that would represent about 1,000 couples annually unable to secure the divorce that, in their circumstances, should have been relatively straightforward.

3 In general, the public are not aware that the 'behaviour' Fact does not actually require serious allegations in practice. Those who can afford lawyers, or get good free advice, will be 'let into the secret'. Otherwise, unrepresented parties may end up having to wait out long separation periods because they do not have access to insider information about how the law works in practice. That is patently unfair.

4 Lawyers are aware that the behaviour threshold is low, but not exactly how low. The uncertainty surrounding the behaviour threshold, amongst litigants in person and lawyers alike, means some are filing stronger, and potentially more damaging, petitions than are strictly necessary in order to ensure that the petition is successful. That uncertainty may have been fuelled after the Court of Appeal's decision in *Owens* in early 2017.

The complexity of the law, and the gap between what the layperson might fairly assume an ostensibly fault-based law requires and what the law in fact requires (and what the uncontested procedure can cope with) is at odds with a family justice system that seeks to be responsive, problem-solving and transparent. It also raises issues of access to justice.

Fanning the flames: does fault increase conflict?

There is a very robust body of evidence on the negative impact of parental conflict on children's wellbeing. A key objective of family law and policy over the last few decades has therefore been to try to contain and minimise parental conflict post-separation. The evidence from this study is that the use of fault may undermine those efforts and actually trigger, or exacerbate, parental conflict in some cases.

In our national survey, 62% of petitioners and 78% of respondents said using fault had made the process more bitter, 21% of fault-respondents said fault had made it harder to sort out arrangements for children, and 31% of fault-respondents thought fault made sorting out finances harder. Interviewees – petitioners and respondents – gave examples of how the use of fault, mainly behaviour, had had a negative impact on contact arrangements, including fuelling litigation over children. Some described threats to show the petition to children.

Lawyers and other advice agencies place great emphasis on trying to reduce harm, such as keeping behaviour particulars short and mild and trying to agree draft petitions between the petitioner and respondent in advance of filing. Those harm-minimisation strategies depend upon awareness and receptivity from both sides, including where parties

are unrepresented. But even with positive intentions on both sides, there is an elevated risk of conflict. Particulars still have to reach the threshold, and an uncertain one at that. Respondent interviewees also reported that there was something inherently upsetting about seeing a series of allegations about them laid out in a legal document and described how that could undermine trust. That was particularly so where particulars had not been agreed, but was even the case where the respondent understood that the petition was intended just as a means to an end.

Conflict will occur on separation whether the divorce law includes fault or not. However, the current divorce law appears to introduce an entirely unnecessary additional source of conflict. It is only in relation to the divorce itself that the law allows the parties to focus on conduct. The law does not allow fault or conduct to influence arrangements for children or money other than in extreme circumstances. Once triggered, however, conflict and an undermining of trust can be very difficult to resolve.

Sucking it up: how fair is the process between petitioner and respondent?

Petitions may be produced jointly between the parties and with 'allegations' that both can accept, more or less. In other cases, the drafting is not a collaborative process and the respondent will disagree with some, or all, of the allegations. That does matter, since the petitioner's account in undefended cases will be taken as true, even where the respondent rebuts the allegations without taking the procedural steps necessary to mount a formal defence. On the face of it, the court's automatic endorsement of the allegations of one of the parties appears to be procedurally unfair, a point not lost on respondents:

> *[The petition] doesn't need to be true, it doesn't need to be fair, it doesn't need to be just, it doesn't need to be anything that stands up to rigour. In which case, it serves no purpose other than in my case to cause upset and I would much prefer that she actually be forced to substantiate the claims rather than just wildly vomit bile onto a page and click submit. (Interviewee WK22)*

There are options available to the respondent to try to shape or challenge the petition, but none are available in all circumstances, or without financial or emotional costs. Defending the divorce is prohibitively expensive, legally challenging and unlikely to work, even after the *Owens* case. Family lawyers therefore encourage respondent clients to 'suck it up', focusing on the petition as 'a means to an end', while recognising that the allegations are unfair.

Does fault protect marriage/deter divorce?

The study found no empirical support for the argument that is sometimes made that fault may protect marriage because having to give a reason makes people think twice about separating. Our evidence pointed the other way: fault enables a quick exit from a marriage. In our court file study, fault was associated with shorter marriages (restricting analysis to marriages longer than six years). Fault was also related to shorter gaps between the break-up of the relationship and filing for divorce. The lack of evidence that fault can protect marriage is not surprising given evidence of gaps in public understanding of the grounds for divorce and the ease and rapidity with which a fault divorce can be obtained, especially with legal advice.

We also found little evidence of the effectiveness of the various legal provisions to promote reconciliation contained in the Matrimonial Causes Act 1973, some of which only apply to legally represented petitioners and so will necessarily have limited impact. As previous studies have shown, once at least one of the parties is seeking advice then it is generally too late to intervene. What did emerge strongly from the qualitative evidence, however, is that the decision to end the marriage is not taken lightly. Marriage is highly valued as an institution and as a relationship, and not one that people give up on precipitately.

Doing the right thing? Fault, morality responsibility

In our national opinion survey, 71% thought that fault should remain part of the law. However, the general public are unlikely to be aware that the current law does not in fact seek to make a definitive allocation of blame or of the very limited scrutiny that the court can undertake in practice.

Drawing on qualitative interviews with the parties, we drew a contrast between two different and mutually exclusive moralities in relation to divorce: a traditional one based on ideas about individual *justice* for the petitioner, and a *responsibility* morality based on the 'good divorce' where the focus is on harm-minimisation, especially in relation to children. The first emphasises the importance of a strict adherence to and finding of fault; the second would eliminate fault if possible.

We also traced how adherents of both moralities experienced the divorce process. In general, the experience of both groups was largely negative, but for different reasons. For some embracing a *justice* morality, the pragmatic orientation of the justice system could be deeply frustrating, whilst for others the experience of fault turned out to be

problematic due to the conflict and upset it generated. Those embracing a *responsibility* morality also found the experience difficult. Some were using fault pragmatically but found the process slow and painful; whilst some who were avoiding fault on principle found the long separation required to avoid fault very difficult in practical terms and also left them feeling they had lost control of private family decisions. A small number of interviewees adopting the *justice* morality wanted the role of fault to be strengthened, but for most the removal of fault was strongly preferred.

All interviewees had a very strong commitment to the institution of marriage, despite their own divorces. Whatever their own personal experiences and views on the current law, whether in favour of the retention or removal of fault, all were very strongly in favour of support for marriage and opposed to anything that would undermine it as an institution.

Divorce law and divorce law reform internationally

What emerged strongly from our comparative law review is that the law and practice in England and Wales are out of step with similar jurisdictions in Europe and North America. The heavy reliance on fault in England and Wales, used for 60% of all petitions, is ten times that of our closest neighbours in Scotland and France. That appears to be at least in part a result of what are the very lengthy separation periods required in England and Wales compared to other jurisdictions. Drawing on the international research on the relationship between divorce law and divorce rates, there is no evidence that the removal of fault or a reduction in the separation periods in England and Wales would have a significant or long-lasting effect on the propensity to divorce.

Options for law reform

We have identified four possible responses to these findings, set out in the table opposite, but given the weight of evidence we do not consider 'no change' or 'stricter interpretation' to be sustainable or achievable options.

The incremental reform option, based on the Scottish system, would retain fault but reduce the separation periods from two years to one with consent, and from five to two years otherwise. However, it is unlikely that this would reduce fault significantly in England and Wales because a behaviour divorce can be secured in as little as three months and does not require the cooperation of the respondent. In addition, Scotland's historically lower use of fault is due to wider legal and procedural factors that could not be replicated in England and Wales without major reform of other areas of family law. Without those seemingly technical, but vital, elements of the complex jigsaw surrounding divorce, it is likely that a large proportion of English and Welsh divorces would remain fault-based.

In contrast, a notification system offers the benefits of being clear, simple, cheap to administer and immune to manipulation. The only disadvantage is that it would require primary legislation, but that would be true of the incremental reform option also.

Conclusion

In reality, we already have divorce by consent or even (given the extreme difficulty and impracticality of defending a case) 'on demand', but masked by an often painful, and sometimes destructive, legal ritual of fault with no obvious benefits for the parties or the state. There is no evidence from this study that the current law protects marriage. The divorce process is currently being digitised. This is a timely opportunity for long overdue law reform so that divorce is based solely on irretrievable breakdown after notification by one or both spouses.

OVERVIEW OF THE OPTIONS FOR LAW REFORM			
	Options	**Potential advantages**	**Disadvantages/limitations**
No change	Retain current substantive law. Continue with digitisation of divorce process.	Avoid need for legislation. Digitisation will reduce complexity and some administration costs.	Law unreformed for half a century, despite social changes. Abundant evidence of hypocrisy, conflict and unfairness of current law and public outcry over the *Owens* case. Expensive court-based system.
Stricter interpretation of the existing law	Raise the threshold for behaviour. Robust inquiries in each case.	Bring greater honesty to the system. Reduce unfairness for some respondents.	Inquiries have never been effective and would be unaffordable. Would be highly contentious and incur accusations of 'nanny state'. Likely to trigger alternative means to circumvent long waiting periods.
Modified mixed fault/no-fault system, as now, but changed as in Scotland	Reduce separation periods to one year with consent, two years without. Abolish desertion.	Existing separation periods too long. Desertion is little used and has a high failure rate.	Fault unlikely to reduce significantly compared to Scotland without wider reform. Remaining fault likely to be the most conflictual, continuing unfairness for respondents, will not address dishonesty. System remains complex, confusing and costly. Will require primary legislation.
Notification divorce	Sole or joint notification of intention to divorce. Directed to online relationship resources and dispute resolution. Sole or joint confirmation of intention to divorce after minimum period (e.g. 6 months).	Eliminates fault-generated conflict. Equally fair to petitioner and respondent as no implication (potentially unwarranted) of blame. Precludes dishonesty. Clear and simple to understand and administer. Significant cost savings for the family justice system. Used internationally.	Will require primary legislation.

About the authors

- Liz Trinder is Professor of Socio-legal Studies at the University of Exeter Law School.
- Debbie Braybrook is a Senior Research Officer at One Plus One.
- Caroline Bryson is a partner at Bryson Purdon Social Research.
- Lester Coleman is Head of Research at One Plus One.
- Catherine Houlston is a Senior Research Officer at One Plus One.
- Mark Sefton is an independent researcher.

About this summary report

This report summarises the findings from a study that explored how the current law in England and Wales regarding divorce and civil partnership dissolution operates in practice, and considered whether and how the law might be reformed. The study was led by Professor Liz Trinder at the University of Exeter and funded by the Nuffield Foundation.

The full report is available to download from www.nuffieldfoundation.org/finding-fault

About the Nuffield Foundation

The Nuffield Foundation funds research, analysis, and student programmes that advance educational opportunity and social well-being across the United Kingdom.

We want to improve people's lives, and their ability to participate in society, by understanding the social and economic factors that affect their chances in life. The research we fund aims to improve the design and operation of social policy, particularly in Education, Welfare, and Justice.

Our student programmes – Nuffield Research Placements and Q-Step – provide opportunities for individual students, particularly those from disadvantaged backgrounds, to develop their skills and confidence in quantitative and scientific methods.

We are a financially and politically independent charitable trust established in 1943 by William Morris, Lord Nuffield, the founder of Morris Motors.

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28 Bedford Square, London WC1B 3JS

T: 020 7631 0566
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Published by the Nuffield Foundation, 28 Bedford Square, London WC1B 3JS

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