

DIVORCE (ETC.) LAW REVIEW BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Divorce (etc.) Law Review Bill [HL] as introduced in the House of Lords on 18 July 2018 (HL Bill 126).

- These Explanatory Notes have been prepared by Baroness Butler-Sloss in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision of the Bill does not seem to require any explanation or comment, the Notes simply say in relation to it that the provision is self-explanatory.

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Overview of the Bill

- 1 The Bill requires the Lord Chancellor to review the law relating to divorce and judicial separation and to the dissolution of civil partnerships and the separation of civil partners. The review is to include consideration of whether the law ought to be changed so that irretrievable breakdown of a marriage or civil partnership is evidenced solely by a system of application and notification.

Policy background

- 2 The 1990 Law Commission report *The Ground for Divorce* (Law Com No 192) identified a range of problems with the divorce law, as set out in the Matrimonial Causes Act 1973. Those problems included that the court was only able to "pretend" to inquire into allegations of fault, that the law was confusing, unjust, provoked unnecessary hostility, had the potential to make things worse for children and did nothing to protect marriage. It proposed that divorce be available after a period of reflection and consideration, a form of "no-fault" divorce. The 1995 White paper *Looking to the Future: Mediation and the Ground for Divorce* (Cm. 2799) repeated the Law Commission's analysis of problems with the law. It also endorsed the recommendation that the ground for divorce should be irretrievable breakdown following a period of reflection and consideration, without the need for the parties to give further reasons. The Family Law Act 1996 introduced such a scheme, with divorce following a period of reflection and consideration, but adding a requirement that the parties attend information meetings and mediation meetings during the waiting period.
- 3 The reforms to the ground for divorce were never implemented. In 2001, the Government announced that the divorce law provisions within Part II of the 1996 Act would not be commenced. This was attributed, by the then Lord Chancellor, to two factors, both relating to procedural matters introduced during the passage of the Bill that had not formed part of the original Law Commission scheme. The first factor was the ineffectiveness of the information meetings that had been piloted and evaluated. The second factor was "the complex procedures" that would be likely to result in a delay and uncertainty in resolving matters that would not be in the best interests of children or the parties.¹ The no-fault ground for divorce was not tested and was not cited as a factor in the Lord Chancellor's decision. The uncommenced provisions of Part II of the 1996 Act were repealed by the Children and Families Act 2014. The ground for divorce therefore remains as set out in the Matrimonial Causes Act 1973.
- 4 Empirical evidence of the current position was set out in the Nuffield Foundation Finding Fault study, the first major research study on the divorce law since the early 1990s. The Finding Fault report on undefended divorces in 2017² found that fault, especially the behaviour fact, was used widely to avoid a long wait for a divorce, with the parties exaggerating allegations or retro-fitting the reasons for their separation to meet the legal requirements. The study found, as had the Law Commission in 1990, that the court could not fulfil its duty to inquire into allegations and instead took the petitioner's allegations against the respondent at face value. That was procedurally unfair for respondents who disputed allegations, but could not afford, or understand how, to defend against them. The study found no evidence that fault prevented or delayed the decision to divorce. It did find, as had the Law

1 Lord Chancellor's Department, *Divorce law reform – government proposes to repeal Part II of the Family Law Act 1996* (16 January 2001).

2 Liz Trinder et al *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>

Commission, that producing evidence of fault could generate or exacerbate conflict, with damaging consequences for children, and contrary to the aim of family law and policy.

- 5 A second report on defended divorce cases in 2018³ concluded that the majority of defences were caused by the law itself, whilst the process for defending was an inaccessible and ineffective remedy for problems caused by the law.
- 6 The *Finding Fault* study recommended that the current ground for divorce be replaced by a notification system, similar to the Law Commission's original proposals.
- 7 Her Majesty's Courts and Tribunal Service is currently developing a system of online applications for divorce as part of the court modernisation process. The early results indicate that the process will greatly reduce the number of errors, providing a better service for users.⁴ However, the online process will not change the substantive law.

Legal background

- 8 Divorce and judicial separation in England and Wales are governed by the Matrimonial Causes Act 1973, consolidating the Divorce Reform Act 1969. The sole ground for divorce is that the marriage has broken down irretrievably, but that has to be evidenced by one of five facts: adultery (with a member of the opposite sex), behaviour (that it is unreasonable to expect the petitioner to live with), desertion for two years, separation for two years with the consent of the respondent or separation for five years.⁵ The law provides that the court is under a duty to inquire into any facts alleged by the petitioner or respondent. The parties must have been married for one year before instituting divorce proceedings. Judicial separation does not require that the marriage has broken down irretrievably, nor is there a prohibition on applications within one year of the marriage.
- 9 The legal framework for civil partnership dissolution and the separation of civil partners is set out in the Civil Partnership Act 2004. The Act mirrors the provisions of the Matrimonial Causes Act 1973. The sole difference is that only four facts are available to evidence the irretrievable breakdown of a civil partnership. Adultery, whether same or opposite sex, is not available as a fact for civil partnerships.

Territorial extent and application

- 10 Legislative competence for divorce and civil partnership has been devolved to Scotland and Northern Ireland and separate legislation exists to govern divorce and civil partnership in those jurisdictions. Legislative competence in these areas has not been devolved to the National Assembly for Wales.
- 11 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions.

3 Liz Trinder and Mark Sefton No Contest: Defended Divorce in England and Wales (Nuffield Foundation 2018) Available at <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>

4 Letter from the President of the Family Division and Chief Executive of HMCTS, 8th May 2018 <https://www.judiciary.gov.uk/wp-content/uploads/2018/05/divorce-public-joint-letter-20180508.pdf>

5 The interpretation of the behaviour fact under s.1(2)(b) of the 1973 Act is currently before the Supreme Court in the case of *Owens v Owens* <https://www.supremecourt.uk/cases/uksc-2017-0077.html>

Commentary on provisions of Bill

Clause 1: Review of law

- 12 This clause requires the Lord Chancellor to review the law relating to divorce and judicial separation and the dissolution of civil partnerships and separation of civil partners and to include consideration of a replacement scheme of application and confirmation set out in the Schedule. The rest of the clause makes further provision about the review.

Clause 2: Extent, commencement and short title

- 13 This clause provides for the Act to extend only to England and Wales and to come into force two months after passing.

Schedule: Scheme for Reformed Law of Divorce etc.

- 14 The Schedule sets out a scheme for the Lord Chancellor to consider as part of the review. The provisions are largely self-explanatory. The scheme sets out that the sole ground for divorce and civil partnership dissolution is the irretrievable breakdown of the marriage or civil partnership. That is to be evidenced solely on the basis of a system of application and subsequent notification after a minimum period of nine months. No other reason or evidence is to be required to prove irretrievable breakdown. The scheme retains the current time bar where the parties are prohibited from starting the divorce or dissolution process until at least twelve months from the date of the marriage or civil partnership. The application and subsequent confirmation may be made by one or both parties. The scheme provides that in sole application cases the other party must be informed of the application. Where it is not possible to show that the other party has been given notice, the scheme provides that service can be deemed by a court, as operates currently.

Annex A: Territorial extent and application

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion required?	Extends to Scotland?	Legislative Consent Motion required?	Extends to Northern Ireland?	Legislative Consent Motion required?
Clause 1	Yes	Yes	No	No	No	No	No
Clause 2	Yes	Yes	No	No	No	No	No
Schedule 1	Yes	Yes	No	No	No	No	No

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