

Finding Fault? Divorce Law and Practice in England and Wales

Full report

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About this report

This report presents the findings from the Nuffield-funded project to explore how the current law regarding divorce and civil partnership dissolution in England and Wales operates in practice and to inform debate about whether and how the law might be reformed.

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

About the Nuffield Foundation

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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 of Justice and Welfare

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The project involved a considerable amount of fieldwork, all of which was possible due only to the help and assistance of our colleagues within the family justice system and to members of the public. We are grateful to Ben Collins and his team at Kantar Public for their work on the national opinion survey. We would like to thank Resolution nationally and locally for supporting the project and the Resolution members who gave up their time for the focus groups and contested cases interviews. MoJ Analytical Services were very helpful in producing sample lists for the file studies. Adam Lennon and Shahnaz Khanam from HMCTS were invaluable members of the Advisory Group as well as facilitating access to field sites. We are also extremely grateful to the HMCTS managers and staff, legal advisers and judges in the four Regional Divorce Centres and local hearing centres for their time and patience in supporting the observations, case file reviews and interviews. We are grateful to the Judicial Office and the President of the Family Division for giving permission for the study.

We would like to thank the members of the public who contributed to the national opinion survey, and especially to those who took part in individual qualitative interviews. Particular thanks are due to Ian Rispin and his colleagues from Wikivorce and the local Resolution members who worked hard on our behalf to recruit interviewees for the study.

Finally, we are very grateful to the Lord Speaker for his permission to allow us to launch this report in the splendid surroundings of the River Room, to the Rt Hon the Baroness Butler-Sloss for sponsoring the launch and to Maggie Stevenson for assisting with the organisation.

Dedication

This report is dedicated to the memory of Sir Nicholas Wall, a former President of the Family Division and an advocate of divorce law reform.

Glossary

Terms underlined are also the subject of entries in this glossary

Unless otherwise indicated, the terminology of divorce is equally applicable in the context of dissolution of civil partnerships.

Acknowledgment of service: Court form on which the respondent should confirm receipt of the petition, say whether they intend to defend the proceedings, and provide certain other information. The form should be signed by the respondent personally if they are using it to admit adultery or to consent to a decree in two years' separation with consent cases. In other cases, the form may be signed by a solicitor on their behalf.

Adultery: One of the Facts which may be relied on to establish that a marriage has broken down irretrievably. Adultery involves consensual sexual intercourse between a man and a woman who are not married to each other, but at least one of whom is married. Adultery is not available as a Fact to be relied on in respect of civil partnership dissolution.

Answer: A formal defence to divorce proceedings.

Bailiff service: See under service.

Box work: Work undertaken by District Judges or Deputy District Judges on cases where there is no court hearing involved, especially dealing with applications on paper.

Certificate of entitlement: If satisfied that the petitioner is entitled to a divorce (or dissolution), the court will send a notice to the petitioner and respondent confirming that and specifying a date on which decree nisi (or a conditional order in the case of a civil partnership) is to be pronounced.

Child arrangements: In family law this term covers, in the context of divorce or separation, with whom a child is to live, spend time or otherwise have contact.

Co-respondent: If a divorce petition is based on adultery and the person with whom the respondent is alleged to have committed adultery is named in the petition, that person is made a co-respondent (i.e. a second respondent) to the proceedings.

Conduct: The conduct of each of the parties is one of the matters which the court has to have regard to when exercising its powers in financial remedy proceedings, but only if it would be inequitable to disregard it. In practice, conduct is rarely considered relevant in such proceedings.

Court fees: HMCTS charges a fee for taking certain steps in proceedings, including applying for a divorce. Means-tested **Help with court fees** may be available to parties with limited means; if so, fees may not have to be paid or may not have to be paid in full.

Decree nisi (or conditional order in the case of a civil partnership): A provisional decree indicating that the court has held that the marriage (or civil partnership) has irretrievably broken down based on the Fact(s) relied on by the petitioner and sees no reason why a divorce (or dissolution) cannot take place. The divorce (or dissolution) is not finalised at this point.

Decree absolute (or final order in the case of a civil partnership): The final court order in divorce (or civil partnership) proceedings, which legally brings the marriage (or civil partnership) to an end. Usually it will be the petitioner who applies for decree absolute (or final order), but in certain circumstances the respondent may do so.

Deemed service: See under service.

Defended divorce: A petition may be defended if the respondent files an Answer challenging the allegations made by the petitioner and/or disagreeing that the marriage has broken down irretrievably. The petitioner's petition will also be treated as defended if the respondent files their own petition (previously referred to as a cross-petition).

Desertion: One of the Facts which may be relied on to establish that a marriage has broken down irretrievably. Desertion involves one spouse intentionally leaving the other without good cause and without the other's consent, for a period of at least two years.

Directions for trial: The formal term previously used to refer to the process of dealing with an application for decree nisi but which was still in use in Regional Divorce Centres at the time of field work.

Dissolution: The term used instead of divorce for the ending of a civil partnership.

District Judge: District judges are full-time judges who deal with a wide spectrum of civil and family law cases. **Deputy District Judges** may deal with a similar range of cases, but on a part-time basis. They are commonly also practising barristers or solicitors.

Family Procedure Rules (FPR): Rules of court which govern the conduct of family law cases in the Family Court and High Court. The rules are supported by Practice Directions.

Fact(s): Unless otherwise indicated, used in this report (in capitalised form) to refer to one of the five Facts which may be relied on to satisfy the court that a marriage has broken down irretrievably.

File: (verb) In court proceedings, delivering or having a document delivered to the court.

Financial remedy proceedings: Proceedings involving applications for financial orders that the court may make in respect of the parties' money and property and which may accompany divorce proceedings. A final financial order cannot be made before decree nisi has been pronounced. Such proceedings were previously referred to as 'Ancillary Relief'.

HMCTS: HM Courts and Tribunals Service, an executive agency responsible for the administration of criminal, civil and family courts and tribunals in England and Wales.

Issue: (verb) In the context of court proceedings, means the formal start of proceedings.

Jurisdiction: The petition must state why the court has jurisdiction (the legal authority) to deal with the proceedings; this requires one or both of the parties to have one of certain specified connections to England and Wales.

Justices' Clerk: A senior lawyer who acts as legal adviser to and provides support to, lay magistrates when they are dealing with criminal and family proceedings. In certain limited circumstances, Justices' Clerks may also undertake certain functions which ordinarily fall within the remit of judges and magistrates in the family court. A Justices' Clerk may authorise **Assistant Justices' Clerks**, commonly known as **Legal Advisers**, to perform similar functions. Justices' Clerks and Assistant Justices' Clerks are employed by HMCTS.

Law Commission: An independent body with a remit to keep the law of England and Wales under review and to recommend reform where it is needed.

Legal Adviser: See under Justices' Clerk.

Litigant in person: A party to proceedings who is not represented by a lawyer.

Ministry of Justice (MoJ): Government department responsible for, among other things, courts, and family law policy.

Petition: The form on which an application for a divorce is made.

Petitioner: The party applying for a divorce.

RDC: Regional Divorce Centre.

Respondent: The person against whom an application for divorce is made.

Service: In court proceedings, to serve a document means to deliver or have it delivered to another party. In divorce proceedings, the standard method for service of the petition and accompanying documents, is for the court to send them by first class post to the respondent at the address supplied by the petitioner. If service cannot be achieved in this way there are a number of options open to the petitioner. These include bailiff service, whereby an application may be made for a court-employed bailiff to attempt to deliver the documents to the respondent personally, and deemed service, whereby an application may be made for an order that the respondent be deemed to have been served with the petition.

Statement in support: An application for decree nisi must be accompanied by a statement in support of the application, signed by the petitioner personally, confirming the contents of the petition are true, and providing further information which the court requires to consider entitlement to a decree. If an acknowledgment of service has been signed by the respondent personally, a copy must be attached and the respondent's signature identified.

Statement of arrangements for children: Prior to April 2014, the petitioner was required to file a statement giving details of proposed arrangements for any dependent children of the family.

Statement of case: The section of the petition where the petitioner should set out sufficient details of the alleged adultery, behaviour, desertion or separation to satisfy the legal requirements relevant to the Fact(s) relied on.

Statement of reconciliation: Where the petitioner is legally represented, the legal representative must file a statement certifying whether they have discussed the possibility of reconciliation with the petitioner and whether they have given the petitioner names and addresses of people qualified to help effect a reconciliation.

Court forms referred to

- D6 Statement of reconciliation
- D8 Petition
- D8b Answer
- D10 Acknowledgment of service (there are different versions depending on the Fact(s) relied on in the petition)
- D30 Form for consideration of application for decree nisi (for internal use)
- D36 Application for decree absolute
- D80 Statement in support (there are different versions depending on the Fact(s) relied on in the Petition)
- D84 Application for decree nisi
- Form E Prescribed form of financial statement in contested financial remedy proceedings, used by each party to disclose their income, assets, liabilities and other relevant information.

Summary

1. 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.

2. 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.

3. 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.

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.

- 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 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*.

4. 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 very important. Lawyers and petitioners interviewed for the study made clear that it was often not 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.

5. 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.

6. 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 are sufficient 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,

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

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

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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. Options for law reform

We have identified four possible responses to these findings, set out in the table below, 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 south of the border 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.

	Options	Potential advantages	Disadvantages/limitations
No change	Retain current substantive law.	Avoid need for legislation.	Law unreformed for half a century, despite social changes.
	Continue with digitisation of divorce process.	Digitisation will reduce complexity and some administration costs.	Abundant evidence of hypocrisy, conflict and unfairness of current law and public outcry over <i>Owens</i> case. Expensive court-based system.
Stricter interpretation of the existing law	Raise the threshold for behaviour.	Bring greater honesty to the system.	Inquiries have never been effective and would be unaffordable. Would be highly contentious and incur accusations of 'nanny state'.
	Robust inquiries in each case.	Reduce unfairness for some respondents.	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.	Existing separation periods too long.	Fault unlikely to reduce significantly compared to Scotland without wider reform.
	Abolish desertion.	Desertion is little used and has a high failure rate.	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 <i>minimum</i> 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.

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.

Introduction

“The hypocrisy and lack of intellectual honesty which is so characteristic a feature of the current law and procedure differs only in magnitude from the hypocrisy and lack of intellectual honesty which characterised the ‘hotel divorce’ under the old law.”

Sir James Munby, President of the Family Division⁵

Why this study?

There have been major changes in family life over the last 30 years, with more diverse patterns of partnering and parenting, the rise of cohabitation, civil partnership and same sex marriage. Relationship breakdown has become a reality affecting many families, including more than 100,000 divorces in England & Wales each year. There have also been significant shifts in family law, with far greater emphasis on problem-solving approaches, family decision-making and conflict avoidance. Procedurally too, the family courts are embracing technology, bringing in digitisation and paperless proceedings. One area of law that has not kept pace with social change is the divorce law, now nearly 50 years old.

The current ground for divorce stems from the Divorce Reform Act 1969, subsequently consolidated in the Matrimonial Causes Act 1973. Since 1969 there has been one ground for divorce – the irretrievable breakdown of the marriage – but that has to be evidenced by one of five Facts.⁶ Three of the Facts – adultery, behaviour and desertion – are generally based on one party attributing responsibility for the breakdown of the marriage to the ‘fault’ of the other. It is possible to divorce without having to cast blame but only following a fairly lengthy separation of two years (if both agree to divorce), otherwise five years. Legislators in the 1960s anticipated that the use of fault would dwindle over time. In practice, fault continues to be used in the majority of divorces in England in Wales, in an instrumental fashion to avoid a long wait for the divorce.

The problems with the reliance on fault in divorce, particularly (unreasonable) behaviour,⁷ were mapped out in a series of highly critical reports in the 1970s, 1980s and 1990s. Summarising these, the Law Commission in 1990 highlighted 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 the allegations.⁸ Parliament was persuaded to act. The Family Law Act 1996 set out a new regime with irretrievable breakdown as the sole ground for divorce without reference to any ‘Fact’. However, the no-

⁵ Giving judgment in the defended divorce case of *Owens v Owens* [2017] EWCA Civ 182 [95].

⁶ ‘Fact’ is capitalised in this report where we are referring to the Facts required to evidence irretrievable breakdown of a marriage or civil partnership.

⁷ Strictly, the behaviour Fact is “that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent”. This is often shortened, incorrectly, to “unreasonable behaviour”, but in law it is not the ‘behaviour’ that must be ‘unreasonable’ but the expectation that the petitioner should continue to live with the respondent. Indeed, in some cases, the respondent may not be at fault at all, e.g. *Thurlow v Thurlow* [1976] Fam 32 and other cases involving the impact of serious illness of the respondent. Throughout the rest of this report we use the term ‘behaviour’.

⁸ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.11.

fault divorce provisions of the Family Law Act were never implemented, not because of the principle of no-fault divorce, but because of the overly complex procedures the particular scheme enacted by Parliament would have entailed.⁹

Thus, the much-criticised divorce law of the Matrimonial Causes Act 1973 has remained in force. There have continued to be calls for reform, boosted in 2017 by the case of *Owens v Owens*, where a woman was denied a divorce despite a recognition that her marriage had broken down irretrievably.¹⁰ There have, however, been no major empirical studies of how the divorce law is working since research undertaken in the 1980s.¹¹

The *Finding Fault* study was therefore designed to contribute to the growing debate about the current grounds for divorce. The project aimed to explore how the current law on the ground for divorce and civil partnership dissolution operates in practice and to inform discussions about whether, and if so how, the law might be reformed. In doing so, the project was also able to consider whether the problems identified by the Law Commission and Parliament in the 1980s and 1990s have remained the same, have worsened or perhaps have been resolved.

About the Finding Fault study

The Finding Fault study is a large, multi-method study.¹² It is designed to capture both party and professional views and experiences and to understand the two key processes of the production of divorce petitions and scrutiny of entitlement to a divorce.¹³ The study explores three main questions:

1. How does the current law work *in practice* during the process of petitioning? What factors shape the selection of the Fact relied upon and how does that relate to the reasons for the breakdown of the relationship? What impact does the process have on the relationship between the divorcing couple?
2. What does the “duty of the court to enquire, so far as it reasonably can, into the Facts alleged”¹⁴ mean in practice? How rigorous is the process and has the scrutiny of petitions already become an administrative rather than an inquisitorial process?
3. Is there a desire and need for reform, and if so, how?

The research incorporated five inter-connected studies, as set out in the table overleaf. The *petition journey study*, consisting of qualitative interviews with petitioners and respondents and focus groups with family lawyers, was designed to shed light on what factors shape the

⁹ The Law Commission proposals were far more straightforward.

¹⁰ *Owens v Owens* [2017] EWCA Civ 182. The case is being appealed to the Supreme Court.

¹¹ Considered in Section 1.4 below.

¹² A comprehensive technical appendix setting out the components of the project in detail is available at nuffieldfoundation.org/finding-fault

¹³ We use ‘divorce petitions’ and ‘entitlement to a divorce’ as shorthand to cover also applications and entitlement to civil partnership dissolution unless otherwise stated. The findings from the national opinion poll referred to below, however, only refer to divorce and not civil partnership dissolution.

¹⁴ Section 1(3) of the Matrimonial Causes Act 1973 imposes a duty on the court ‘to enquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent’.

selection of who petitions and on what basis. The journey study also provides crucial insights into the experience of the process and the impact of the use of fault on the parties.

The *court scrutiny study* was designed to explore the nature of the scrutiny process in undefended cases, by looking at case progress and outcomes in a sample of 300 divorce cases, together with observation of legal advisers as they went about the process of scrutiny of entitlement to divorce, supplemented by interviews about their role. Where possible, we have asked similar questions and used similar measures as the court file study and public opinion survey conducted for the Law Commission in the 1980s¹⁵ to provide an approximate baseline comparison.

The third question about whether and if so how the law might be reformed has been addressed by a *national opinion study* and *comparative law study* in addition to insights from the qualitative interviews with the parties from the *journey study*. The national opinion study was based on a survey among 2,845 adults living in England & Wales, designed to measure public opinion about current divorce law and gauge appetite for reform. In order to look more closely at the views of those who had experienced divorce, we boosted the number of divorcees within our survey sample, with 1,336 of our 2,845 survey participants currently going through or having been divorced.¹⁶ The comparative law study consisted of an academic workshop where national experts from nine European and North American jurisdictions presented papers on the domestic divorce law, the operation of the law in practice and pressures for and experience of law reform.

The *contested cases study*, based on court file analysis of cases where there was at least an intention to defend, a boost sample of cases where an Answer had been filed to defend the divorce and interviews with solicitors about high conflict cases, will be reported on separately.¹⁷

The study focuses on divorce, with some limited reference to civil partnership dissolution. We were able to observe five civil partnership dissolutions being scrutinised. We were, however, unable as planned to recruit interviewees with experience of civil partnership dissolution. We also took the decision not to include civil partnership dissolution within the national survey. Although the legal differences between (opposite sex) divorce and civil partnership dissolution are small, we considered that they would be too complex to address in survey questions with a lay audience. Given that the legal differences are small and the process involved is largely the same, we believe that these findings are relevant to civil partnership dissolution, at least as far as the scrutiny process is concerned.

¹⁵ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendices C and D.

¹⁶ Where we report on 'all participants', divorcees are down-weighted to their appropriate proportion. Some questions were only asked of those 645 participants who were currently divorcing or had divorced within the past ten years. For all of the survey questions reported, there were statistically significant differences (at the 95% confidence level) in responses across the sub-groups of divorcees and non-divorcees show in the tables.

¹⁷ As a Nuffield Foundation Report '*No contest? 'Defended' divorces in England & Wales*'.

Components of the Finding Fault study

Study element	Method	Sample size	Sample source
1. Petition journey study	Qualitative interviews with petitioners and respondents	110 interviews with 81 people (57 petitioners, 22 respondents, 2 other)	Wikivorce ¹⁸ ; Splitting Up? ¹⁹ and Resolution ²⁰
	Focus groups with lawyers	4 regional focus groups with 5-8 participants in each	Volunteers recruited via Resolution
2. Court scrutiny study	Main court file analysis	300 divorce cases issued Q4 2014 to Q4 2015 (75 from 4 Regional Divorce Centres (RDCs))	Samples identified by Ministry of Justice (MoJ) Analytical Services
	Observation of scrutiny process	17 observation sessions from 4 RDCs scrutinising a total of 292 cases	Negotiated locally with approval from HMCTS and the Judicial Office
	Interviews with legal advisers and judges	16 from 4 RDCs	Approval from HMCTS and the Judicial Office
3. Contested cases study	Contested cases court file analysis	100 files (25 from each of 4 RDCs) where there was an intention to defend	Samples identified by MoJ Analytical Services
	Contested cases court file analysis – Answers booster sample	50 files (from 3 receiving courts) where an Answer was filed	Samples identified by HMCTS
	Interviews with family lawyers discussing 2-4 high conflict cases	Interviews from four areas	Volunteers recruited via Resolution
4. National opinion study	Public opinion survey	2,845 individuals 16+ in England & Wales, including 1,336 divorcees, ran Nov 2015 to Jan 2016	Kantar Public face-to-face quota omnibus survey
5. Comparative law reform study	Workshop papers on law and law reform from different jurisdictions	Nine papers on 13 jurisdictions from Europe and North America	

¹⁸ Wikivorce – an online service providing advice and resources to support people through the divorce process <https://www.wikivorce.com/divorce/>.

¹⁹ Splitting Up?: Put Kids First - an online space hosted by OnePlusOne where people can access a programme on skills to ease the pressure on children and develop a parenting plan.

²⁰ Resolution represent around 6,500 family justice professionals, the vast majority of whom are family lawyers.

Organisation of the report

This report is in four parts. In Part A *Context*, we set out the legal context for this study. Section 1 details how the divorce law has evolved, the criticisms of it and recent calls for reform. In Section 2, we set out a conceptual framework for understanding the findings of the study, drawing a distinction between two different norms or approaches to divorce and between the law in the books and the law in action.

In Part B *Divorce law in theory and practice* we explore how the law works in practice in relation to the two key processes of how petitions are put together and how the court scrutinises them. In Section 3, we trace how petitions are put together, emphasising the dominance of a pragmatic approach, whereby facts are found to fit the law. In Section 4, we trace how the logistical constraints have meant that the court's duty to inquire into the Facts alleged by petitioner and respondent has been reduced to a pragmatic assumption that what the petitioner asserts is true, unless the case is defended. In Section 5, we show how the court's interpretation of what is required to make out one of the five Facts has reduced over the last three decades, particularly in relation to behaviour.

In Part C *Consequences*, we explore some of the issues that arise from how the law works in practice. In Section 6, we examine the problems arising from the complexity of the substantive law and particularly the lack of clarity about the behaviour threshold. In Section 7, we show how the use of fault can trigger or increase conflict that can impact on children, despite the widespread use of harm-minimisation strategies. In Section 8, we explore the sense of unfairness experienced by some respondents who are subject to allegations that the court cannot investigate and that very few respondents will be able to defend. In Section 9, we assess whether fault and the reconciliation provisions within the existing law protect marriage.

In the final part of the report, Part D *Fault and law reform* we consider the various options for reform. In Section 10, we explore the views of the public and especially divorcees about law reform and fault. In Section 11, we consider the international evidence on the relationship between fault and divorce rates and on the law and use of fault in similar jurisdictions to England & Wales. In Section 12, we consider the arguments for and against fault before outlining the advantages and disadvantages of four approaches to law reform. We conclude, following the Law Commission in 1990, that the best option would be the removal of fault and instead to have a system of divorce based solely on the expiry of a notification period initiated and confirmed by one or both parties.

PART A. CONTEXT

1. What is the current law and how did we get here?

1.1 The current law – the Matrimonial Causes Act 1973

The current law on divorce in England & Wales dates back to the late 1960s in the form of the Divorce Reform Act 1969,²¹ later consolidated in the Matrimonial Causes Act 1973.²² The sole ground for divorce is irretrievable breakdown of a marriage.²³ However, irretrievable breakdown has to be evidenced by one of five ‘Facts’.²⁴ Three of those Facts are fault-based: adultery, behaviour (combining what had been previously ‘cruelty’ and ‘incurable insanity’) and desertion. Two of the Facts are based on periods of separation: two years with the consent of the respondent to the divorce, otherwise five years. It is not a requirement that the Fact relied upon is causally related to the reason for the breakdown of the marriage.²⁵ The DRA 1969/MCA 1973 therefore established a mixed fault regime where a non-fault route is possible, but only after a lengthy period of separation.

There is a strong presumption that irretrievable breakdown will be established if a Fact is made out.²⁶ However, both elements – irretrievable breakdown and a Fact – need to be established. Even where it is accepted that the marriage has broken down beyond repair, a Fact still has to be made out. This was reaffirmed in the recent, and rare, defended divorce case of *Owens*,²⁷ where the trial judge accepted that the husband was ‘deluding’²⁸ himself that the wife would return. Nonetheless, the Court of Appeal upheld the decision, agreeing with the husband that behaviour had not been made out on the evidence.

There was an opportunity to overhaul the law early in the millennium with the introduction of civil partnership. However, the same formula of irretrievable breakdown as evidenced by a fault or a separation Fact was transposed for same sex unions, except in relation to the adultery Fact. Applicants for a civil partnership dissolution have only four Facts to rely upon, meaning any allegations of sexual infidelity must be framed as behaviour rather than adultery.²⁹ Petitioners in a same sex marriage may rely on the adultery Fact to divorce, but only if the respondent has voluntary sexual intercourse with a member of the opposite sex.³⁰

²¹ Hereafter ‘DRA 1969’.

²² Hereafter ‘MCA 1973’.

²³ The couple must have been married for at least one year before presenting a petition (MCA 1973, s 3(1)). This waiting period was reduced from three years to one by the Matrimonial Proceedings Act 1984.

²⁴ The specific requirements for each Fact are considered in Section 5 below.

²⁵ *Stevens v Stevens* [1979] 1 WLR 885.

²⁶ Section 1(4) MCA 1973 provides that “If the court is satisfied on the evidence of any such Fact mentioned in subsection 2 above then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall grant a decree of divorce”.

²⁷ *Owens v Owens* [2017] EWCA Civ 182.

²⁸ *Owens v Owens* [2017] EWCA Civ 182 [1].

²⁹ Civil Partnership Act 2004 (hereafter ‘CPA 2004’), s 44.

³⁰ Sexual intercourse must entail penile penetration of the vagina: *Dennis v Dennis (Spillett cited)* [1955] P 153. The Marriage (Same Sex Couples) Act 2013 amended s 1(6) of the MCA 1973 to restrict the definition of adultery to “conduct between the respondent and a person of the opposite sex”. See Section 5.3 below for the limited policing of the opposite sex requirement in practice.

The DRA 1969 did represent a major turning point in the divorce law of England & Wales as it introduced a no-fault route to divorce for the first time, including cases where a ‘wholly innocent’ spouse could be divorced against their will using the five years separation Fact. The 1969 Act followed a significant shift by the Church of England in the mid-1960s when it abandoned its historic commitment to the doctrine of the ‘matrimonial offence’,³¹ proposing instead a sole ground of irretrievable breakdown.³² However, in other respects, the Act was also rooted in a long history of fault-based divorce, as indicated in Table 1.1.

Table 1.1: Grounds for divorce in England & Wales, 1700 to date

Statute	Grounds for divorce
Private Acts of Parliament – 1700-1857	<ul style="list-style-type: none"> • Adultery by wives, for husbands • ‘Aggravated’ adultery by husbands, for wives (adultery plus the husband’s bigamy, incest, bestiality, sodomy, desertion, cruelty or rape)
Divorce and Matrimonial Causes Act 1857	<ul style="list-style-type: none"> • Adultery (for husbands) • Aggravated adultery (for wives)
Matrimonial Causes Act 1923	<ul style="list-style-type: none"> • Adultery
Matrimonial Causes Act 1937	<ul style="list-style-type: none"> • Adultery • Cruelty • Desertion for three years • Incurable insanity
Divorce Reform Act 1969 (consolidated in the Matrimonial Causes Act 1973)	Irretrievable breakdown, evidenced by one of five Facts: <ul style="list-style-type: none"> • Adultery • Behaviour • Desertion of two years • Two years separation with consent • Five years separation
<i>[Family Law Act 1996 (never implemented and now repealed)]</i>	<i>[Irretrievable breakdown]</i>

1.2 The law in practice: the use of fault

The expectations in the late 1960s were that the separation Facts would become the most commonly used, with reliance upon the fault Facts diminishing in use over time. Indeed, in all other areas of family law, the role of fault has long since been reduced to almost nil.³³ Fault or ‘conduct’ now plays a minimal role in financial provision, relevant only in extreme

³¹ That restricted divorce, in theory at least, only to an ‘innocent’ petitioner following a matrimonial offence, or ‘fault’, that had been committed by a ‘guilty’ respondent.

³² Archbishop of Canterbury’s Group on the Divorce Law, *Putting Asunder: A Divorce Law for Contemporary Society* (SPCK 1966).

³³ Andrew Bainham, ‘Men and Women Behaving Badly: Is Fault Dead in English Family Law?’ (2001) 21 *Oxford Journal of Legal Studies* 219.

cases such as criminal acts against the spouse or financial misconduct such as dissipation.³⁴ In child matters, the child's welfare is the court's paramount consideration.³⁵

However, while it was expected that fault would gradually diminish in significance in divorce, in practice, petitions based on the fault Facts of adultery, behaviour or desertion have consistently accounted for the majority of divorces since 1975 (Table 1.2). In fact, the use of fault in England & Wales remains astonishingly high in comparison with the (declining) number of other jurisdictions that still retain fault. Just north of the border, only 6% of Scottish divorces are fault-based, while further afield the figure is only 5% in New York State, 1% in Italy and 0.2% in Norway.³⁶

Table 1.2 also reveals another curious fact: the gradual decline in the use of adultery from 30% to 12% of divorces between 1975 and 2015 and the corresponding increase in behaviour, from 26% to 46% of all divorces over the same period.

Table 1.2: Fact proven at divorce³⁷ in England & Wales, 1975 to 2015

Fact proven	1975	1985	1995	2005	2015
Adultery	30%	30%	26%	20%	12%
Behaviour	26%	40%	44%	46%	46%
Both Adultery and behaviour	1%	0%	0%	0%	1%
Desertion	5%	1%	1%	0%	1%
[All fault]	[62%]	[71%]	[71%]	[66%]	[60%]
Two years separation	26%	22%	23%	24%	26%
Five years separation	12%	6%	6%	9%	14%
Total divorces (number)	(119,792)	(159,095)	(154,576)	(141,017)	(100,685)

Source: Office for National Statistics.

What has been clear for many years, however, is that the continuing reliance upon fault, particularly behaviour, is not a reliable indicator of the quality of marital relationships in England & Wales. Previous research has suggested that it is, instead, a more prosaic consequence of the fact that divorces based on adultery and behaviour can be instigated at any time³⁸ and completed in a few months, rather than waiting for at least two or five years for a non-fault divorce.³⁹ As we explore in Section 5.3, the decline in adultery, and increase in behaviour divorces is unlikely to reflect shifting patterns of marital fidelity, but rather changing evidential requirements and the fact that behaviour, unlike adultery, does not

³⁴ Following the Court of Appeal decision in *Wachtel v Wachtel* [1973] Fam 72, CA.

³⁵ The decision in *J v C* [1970] AC 668 firmly established the paramountcy of the child's welfare even above those of 'unimpeachable' parents. The principle was put on statutory footing by Section 1 of the Children Act 1989.

³⁶ See Table 11.2 in Section 11.3 for details. There are procedural explanations for the low use of fault in Scotland, compared to England & Wales. See Sections 11.3 and 12.4 below for discussion of the reasons for the disparity between England & Wales and other comparable jurisdictions, including Scotland.

³⁷ Opposite sex divorces only. There were 22 same sex divorces in 2015, 17 of these were based on behaviour.

³⁸ Subject to at least one year having elapsed since the date of marriage.

³⁹ Indeed, a behaviour petition in England & Wales may be one of the fastest forms of achieving a unilateral divorce available internationally given what limited evidence is required to satisfy the court that the Fact is made out (see Sections 4 and 5 below). Elsewhere the minimum period for a notification or separation divorce without consent is six months in Denmark, New York State, Spain and Sweden (see Section 11.3 below).

require an admission from the respondent. There is nothing new in the tactical use of the divorce law. Indeed, the history of divorce in England & Wales is replete with examples of parties manipulating the grounds to achieve a divorce.⁴⁰ As Chester and Streater found in relation to the Matrimonial Causes Act 1937, “whatever the client's reason for wanting divorce, the lawyer's function is to discover grounds”.⁴¹

1.3 The law in practice: the quasi-administrative nature of ‘scrutiny’

The reason why lawyers and some parties are able to select Facts on a tactical or instrumental basis is founded on an awareness of the very limited nature of scrutiny by the court. Section 1(3) of the MCA 1973 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”. In practice, the investigatory activity of the court into the truth of any allegations has been limited for many decades, if it was ever effective.⁴² The ability of the court to inquire was eroded even further by the introduction in 1973 of a ‘special procedure’ whereby the court relies solely on paperwork submitted by the parties, with no oral evidence. The ‘special procedure’ was extended from all two years separation cases in which there were no children involved to all undefended divorces in 1977.⁴³ With even less information available to the court than previously and a high volume of cases, the Law Commission noted in 1990 that it was “practically impossible to test the Facts” in undefended cases and that the “present law pretends that the court is conducting an inquiry”, but it can do no such thing.⁴⁴

More recently, the current President of the Family Division noted, without further comment, that the duty to inquire under s.1(3) in an undefended behaviour case “comes down to this question: *assuming the facts alleged are true*, does what is pleaded amount to unreasonable behaviour within the meaning of section 1(2)(b)?”⁴⁵ The lack of inquiry raises issues of justice and fairness where respondents are unhappy with the allegations made. The respondent can defend the divorce and/or file their own petition. But in practice, neither is a realistic option for the great majority, given the financial and emotional costs, let alone the legal challenges.⁴⁶ Not surprisingly, the proportion of respondents who register even an

⁴⁰ The classic example being the staged ‘hotel adulteries’ of the 1930s where the respondent arranged to be seen in bed with a supposed female partner who had in fact been paid to play the role. See Lawrence Stone, *The Road to Divorce: England 1530-1987* (OUP 1990); Stephen Cretney, *Family Law in the Twentieth Century* (OUP 2003); Rebecca Probert, ‘The controversy of equality and the Matrimonial Causes Act 1923’ (1999) 11 *Child & Family Law Quarterly* 33.

⁴¹ Robert Chester and Jane Streater, ‘Cruelty in English Divorce: Some Empirical Findings’ (1972) 34 *Journal of Marriage and the Family*, 706, 712.

⁴² See Section 4 below.

⁴³ The term ‘special procedure’ is no longer used as the vast majority of divorces are now undefended. The latest version of the Family Proceedings Rules simply refers to the procedure for uncontested divorce: r.7.20(2). The procedure also applies to civil partnership dissolution.

⁴⁴ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.11.

⁴⁵ *Owens v Owens* [2017] EWCA Civ 182 [93] (emphasis supplied).

⁴⁶ See Section 8 below. The court fee to file an Answer is currently £245 (although help with court fees may be available, it is means-tested and many will not qualify). That does not include any legal costs which may be incurred to complete what are fairly complex forms, for which there is generally no legal aid available.

intention to defend is very small, about 2% in 2016. Even fewer, 0.7% of respondents, file an Answer as the first stage in attempting to defend the divorce.⁴⁷

1.4 Pressures for reform: the rise and fall of the Family Law Act 1996

The problems with the operation of the current divorce law have been recognised for decades, following a series of research studies and reports by the Law Commission and others.⁴⁸ In the late 80s, the Law Commission launched a major review of the operation of the law, including a specially commissioned public opinion poll and court file survey. Drawing on these and earlier studies and consultation responses, the Commission's final report identified a long list of problems with the law, paraphrased below:

1. *Truth and honesty.* There was a gap between what the law said and how the law worked in practice. This included the lack of any necessary relationship between the reason for a marriage breakdown and the Fact on which a divorce was granted, the instrumental use of fault Facts to secure a faster divorce, and that the court 'pretended' to inquire into allegations.⁴⁹
2. *Conflict and harm.* Fault was seen as needlessly generating or exacerbating conflict between the parties. This was at odds with the expectation that the parties adopt a constructive and collaborative approach to child arrangements and financial remedies.⁵⁰
3. *Fairness and justice.* It was unfair for respondents to be on the receiving end of allegations that were not properly tested and where they were extremely difficult to defend.⁵¹ Parties could be put at an unfair disadvantage in negotiations over children and money depending upon the facts available to the petitioner.⁵²
4. *Discrimination.* It was harder for lower-income families to use the non-fault separation grounds as they were less able to afford to maintain two households.⁵³
5. *Undermining marriage saving.* Neither the fault nor separation Facts facilitated a climate of reconciliation.⁵⁴

The Law Commission concluded that the courts "should not be pretending to adjudicate upon matters they cannot decide or in disputes which need never arise".⁵⁵ It recommended that divorce be available on the sole basis of the expiry of a minimum 12 month waiting

⁴⁷ Unpublished HMCTS data reported in *Owens v Owens* [2017] EWCA Civ 182 [98].

⁴⁸ Research studies include: Elizabeth Elston, Jane Fuller and Mervyn Murch, 'Judicial Hearings of undefended Divorce Petitions' (1975) *Modern Law Review* 609; John Eekelaar and Eric Clive, with Karen Clarke and Susan Raikes, *Custody after Divorce* (SSRC Centre of Socio-Legal Studies, 1977) and Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988). Official reports include the Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO, 1985); Law Commission, *The Financial Consequences of Divorce* (Law Com No 112, 1981), Law Commission, *Facing the Future* (Law Com No 170, 1988); and Law Commission, *The Ground for Divorce* (Law Com No 192, 1990).

⁴⁹ Law Commission 1990 (n 48) paras. 2.8-2.11.

⁵⁰ *ibid* paras 2.15-2.16.

⁵¹ *ibid* paras 2.12-2.14.

⁵² *ibid* para 2.15.

⁵³ *ibid* paras 2.12-2.14.

⁵⁴ *ibid* para 2.17.

⁵⁵ *ibid* para 2.21.

period, after one or both of the spouses had filed a statement that the marriage had broken down.⁵⁶

Parliament did accept that reform was necessary. However, the resulting Family Law Act 1996, Part II, lacked the clarity and simplicity of the Law Commission's recommendation. Irretrievable breakdown would have been retained as the sole ground for divorce, but it would no longer be established by reference to one of the five facts – instead a new, complicated procedure would have to be completed before a divorce could be granted. Those seeking a divorce would have been expected to attend an information meeting that would both explore the potential to save the marriage and explain the divorce process if they decided to proceed. Only then could they initiate the process that would entail a long “period of reflection and consideration”. Parties receiving legal aid funding were also to be expected to attend a mediation assessment. The multi-stage process would take at least 18 months for those with minor children.

In the event, the government announced in 2001 that Part II of the 1996 Act would not be implemented. This was attributed, by the then Lord Chancellor, to two factors. The first was the ineffectiveness of the information meetings that had been piloted and evaluated. The second were “the complex procedures” in Part II that would be likely to result in delay and uncertainty in resolving matters that would not be in the best interests of children or the parties.⁵⁷

The law remained, and does to this day, the mixed fault regime of the MCA 1973. The divorce-related provisions of the Family Law Act 1996 were finally repealed by s.18 of the Children and Families Act 2014. The workability and impact of the no-fault provisions were never tested – but importantly, the abandonment of the reforms was not based on a rejection of the fundamental move to a no-fault approach.

1.5 Developments since 1996

In the absence of any reform of the substantive law, the focus has been on administrative and procedural developments to minimise the impact of fault on the parties and, increasingly, to reduce the financial costs to the family justice system of administering a judicially-based divorce procedure. These developments have been led largely by the legal profession and judiciary.

In relation to harm-minimisation, developments include changes in the Family Procedure Rules, discouraging the naming of Co-Respondents in adultery cases. They also include the Law Society *Family Law Protocol*⁵⁸ and the Resolution *Code of Practice*, both of which emphasise the desirability of a constructive and non-confrontational approach to divorce, particularly in relation to behaviour petitions.

⁵⁶ *ibid* paras 3.48, 7.2, 7.12.

⁵⁷ Lord Chancellor's Department, *Divorce law reform – government proposes to repeal Part II of the Family Law Act 1996* (16 January 2001).

⁵⁸ First published in 2002, now in its 4th Edition (2014).

The drive for a more streamlined approach to divorce procedure originates in a government-appointed, but independent, panel to review family justice. The Family Justice Review recommended the creation of an online hub for processing divorces and for greater use of administrators, rather than judges, for processing uncontested divorces.⁵⁹

Both recommendations were adopted by government. Responsibility for handling divorces has now been transferred from over 150 local courts to 11 Regional Divorce Centres. Assistant Justices' Clerks (also known as Legal Advisers), rather than judges, now process the majority of undefended decree nisi applications, including determining whether a Fact has been made out.⁶⁰

A further significant development is an HMCTS project to enable petitioners to apply for a divorce, and eventually both petitioners and respondents to complete the divorce process online, akin to the online processes for applying for a passport or driving licence.⁶¹ The 'apply for a divorce online' service is one of the earliest components of a £1 billion government technology project aiming to establish an online court. One of the primary drivers is to reduce costs through digitising expensive paper-handling and storage processes. However, the project also aims to enhance access to justice, especially for litigants in person, through simplifying systems and processes originally designed largely by and for lawyers.⁶²

Taken together with the introduction of the procedures for undefended divorces in the 1970s, substantial changes have been made to practice and procedure in lieu of reform of the grounds for divorce. The combined effect is to streamline, as far as possible, the court's responsibility for processing undefended divorces. In 2012, the late Sir Nicholas Wall, a former President of the Family Division, speaking extra-judicially, characterised the current divorce law as one which is "in fact administrative, but which masquerades as judicial."⁶³ Since then, the introduction of the Regional Divorce Centres, transfer of responsibility for processing undefended cases to legal advisers and steps towards digitisation of the process have taken the system further towards an administrative, and even further from a judicial, process.

1.6 A renewed appetite for substantive law reform?

Twenty years after the abandonment of the Family Law Act 1996, there are signs of a renewed appetite for substantive law reform. Two specialist family law Supreme Court Justices, including the President of the Court, have called, extra-judicially, for the removal of

⁵⁹ Family Justice Review, *Final Report*, (2011) para 4.166.

⁶⁰ The power was bestowed by The Justices' Clerks and Assistants Rules 2014: SI 2014 No. 603 (L.8), made under the Crime and Courts Act 2013. A case may still be referred to a judge by the legal adviser. A judge, or deputy district judge, must still formally pronounce decree nisi although it will generally be a legal adviser who has determined entitlement to that decree.

⁶¹ For an insight into the customer-centred rationale and approach of the project see <https://insidehmcts.blog.gov.uk/2017/04/11/working-with-stakeholders-to-develop-an-online-divorce-service/>.

⁶² See for example, 'The Modernisation of Access to Justice in Times of Austerity' Sir Ernest Ryder, 3 March 2016 <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf>.

⁶³ Speech to the Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012.

fault.⁶⁴ Three Presidents of the Family Division, again speaking extra-judicially, have asked whether there could be a no-fault and administrative process.⁶⁵ In *Owens*, Sir James Munby noted that many hold the view that the law “is badly out-of-date, indeed antediluvian”.⁶⁶ Resolution, who represent around 6,500 family justice professionals, the vast majority of whom are family lawyers, has been particularly active in campaigning for no-fault divorce and the issue is a key part of its *Manifesto for Family Law*, launched in 2015.⁶⁷

In Parliament, there are also signs of increased political interest in the issue. In October 2015, a Conservative backbench MP introduced a Ten-Minute Rule Bill on No Fault Divorce.⁶⁸ The Bacon Bill would have retained the existing five Facts, but added a sixth Fact, enabling the presentation of a joint petition, with divorce being finalised after expiration of 12 months. In March 2017, the government announced that a review of divorce law would be included as part of a review of family justice.⁶⁹ The 2017 Labour Party general election Manifesto contained a commitment to introduce a no-fault divorce procedure.⁷⁰ Meanwhile, in the broader public domain, the *Owens* case has attracted considerable public and media interest, with the strong weight of opinion being that the law is outdated. The *Times* leader went further, concluding that the law ‘was an ass’.⁷¹

1.7 Conclusion

The current divorce law in England & Wales is now nearly fifty years old. It has not kept pace with the significant changes in family life or family law that have occurred since the late 1960s. Throughout most of that period the law has been subject to criticism, particularly in relation to what has been seen as the ritualised and sometimes dishonest nature of the process, the potentially damaging impact of allegations and the unfairness to the respondent where allegations are taken at face value. Parliament was sufficiently persuaded by the evidence to act. The abandonment of the Family Law Act 1996 has meant, however, that the law has remained unreformed, although there have been significant procedural developments. There is now mounting pressure for reform, encapsulated in the public and media response to the *Owens* case.

⁶⁴ Lady Hale, quoted in Frances Gibb ‘Divorce with no fault gets backing of top judge’, (The Times, 7 October 2017) 15; Lord Wilson, quoted in ‘No-fault divorce is long overdue, says top judge’ (The Times, February 27 2017).

⁶⁵ Dame Elizabeth Butler-Sloss, quoted in Frances Gibb, ‘Senior judge backs adoptions by gays’ (The Times, 16 October 1999); Sir Nicholas Wall, Speech to the Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012; Sir James Munby, Speech on family justice reforms, Royal Courts of Justice, 29 April 2014.

⁶⁶ *Owens v Owens* [2017] EWCA Civ 182 [38].

⁶⁷ Resolution, *Manifesto for Family Law* (2015)

http://www.resolution.org.uk/site_content_files/files/resolution_manifesto_for_family_law.pdf.

⁶⁸ The parliamentary webpage for the bill can be found at: <http://services.parliament.uk/bills/2015-16/nofaultdivorce.html>

⁶⁹ Baroness Buscombe, HL Deb 29 March 2017 cc597-9.

⁷⁰ The Labour Party, *For the Many Not the Few: The Labour Party Manifesto 2017* (Labour Party 2017) 81.

⁷¹ Editorial, ‘Better Apart: In *Owens v Owens*, the courts are unwittingly making a mockery of justice’ The Times (London, 25 March 2017) 29

PART B. DIVORCE LAW IN THEORY AND IN PRACTICE

2. Literalism and pragmatism

“English divorce law is in a state of confusion. The theory of the law remains that divorce is a matter in which the State has a vital interest, and that it is only to be allowed if the marriage can be demonstrated to have irretrievably broken down. But the practical reality is very different: divorce is readily and quickly available if both parties agree, and even if one of them is reluctant he or she will, faced with a divorce petition, almost always accept the inevitable: there is no point in denying that the marriage has broken down if one party firmly asserts that it has.”⁷²

2.1 Introduction

The story of divorce law in England & Wales has, for many decades, been an uneasy compromise, or fudge, between two different norms or approaches to divorce: one emphasising the centrality of fault; the other seeking to minimise its role and impact. At the same time, the picture is confused further by a gap between what the law actually is – or at least what people think it is – and how the law actually works in practice. We start our presentation of the findings from the study by outlining these two sets of tensions as they have such significance for all stages of the divorce process considered in later sections of this report – from petitioning to scrutiny.

2.2 Competing approaches: literalism and pragmatism

We start with two different norms or approaches in relation to divorce and divorce law: literalism and pragmatism. By literalism we mean the idea that divorce should be based on the accurate allocation of responsibility for the relationship breakdown, at least where a fault-based reason is used (see Table 2.1 below). On this view, there is, or should be, a direct causal relationship between the reason for the marriage breakdown and who petitions and on what basis. Underpinning the literalist approach to fault-based divorce is a strong moral dimension, with roots in Christian theology,⁷³ where a wrongdoer should be punished. Divorce is also characterised as morally wrong and undesirable. It should therefore only be available to the ‘innocent’ party where there is evidence either of blame or a long separation.

Pragmatism, in contrast, does not view divorce as necessarily a problem, but as a practical solution to the factual reality of marriage breakdown. On a pragmatic view, seeking to identify and allocate responsibility for marriage breakdown is neither fair, realistic or helpful to the parties and so there should be no necessary, or desired, connection between the ‘real’ reasons for the marriage breakdown and the Fact used for the divorce. However, given the

⁷² Stephen Cretney, *Family Law in the Twentieth Century* (OUP 2003) 391.

⁷³ Is it important to note, however, that the Church of England moved away the concept of the ‘matrimonial offence’ in the 1960s and embraced instead the concept of irretrievable breakdown without reference to fault: Archbishop of Canterbury’s Group on the Divorce Law, *Putting Asunder: A Divorce Law for Contemporary Society* (SPCK 1966).

present reality of a mixed fault/no-fault law, the pragmatic approach will make instrumental use of fault to achieve a faster divorce.

As an approach, pragmatism also has a strong moral dimension, but different from that of the literalist focus on innocence and guilt, blame and punishment. It is instead an alternative morality based on trying to achieve a ‘good’ divorce that preserves relationships post-separation and particularly seeks to minimise the impact of conflict on children. The pragmatic approach to divorce, therefore, is consistent with wider family justice themes of conflict-reduction and minimising harm, especially for children.

Table 2.1: Literalism and pragmatism compared

	Literalism	Pragmatism
Overall	Divorce should be based on accurate allocation of blame for relationship breakdown – causal link to fault Fact	Divorce should be readily accessible when a marriage has broken down. Fault is only relevant (currently) as an instrumental means to achieve a faster divorce
Allocation of responsibility or blame	Vital	Not important and inherently non-justiciable/unknowable
Reference point	Past behaviour – the ‘bad’ respondent	Future relationships – the ‘good’ divorce
Harm/conflict reduction	Lesser importance	Vital
Philosophical roots	Traditional Christian view of marriage as a sacrament	Welfare, fairness
Role of the state	State has legitimate and vital interest in marriage and divorce, achieved via judicial scrutiny	Party autonomy, right to private and family life, proportionality mean decisions should be left to the parties.
Law reform	Retain fault and enforce standards in practice	Clearer, simpler, faster no-fault administrative procedure

2.3 Literalism and pragmatism in law and practice

Have sketched briefly the two norms or approaches, the question arises as to how both translate into law and practice.

The substantive law (at least as it appears on the face of the primary legislation) may be thought at first sight to take a broadly literalist approach – the three fault Facts are (generally) about attributing blame, while the two separation periods simply acknowledge factual separation. Section 1(3) then places a duty on the court to inquire, as far as it reasonably can, into the accuracy of the petitioner’s account.

But the law – both in the books and in practice – also contains elements at odds with literalism (Table 2.2). Section 1(2) of the MCA 1973 states that the court will only hold the marriage to have broken down if the petitioner can satisfy the court in relation to one of the five Facts, and section 1(4) then provides that once the court is satisfied that a Fact has been established, it must grant the divorce, unless the court is satisfied that the marriage has *not* broken down irretrievably. What it does not say explicitly is that one of those Facts, say adultery or behaviour, must be established as the cause or a cause of the irretrievable breakdown. That point was made explicit in subsequent case law.⁷⁴ It might be said that the law therefore treats the proven Fact as proxy evidence for irretrievable breakdown, rather than the actual cause of the breakdown.⁷⁵ This subtlety can, as we see below, be lost on lay parties.

Table 2.2: Literalism and pragmatism in law and practice

	Literalism	Pragmatism
Statute and case law (law in the books)	Requirement to produce evidence of fault (other than for separation divorces) The court has a duty to inquire into allegations	The fact (and particulars) do not have to reflect the reason for the marriage breakdown
Orientation of the family justice system – lawyers and courts (law in action)		Overwhelmingly pragmatist for practical and philosophical reasons The court can only take allegations at face value
Lay parties (law in action)	May seek a literalist approach for their own divorce May <i>believe</i> that the law is literalist – i.e. requires accurate allocation of blame	May seek a pragmatic approach for their own divorce

The more pragmatic approach is clearly evident in the family justice system’s practical operation in processing divorce petitions. Whether lawyers advising clients or courts scrutinising petitions, the focus is on trying to streamline the process to reduce costs for the parties and the state, whilst also trying to reduce the possible emotional impact of the process on the parties and their children. In this pragmatic approach, the role of fault is minimised as far as possible. In practical terms, this means lawyers advising clients to use

⁷⁴ See *Stevens v Stevens* [1979] 1 WLR 885. In many cases, of course, the fact relied on may be the or a cause.

⁷⁵ The Law Commission took the position that breakdown was not a justiciable issue but that it would be possible for the court to infer breakdown from the presence of one of a number of Facts (which was justiciable). That position, the Law Commission acknowledged, was a “compromise”. Law Commission, *Facing the Future* (Law Com No 170, 1988) para 2.4.

the behaviour Fact for speed, whilst seeking to make that process as low-conflict as possible. In relation to scrutiny, it means the acceptance of a quasi-administrative approach to inquiry, mandated both by the constraints of the paper-based procedure prescribed by the Family Procedure Rules for uncontested cases and by a broader philosophical shift away from fault in family law and towards proportionality and harm-minimisation.

For the lay parties, the situation is more complex and potentially confusing. As we will see below, both literalist and pragmatist approaches informed the actions and decisions of petitioners and respondents interviewed for this study, with some seeking to ensure that the petition reflected their view of why the relationship had broken down; others using fault instrumentally or avoiding fault altogether.⁷⁶

We will show also the level of public misunderstanding about the law, stemming from the mix of literal and pragmatic elements in the current law and the gap – or perceived gap – between the law in the books (or statute book) and the law in action. As the Law Commission noted in 1990,⁷⁷ the distinction between the Fact alleged to prove breakdown and the actual reasons for the breakdown is hard to grasp, and is a source of confusion for the public in practice.

Given the complexity of the law, and the inclusion of the three fault Facts, it is not surprising that lay people can and do assume that there should be a causal relationship established between the reason for the breakdown and the Fact relied upon. This misunderstanding has consequences. As we will see below, some petitioners with a literalist orientation will seek to establish their version of events, at considerable emotional and financial cost, on the basis that that is their understanding of what the law means. Similarly, some respondents will be angered by particulars that do not reflect their view of why the relationship broke down. In both cases, the misunderstanding of the law and what the law requires, has the potential to increase conflict.

The other area of lay misunderstanding relates to the scrutiny process. In practice, the inevitable logistical constraints of processing many tens of thousands of petitions each year and philosophical shifts away from fault mean that the scrutiny process is not able to test the truth of allegations (see Section 4). The public are largely unaware of this, and not unfairly assume that real judicial inquiry into the ending of the marriage will be undertaken. Again, this public misperception, based on the gap between the law in the books and the law in action, does have consequences, including increased anxiety amongst those who worry (probably needlessly) that their reasons will not pass what they imagine to be the judicial scrutiny.

2.4 Conclusion

As we explore in the sections below, the presence of two competing norms and a gap, or perceived gap, between law and practice, has not produced a particularly happy compromise for the parties or the family justice system. Rather, the gap between the law in the books and the law in action and the co-existence of literalism and pragmatism continues

⁷⁶ See especially Sections 3 and 10.3-4 below.

⁷⁷ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.9.

to throw up challenges. These include the ongoing problem of the intellectual honesty of the process, both in terms of what petitions actually represent and the constraints on how the court is able to exercise its inquisitorial duty.⁷⁸ It also raises issues about equal access to information about what the law actually is and how it works in practice, and the risk of greater conflict given uncertainty about how the law is interpreted.⁷⁹ As we will see, the competing considerations may fail to satisfy adherents of either side. Those with a literalist orientation may struggle to achieve what they want within the constraints of the current law and a pragmatic family justice system. Pragmatists may struggle to achieve a 'good' divorce within the parameters of the current law.

⁷⁸ See Section 3 for the often formulaic way in which petitions are produced and Sections 4 and 5 for the court's approach to scrutiny.

⁷⁹ See Section 6.

3. Finding a Fact to fit: how ‘true’ are petitions?

[T]he system still allows, even encourages, the parties to lie, or at least to exaggerate, in order to get what they want. The bogus adultery cases of the past may have all but disappeared, but their modern equivalents are the ‘flimsy’ behaviour petition or the pretence that the parties have been living apart for a full two years. In that “wider field which includes considerations of truth, the sacredness of oaths, and the integrity of professional practice”, the present law is just as objectionable as the old.⁸⁰

3.1 Introduction

The logic of a fault-based divorce law is that whichever spouse petitions, and on what Fact, should be directly related to the reason why the marriage broke down. So, the theory goes, if a marriage fails due to the wife’s affair then the husband, but not the wife, should be entitled to petition on her adultery. If the wife flees the home due to the husband’s domestic violence, then the divorce should proceed on the wife’s petition based on the husband’s behaviour, not vice versa. If there is no fault on either side, but the parties have separated simply due to having drifted apart, then either could petition under one of the two separation grounds (provided they do in fact separate), but, again at least in theory, the fault Facts should not be used.

In practice (and as a matter of authority⁸¹), there is no *necessary* relationship between why the marriage broke down and the Fact upon which the divorce is obtained. There is a long tradition of one, or both, of the parties deciding that they want to divorce and then finding a way through the various legal options to achieve that goal. That is not to say that petitions are never accurate accounts of the reasons for the marriage breakdown, rather that petitions may generally be best viewed as narratives produced to secure the divorce.

In this section, we explore what considerations shape the selection of Fact and the drafting of particulars, drawing primarily on our national opinion survey and our qualitative interviews with the parties and lawyer focus groups. What emerges strongly is a pragmatic approach to the petition where the parties are steered towards the behaviour Fact and then the particulars generated to support that Fact. That process of particulars-generation can itself be a routine and ritualised process, based on proven formulas that are known to work. This pragmatic approach is highly effective in terms of securing the decree. However, the limited focus on the ‘real’ reason for the breakdown, and whether that truth is reflected in the petition, can be at odds with what the parties assume that the law expects. For some with a literalist orientation, this can be a source of disappointment. Either way, the generation of particulars in this fashion raises questions about what purpose fault continues to serve.

⁸⁰ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.11.

⁸¹ *Stevens v Stevens* [1979] 1 WLR 885: there need be no causal link between the fact relied on and the breakdown of the marriage.

3.2 The long history of gaming the system

It is not new for divorcing parties to seek out ways around the existing divorce law. There is a long history of legislators trying to catch up with the public's gaming of the law. In 1854, when adultery was, in effect, the sole ground for divorce and petitioners required a private Act of Parliament to secure a divorce, Lord St Leonard bemoaned the fact that parties "came before the House with the determination to conceal everything that could be concealed".⁸² That concealment continued on a larger and more ritualised scale with the staged 'hotel adulteries' of the 1930s where the respondent arranged to be seen in bed with a supposed female partner, but one who had in fact been paid to play the role.⁸³ The Matrimonial Causes Act 1937 sought to curb those abuses by extending the grounds available, to include 'cruelty'. The cruelty ground quickly became popular with petitioners, with empirical research by Chester and Streather concluding that "whatever the client's reason for wanting divorce, the lawyer's function is to discover grounds".⁸⁴

The DRA 1969, consolidated into the MCA 1973, was at least partly designed to eliminate fakery and abuse by introducing two new separation grounds – with consent to divorce or otherwise. However, researchers found once again similar problems of non-correspondence between breakdown and fault with parties often choosing the easiest reason, rather than the 'real' reason, for the breakdown.⁸⁵ In 1990, the Law Commission concluded in fairly strong terms, that the law was confusing and misleading and that law and practice allowed and even encouraged parties to lie or exaggerate.⁸⁶

3.3 The continuing gap between breakdown and the petition

What factors influence the production of petitions today? In our research, it is clear that pragmatic considerations are highly relevant, as they appear to have been for decades. As part of the national opinion poll for the Finding Fault study, we asked those who had been involved in a fault-based divorce how closely the Fact relied on by the petitioner matched the real reason for the divorce. As Table 3.1 shows, perceptions of the 'accuracy' or 'truthfulness' of the petition in this sense is highly dependent upon who is asked, highlighting the problem of the non-justiciable nature of relationship breakdown. Only 29% of respondents to a fault-based divorce reported that the Fact had very closely matched the reason and 29% said that it did not match the reason closely at all. Even amongst petitioners, only 65% claimed that the (fault) Fact chosen very closely matched the reason for the relationship breakdown.

Of course, the law does not require that the Fact relied on be the reason for the breakdown of the marriage – the Fact is there to provide evidence of breakdown. However, as we will

⁸² Second reading of the Divorce and Matrimonial Causes Bill, HL Deb 13 June 1854 vol 134 cc1-281,

⁸³ See Lawrence Stone, *The Road to Divorce: England 1530-1987* (OUP 1990); Stephen Cretney, *Family Law in the Twentieth Century* (OUP 2003); Rebecca Probert, 'The controversy of equality and the Matrimonial Causes Act 1923' (1999) 11 *Child & Family Law Quarterly* 33.

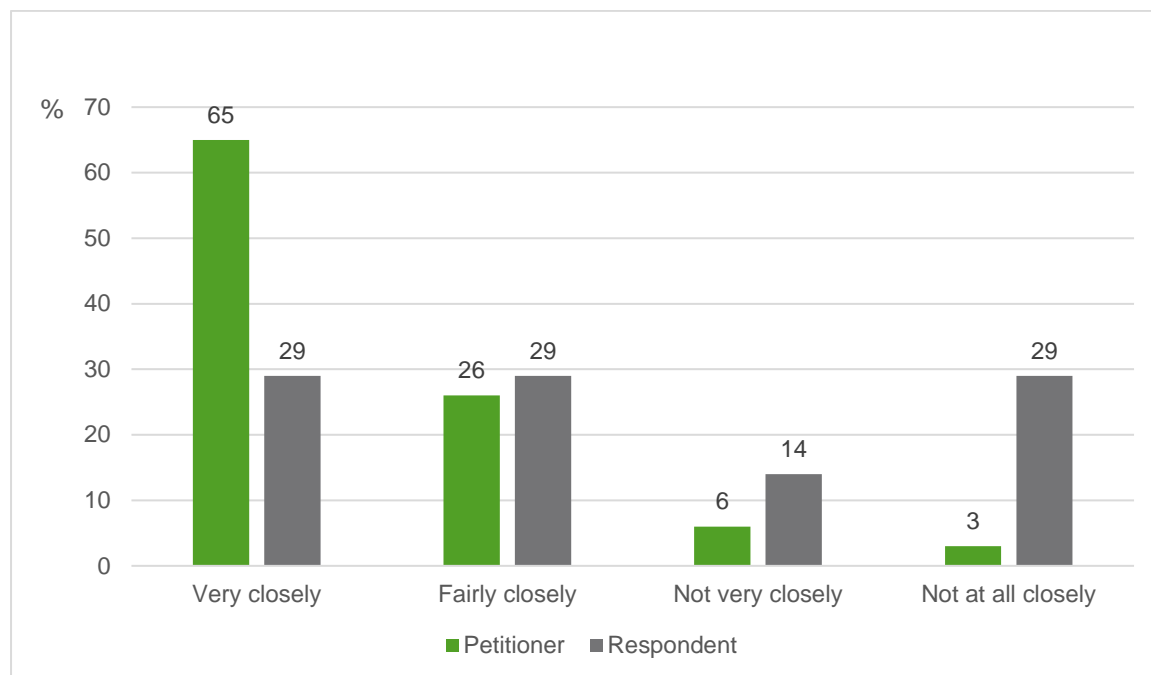
⁸⁴ Robert Chester and Jane Streather, 'Cruelty in English Divorce: Some Empirical Findings' (1972) 34 *Journal of Marriage and the Family*, 706, 712.

⁸⁵ Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 83-4.

⁸⁶ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) paras 2.7-2.21.

see, the parties do generally assume that the Fact *should* at least broadly reflect why the marriage broke down. The lack of correspondence between Fact and breakdown (or ‘The Truth’), can be a source of anger and frustration, for both petitioners and respondents.⁸⁷

Table 3.1 Among fault-based divorcees divorced in past 10 years: how closely Fact given related to real reason for their divorce



Base: Fault divorcees currently divorcing or divorced in past 10 years
 Sample sizes: Fault petitioner 240; Fault respondent 137

The lack of correspondence between breakdown and Fact, especially from the respondent’s perspective was replicated in another recent survey. A poll conducted for Resolution in June 2015 found that 27% of divorcees admitted using fault (adultery or behaviour) on an instrumental basis, because it was the easiest option to secure a divorce, even if it was not the real reason.⁸⁸

3.4 Demographic and socio-legal influences on Fact selection

If there is no clear or necessary link between the reason for the breakdown and the petition, then what does shape the Fact that is chosen? We saw in Section 1.2 above that Fact use has shifted over time, with use of behaviour nearly doubling between 1975 and 2015, whilst adultery more than halved over the same period. Assuming that there have been no significant increases in either marital fidelity or in bad behaviour, then clearly other factors are in operation.

⁸⁷ See below Section 3.7 and Section 8.

⁸⁸ The study was carried out by YouGov in June 2015 http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=301&_ga=2.55356078.420746903.1503942480-1561572160.1492514604

In previous research, it was found that a range of demographic factors were associated with Fact selection. Middle class couples were more likely to use separation than fault Facts and less likely to use behaviour than working class couples.⁸⁹ Women petitioners were more likely to use fault, especially behaviour, than men.⁹⁰ Couples with children were more likely to use fault than separation Facts, it was presumed in order to be able to finalise arrangements for children without a long delay.⁹¹

Our study, based on analysis of 300 court files, found some evidence that the importance of demographic and socio-legal factors has shifted over time. The analysis, which took into account a range of demographic and socio-legal factors,⁹² found that the strongest predictor of the use of fault Facts was the use of legal representation. In terms of demographics, the duration of the marriage was most important in predicting the use of fault Facts, with those with shorter marriages more likely to use fault. As in previous studies, those in higher grade occupations were more likely to use separation than fault Facts.

It is possible that there is some selection effect here, with those petitioners with more conflictual separations more likely to think that they will need the support of solicitors. However, we suspect that that is not the main reason. Instead, the qualitative data from lawyers and the parties going through the process points towards the parties being steered by solicitors towards the behaviour Fact to secure a faster divorce, whilst the unrepresented may either be unaware of the availability of behaviour or be unwilling to use it.

3.5 Pragmatic approaches to Fact selection

Our focus groups with family lawyers provided a clear and consistent insight into the pragmatic or instrumental approach to divorce that shapes their advice to clients. In effect, the first rule of divorce is about actually securing the divorce decree. To do so, lawyers will try to find the “best way forward”.⁹³ In this pragmatic approach ‘best’ does not hinge on the ‘real’ reason for the breakdown, but rests on what will be the most reliable and straightforward and, ideally, the fastest route to the decree. While the presenting problem and (apparent) reason for breakdown might be adultery, that does not necessarily mean it is the best way forward:

⁸⁹ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 5.

⁹⁰ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 3. This remains the case. In 2015, according to ONS data, 52% of wives petitioned on behaviour, compared to 37% of husbands. The husbands were more likely to use two years separation compared to wives (31% cf 23%). Adultery was relied upon equally by both genders at 12%.

⁹¹ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, paras 6-7; Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 82.

⁹² We carried out stepwise logistic regressions predicting the use of fault Facts versus separation. Variables included petitioner representation, marriage duration, presence of dependent children, petitioner gender, petitioner occupation grading, respondent occupation grading and regional divorce centre. Further details of the analysis can be found in the technical report (nuffieldfoundation.org/finding-fault). We should note a number of caveats. Our sample of 300 cases excluded those where there was an intention to defend although those cases would represent 5% or less of the 1980s and 2014/5 samples. The Finding Fault study may also under-estimate the number of couples with children as this is no longer a mandatory element on the petition.

⁹³ Lawyer focus group B.

I say to clients often 'the divorce is a means to an end'. And it's just working out what's the easiest hoop to jump through Say there's been adultery you can say to them, 'I think your options are adultery, or maybe unreasonable behaviour'. And really in your head you're working out then which is probably going to be the easiest thing. You know, is he likely to admit adultery? If so, you know, I'll write to him. ... (Lawyer focus group E)

Lawyers were quite clear that they would not encourage or sanction deliberate falsehoods. They were clear, however, that the process of drawing up the petition was about getting the job done. They were not troubled by philosophical questions about identifying the 'true' reason for the breakdown; indeed, given the law, they need not be.⁹⁴ Instead, as Chester and Leather found in the 1970s,⁹⁵ they saw their job as finding a Fact to fit, whatever the reasons for the divorce. Some lawyers were more explicit or blasé about the gaming of the system to achieve the end goal than others, but the instrumental use of the process was universal amongst focus group participants:

You start off [with clients] with all the ways how you can sort this out and how it's not going to be as bad as they thought and, we can do this that and the other. And then basically it's a farce, because you're just saying, 'All we have to do is get a form of words', you know, 'as long as you're not telling any lies, we'll get it through' ... and it really doesn't matter you sit round the table and you cobble up some words which will, are completely true but, will do the business.... You know, it's the truth, but you know, not the context. (Lawyer focus group C)

The pragmatic approach to Fact selection is necessarily dependent upon the cooperation of petitioners, some of whom were clearly bemused by the process, having assumed that the petition would be based on why the marriage had broken down. One of our qualitative interviewees who was petitioning on behaviour highlighted how behaviour was in effect retro-fitted onto the circumstances of her separation, requiring her to "manipulate [my] situation to fit into their terms... I've not been dishonest about anything I've said but I have had to put my situation into a way that fits in their category."⁹⁶ Similarly interviewee SP11, who had originally wanted to petition on adultery but had switched to behaviour to avoid causing conflict, described the petition as "ridiculous". The example she provided was about untidiness which the solicitor advised would be used to build a bigger picture of not being appreciated and would be sufficient for the court but not anger her husband.

3.6 Finding a Fact to fit – specific Fact selection factors

The need for speed

What does shape Fact selection? Why has there been such an increase in behaviour petitions since the 1970s and why is there an association between representation and

⁹⁴ *Stevens v Stevens* [1979] 1 WLR 885.

⁹⁵ Robert Chester and Jane Streater, 'Cruelty in English Divorce: Some Empirical Findings' (1972) 34 *Journal of Marriage and the Family*, 706, 712.

⁹⁶ Interviewee WK02.

behaviour? In simple terms, the great advantage of a behaviour petition is that there is no lengthy waiting period required before filing for divorce. In a pragmatic world, the attraction of behaviour is clear: a petition can be issued at any time with the only wait involved being the time taken for the court to process the application. This can be as little as three to four months from petition to decree absolute.

The disadvantage of a behaviour petition is the greater chance of conflict stemming from having to produce allegations against the respondent. As well as securing the divorce, a second priority for lawyers is to progress the divorce in a way that facilitates, or at least does not undermine, progress on the other critical issues of children and money. The Resolution Guide to Good Practice on Drafting Documents, for example, states that lawyers “should consider” one of the separation Facts as a means to avoid or reduce conflict.⁹⁷ However, whilst lawyers in our focus groups were mindful of the need to reduce conflict, their overwhelming priority was finding the easiest route forward for their client – in terms of certainty and speed. In practice, the separation Facts were generally seen as viable options only for those who were close to, or had already met, the two-year time period and where there was firm evidence that both parties were in agreement and that consent to the divorce could be relied upon. The five-year time period was barely mentioned as an option.

The consensus amongst lawyers in the focus groups was that, if clients had accepted that their marriage had irretrievably broken down, it was generally better to start the process now. There were a range of reasons why lawyers would steer the parties away from a two years’ separation petition or why the parties themselves would not want to wait for two years before starting the divorce process. It could be based on not wanting to be legally tied to someone for an extended period. It could be wanting to move on emotionally or to remarry or the need to sort out the finances as soon as possible. Many couples cannot afford to fund two households while they wait for at least two years to take any capital out of the former matrimonial home if the parties cannot reach agreement themselves: the money is needed at the point of separation. It is possible to draw up a separation agreement but that would involve significant additional legal costs and could potentially be overturned if circumstances changed significantly. The decision to go on fault grounds, typically behaviour, was therefore one that clients could reach themselves or with a fairly clear steer from their lawyer:

You run through the five reasons and they say, ‘OK, actually we’ll go for the two years separation because we’re friendly’. And when you then go on to explain they can’t have the financial order until then, they then say, ‘Oh, well in that case can you tell me again about the fault-based ones’. (Lawyer focus group A)

I would say to them, you know, ‘You could consider an unreasonable behaviour petition as kind of a means to an end here so that you can sort out the finances and do everything at the same time’. I think most people are persuaded by that. As long as they know they can liaise with the other side and agree the content. (Lawyer focus group B)

⁹⁷ Resolution Code on Good Practice in Drafting Documents (2017) p6
http://www.resolution.org.uk/site_content_files/files/25_drafting_documents.pdf. See Section 7.3 for the harm-minimisation strategies adopted by the lawyers and their clients in behaviour cases.

The need for certainty

The other advantage of behaviour is that, except in the very rare event of a defence, it is not dependent upon the respondent's cooperation. In contrast, adultery requires the respondent to admit the adultery and the two years' separation Fact requires the respondent to provide their consent to the divorce. Failure to admit or to consent can be a real problem. It will mean refusal of the decree, or additional costs and significant delay if a petition has to be amended to a different Fact. Having to rely upon the respondent's cooperation may also strengthen the respondent's position in relation to negotiations over children or money.⁹⁸

Lawyers generally perceived the adultery Fact as potentially less conflictual than behaviour, particularly where the adultery could be based on a relationship started *after* the separation rather than being the more contentious cause of the separation. However, an adultery petition requires an admission. If the respondent's willingness to make an admission was in any doubt, then an alternative route to secure the divorce would be to base a behaviour petition on an 'improper association' with a third party, which does not require an admission.

The universal availability of behaviour and ritual production of particulars

Of course, the steering of clients towards the behaviour Fact is dependent upon clients being able to make out the Fact to secure the divorce. Regardless of the reason for the separation, the family lawyers in the study were confident that the behaviour Fact would always be available and could be relied upon to provide a (faster) exit.⁹⁹ That perception was based on an awareness that the threshold for behaviour is very low and that there is no requirement to provide any corroborative evidence.¹⁰⁰

Not all clients were aware of the reality of how the behaviour Fact operates.¹⁰¹ Some had assumed, before their lawyer had explained the threshold to them, that 'unreasonable behaviour', meant domestic violence or drug and alcohol abuse. The following account of how the explanation is done illustrates how family lawyers typically talk clients through their options and in the direction of behaviour, normalising what to clients might be an offensive or troubling suggestion about 'unreasonable behaviour' by referring to the lawyer's own personal experience of an annoying spouse.¹⁰²

⁹⁸ The impact of fault on bargaining positions was raised in the 1990 Law Commission report. There were examples of bargaining in our main court file study too. In one 'cash for consent' case the respondent failed to return the Acknowledgement of Service and so there was no evidence of consent for a two years' separation petition. The unrepresented petitioner applied for decree nisi notwithstanding this. The petitioner did include, to try to establish evidence of service, a communication from the respondent which clearly stated the respondent was not in a position to sign the acknowledgement as they were still owed a significant amount of money by the petitioner, but would be willing to cooperate if that money was paid. The application for decree nisi was refused on the grounds of lack of consent and the proceedings had stalled.

⁹⁹ *Owens* is unusual, both as a defended case and one where the court refused to allow the decree.

¹⁰⁰ See Section 5.2 for analysis of the behaviour threshold, both in the early 1980s and today.

¹⁰¹ Nor were all unrepresented parties aware that behaviour would generally be a possible option (see Section 6.5).

¹⁰² The other stock phrase designed to reassure clients that was reported by the focus groups was the suggestion that any family lawyer could draft an adequate behaviour petition for 'even the most happily married couple'.

*You have your little parrot-like speech about irretrievable breakdown and you list the grounds. I normally say, if you wanted a divorce now rather than waiting for two years that leaves adultery and unreasonable behaviour. So, I'd explain that to them, and then talk about unreasonable behaviour being sort of the catch-all ground. So, I then talk about how it's the subjective analysis not the objective analysis, and it's what they've found unreasonable. And I talk about how annoying my [spouse] is. You sort of give them almost examples of what it could be. So, I talk about it could be one big event, it could be lots of little things that over the years or weeks have got harder and harder. And normally then they start chipping in.
(Lawyer focus group A)*

What is also evident in this instance is that the process of Fact selection and particulars-generation can be a deductive one, starting with the behaviour Fact and then finding examples of behaviour to retrofit to the Fact.

An alternative reported method of producing particulars reported was to rely on what was in effect an à la carte approach, based on presenting a 'behaviour menu' to clients and asking them to identify which might be relevant in the client's circumstances:

L1: I would say 'Well, ... pick five or three or four from this list of twenty [on the firm's system] that suits you. It doesn't say anything particularly. Just pick them and stick them in there, no names. It's enough to get past the judge's nose. I think that's been going on ... rightly or wrongly ...

L2: I don't actually have a list of 20 on a piece of paper, but I have them in my mind.

L3: We see the same ones going around the houses as it were.

L2: And I might give an example of some say like there's been ... you know he or shows you no love and affection or ...

L1: That's one of mine [general laughter]

L3: That's one of mine as well. (Lawyer focus group F)

A very common approach in drafting particulars, reported in the focus groups, and evident from our study of the court files, was to use a standard formula of a behaviour coupled with a subjective impact on the petitioner. The explicit and deliberate use of the behaviour + impact formula is evident in this further exchange from focus group F about how to draft mild particulars that would be sufficient to "get past the judge's nose":¹⁰³

L1: And if you had two or three examples that say, 'leaving the client emotionally abandoned' or something isolated, you're going to be fine. And then something within the last six months. Anything.

L2: You need something that's continual.

L1: Yeah. 'And that behaviour is continuing'. That's a good one.

L3: Yes, 'and increasingly over the last few months'.

L2: Yeah, perfect.

¹⁰³ Although, as will be seen in Section 4.2, most petitions are scrutinised by legal advisers, not judges.

L1: But if you talk about ... cos it's a two-tier thing, isn't it? So, if you emphasise it so it's subjective about 'this is how it made me feel' ... well you can't defend that because you can't really defend against how somebody felt ... so that is the way that you do get it through.

Facilitator: What do you think would be too weak to get through?

L1: Socks in bed. 'My wife wore socks in bed – that upset me'.

L2: I don't think it's in the behaviour. I think it's in the way you phrase it. I think you could take almost any behaviour and phrase it appropriately in the particulars. So maybe one instance of wearing socks in bed, no. But like:

'Throughout the marriage the petitioner has dressed in a way which I found inappropriate, leading me to feel like he doesn't care about my wishes'

[general laughter]. Something like that. (Lawyer focus group F)

What these and the other exchanges underline is the extent to which the selection of Facts and the production of particulars is a pragmatic and instrumental activity designed to get the job done. It is about how best to game the system – or to work out what is required to achieve the goals in the easiest and most effective way while causing least damage to the relationship between the client and their spouse. The use of boilerplate examples and drafting formulas does not necessarily mean that particulars are not true, but they are not intended as a careful and personalised account of the unique circumstances leading to the breakdown and the respondent's culpability in the separation. It is instead a highly routinized, but skilful, approach geared towards generating evidence of a relevant Fact, typically the behaviour Fact, that is a requisite part of achieving the decree.

Inducting litigants in person into the reality of 'behaviour'

So far, we have concentrated on represented petitioners. The pragmatic approach was also relevant to unrepresented petitioners and respondents in the journey study, so long as they were aware of it.

A version of the à la carte approach, based on recycling, or 'plagiarising' example particulars found on the internet, was also reported by self-representing petitioners. Interviewee SP12,¹⁰⁴ for example, was drafting the petition herself to save money. She had researched on the internet and had concluded that she would need to generate about six examples of behaviour for the petition. She did so by looking online for examples of behaviour from the websites of law firms and copied the phrasing into her own petition, adding in some of her own examples.

In some instances, unrepresented petitioners were fortunate enough to stumble across websites or helplines that would give them the same access to information about the reality of behaviour that represented clients had, in other words, that behaviour does not mean 'behaviour' in a strict sense.¹⁰⁵ Interviewee WK17, for example, did not want to wait two years for a divorce and had been surprised when a helpline adviser had explained that she

¹⁰⁴ The prefix 'SP' denotes an interviewee recruited from the online service Splitting Up? Put Kids First. The WK prefix denotes an interviewee recruited from the online service Wikivorce.

¹⁰⁵ We discuss the unfairness of this unequal access to information about how the law works in practice in Section 6.5.

could use behaviour. WK17 then suggested the quicker behaviour option to her husband who was initially outraged by the suggestion and suggested that she should make up an adultery allegation instead:

[Husband] straight away went 'No, not doing it. It's not unreasonable [behaviour]. I am not having that on my name'. He went 'Just put down you cheated'. I went 'No, that's a lie'. He went 'I don't want it all on me'. I said, 'The reasons I've given are we both argue with each other'. I said that is what it is and that's what it comes under [i.e. behaviour].

In this case, the wife then got the husband to also phone the helpline to also be coached through what behaviour really meant in practice. In a further twist, the husband was also told (accurately) that he could agree to the divorce but also disagree with, or rebut, the reasons given on the petition:

He said, 'Yes you are right, it does come under unreasonable behaviour'. He turned around and said, 'I've also been told that I can agree and sign that I agree to the divorce but I don't agree to the reasons as well'.

To get the divorce through the wife also noted that she had agreed with the husband that she would omit some allegations of his behaviour. The result of all these exchanges was that the wife had refused to lie about having committed adultery, but instead submitted a behaviour petition that omitted key details and where the allegations were ritually rebutted by the respondent. It was a classic example of a negotiated 'truth' or anodyne petition designed to comply with the requirement to provide evidence of 'behaviour'. Even so, the process had been a rocky one. As the wife said, "it does sound like I am being harsh, as I've called it all unreasonable and that did backfire a little bit and blow up with me".

Another example of a litigant in person being inducted into the universal availability of behaviour was WK04. He had had an affair. The couple had tried to repair the marriage over the course of a year, but failed. The husband had enough legal knowledge to know that his wife would no longer be able to rely on the adultery Fact.¹⁰⁶ His assumption was that they would have to wait a further two years until a helpline again explained that behaviour would be available. The result was another classic collaborative behaviour petition between 'amicable' spouses who could not rely upon the 'real' reason for the divorce:

Before I called [the helpline] I thought that we would have to be separated for two years and they kind of advised that there was the option to do the like intolerable behaviour kind of grounds. We're both agreeable about what we're doing and we're both on really good terms and we just want to try and get things sorted as soon as we possibly can.

¹⁰⁶ The adultery Fact can only be used if the parties have not lived together for more than six months after the petitioner learned of the adultery (MCA 1973 s 2(1)). See Section 9.3 for criticism of this provision.

Being flexible

What is critical in the pragmatic use of behaviour is a willingness of the petitioner to be 'flexible' and not insist that the choice of Fact and the particulars exactly match the reason for the breakdown. In practice, this was not generally an issue amongst our interviewees. Other than a small number of literalist petitioners, considered below, interviewees were generally willing to do whatever was required. An example of a higher level of 'flexibility' was the represented wife SP42 whose marriage had ended because of her husband's affair and who had assumed that the petition would have to reflect that. Her focus, however, was on getting the divorce and she was not concerned that she had been steered towards behaviour to avoid relying on an admission of adultery from her husband that might not be forthcoming:

The proper reason is adultery, isn't it? But it's fine. To be honest, if he said, 'I want to divorce you' for whatever reason he's come up with I'd just say yes and it's over and done with. I don't care. I don't think it's a big deal. I don't feel like I'm the wronged woman. I just want to get out of this relationship and separate from him. If someone said to me 'You've got to say you've committed adultery to get out this relationship' I'd say, 'Where do I sign?' Perhaps that's not the appropriate thing to say.

Massaging separation periods and living under the same roof

Besides behaviour, other issues that involved delicate handling were the timing of separation periods and living under the same roof. The question of when a couple actually separate can be difficult to determine. Lawyers were not prepared to lie, but they were willing to give clients the benefit of the doubt as to when a separation had occurred to prevent further long waits:¹⁰⁷

That can be a difficult one often. At what point are they? He's now got a job up in [city] and he just comes back once a week. And separate bedrooms. You know, at what point do we? And I think I've had, I must admit, ones like that where I've said, 'Well ok, you were separate households' because, you've just got to get on with it, we don't want to wait any longer. (Lawyer focus group A)

The law requires that if the petitioner is seeking to rely on a separation Fact, but the parties are still living under the same roof, then the petitioner must provide evidence that they are living within separate households. The same applies to petitioners seeking to rely on the adultery Fact six months after the disclosure of adultery and those seeking to rely on behaviour six months after the last incident of behaviour.¹⁰⁸ If still living within the same household, the 'Mouncer rules', based on a case from the early 1970s, require that the

¹⁰⁷ As we see below in Section 5.5, the courts can also take a pragmatic approach to this issue.

¹⁰⁸ MCA 1973, s 2(6) and CPA 2004, s 45(8).

parties establish two distinctive households under the same roof with separate sleeping, cooking, washing facilities etc.¹⁰⁹

A different lawyer in the same focus group A talked about the difficulties of handling such cases where the parties were having to co-reside as they could not afford to separate and set up to two different households until the divorce (and finances) had been finalised. In those cases, the lawyer came close to leading the client as to what would be required to evidence living separately under the same roof:

Lawyer 2: I sometimes make the mistake of telling them the sort of things we need to know about before they then tell me. Does that make sense? So, you don't cook for him? And you don't do each other's washing? Is that what happens in your [household]?

In practice, the courts do not now impose a very strict interpretation of the *Mouncer* rules.¹¹⁰ However, the perception remains that that is the case. WK08 and her husband were co-resident, intending to use the two years' separation fact to avoid fault. She was highly critical of the micro-management of her private life that the law required. Even so, her account of the difference between the official and actual version of their household arrangements serves to highlight that the pragmatic and instrumental nature of petitions is not restricted to fault Facts:

You must lead completely separate lives. You must not make each other a cup of tea, which is utter rubbish to be honest. Because you're in the same house and you've got the kettle on, you go 'do you want one?'. That's what you'd do with a flat share and this is basically a flat share with added children. So, while officially we never make each other a cup of tea, occasionally we do.

3.7 Literalism, truth and emotion

In the journey study the dominant approach articulated by lawyers, and reportedly by some advice agencies, was centred on a pragmatism embracing rationality, instrumentality and getting the job done. The 'Truth' of the breakdown was not a driver and could be watered down, marginalized or excluded to achieve a minimally sufficient petition. That approach was welcomed by many clients who knew that their marriage was over and who just wanted to get divorced in the easiest and cheapest way possible, even if they had assumed initially that the law would expect the petition to chart why the marriage had broken down.

Not all petitioners embraced the pragmatic approach. Whilst some clients, like SP42 were quite happy to say and do whatever it took and others struggled to find enough allegations to

¹⁰⁹ In *Mouncer v Mouncer* [1972] 1 All ER 290 the parties had separate lives and slept separately but had shared meals to try (commendably) to create a normal family environment for their children. The petition was rejected. It is doubtful whether the case would be decided the same way today given very different patterns and norms surrounding parental involvement following separation and greater understanding of the impact of parental conflict on children's wellbeing.

¹¹⁰ See Section 5.6 below.

make up a behaviour petition, there were some petitioners – represented and unrepresented – who took a literal approach and wanted their petition to tell their truth of the breakdown.

How easy was it for petitioners to get their ‘truth’ into the petition in the context of a strongly pragmatic system? Based on our analysis of behaviour particulars in our sample of court files,¹¹¹ it is clear that many petitioners, represented and unrepresented, were able to produce quite strong behaviour particulars. However, there were a number of barriers that literal petitioners faced, including holding back for fear of recrimination, the non-cooperation of the respondent and muting by pragmatic lawyers. These barriers again undermine the literalist notion that the petition is a direct and straightforward reflection of the reason for the breakdown, even with literalist-oriented petitioners.

Fear of recrimination

There were a number of interviews where petitioners (usually, but not always, women) reported a background of domestic violence. They had wanted the petition to reflect their experiences but did not insist on that for fear of recrimination from their spouse. SP02, for example, had already toned down what she included in her behaviour petition for “fear of repercussions” knowing that a copy would be sent to her husband. Even so she reported that he was still angry with what she had filed. SP43, who was unrepresented, also heavily edited what she included in her initial draft but was still concerned about the likely effect:

What’s he going to do? What’s he going to do? Is he going to kick off? Is he going to come around? Is he going to harass me? That’s the scary bit that you’ve got to share what you have actually said.

There were also indications from the court file study that ‘official’ accounts submitted to the court might not be the only story that could be told. Unusually, the behaviour case L132 had two separate statements of case. In the first, the narrative was about cultural differences that had undermined the marriage but a commitment to working in harmony for the sake of children. A second statement, attached to the petition told a different story of the husband having an affair and the wife being afraid to mention it. It was not clear whether the wife thought that by appending a second ‘true’ account that it would not be seen by the husband.

Respondent resistance

In some cases, the resistance of the respondent could sabotage the petitioner’s attempt to tell their story. Interviewee WK01, for example, had really wanted to petition on adultery: “because that’s why, the reason why we were getting divorced was his adultery”. The husband refused to admit the adultery, and after spending thousands the wife had had to amend the petition to behaviour.

Muting by a pragmatic approach

As noted, lawyers are strongly oriented towards an instrumental future-oriented rational approach whilst some clients are oriented towards a literal, personal and emotional

¹¹¹ See Section 5.2 below.

approach. The distinction was captured by one of the lawyers in focus group A who noted that lawyers tend to think of the divorce as a means to an end but “if that’s about you, people do take it to heart”. The Resolution *Guide to Good Practice on Drafting Documents* recognises that there can be a tension between professional values and client instructions. It encourages practitioners to focus on the longer-term interests of their clients.¹¹²

It is impossible to say how commonly the pragmatic approach dominates. However, for some clients, the pragmatist orientation of the family justice system was a source of real frustration. Interviewee SP13, for example, recognised belatedly that neither the courts nor lawyers were interested in his experience or the reasons why the marriage had broken down:

Stuff that I put down, my lawyer kind of took some of them out saying ‘You don’t want it defended, it costs you money’. And I’m kind of thinking, ‘Yes, but I want the truth’. Nobody’s really bothered about the truth. Nobody’s really bothered about what has actually happened in almost all of the circumstances; it’s just you [i.e. lawyers, courts] want an outcome.

Underpinning this is the desire from some literalist clients to have recorded, and endorsed by the court, the specific reasons for the breakdown of their marriage and to attribute blame, not to produce a generic and impersonal account. Whilst the lawyer focus groups generally gave the impression that clients shared the pragmatic approach, or could be talked around, some of the lawyers did identify clients or instances where the professional values were overruled by client wishes.¹¹³ An interesting example of this occurred in lawyer focus group A. Here the lawyer had acceded to the client’s wish to use strong particulars, despite warnings about the possible impact on the financial settlement. Part of the reason for acceding in this case was the expectation that the lawyer on the respondent’s side would also adopt a pragmatic approach and talk the husband out of defending particulars:

I mean it is their document at the end of – it’s their case. I’m thinking of one or two people where I said, ‘We won’t mention that’ or, but she’ll say, ‘But that is actually the main thing, that is the main reason that I’m leaving him’. And in a sense, it’s her case, so she ought to be able to say it in a sense. [But] I’d say, ‘It’s not helpful to you if we get this off on the wrong track, because a few months down the line we’re going to be sorting out the money and we want to try and keep him sweet’ and I might wrap it up like that. I have also done petitions where I personally would have preferred not to put things in, but I’ve felt that she’s paying me and it’s her case and [respondent] is just going to have to live with it. He’s got a lawyer who will say, ‘Don’t worry it’s just, you know, go with it’.

¹¹² Resolution *Guide to Good Practice on Drafting Documents* (2017) 3-4
http://www.resolution.org.uk/site_content_files/files/25_drafting_documents.pdf.

¹¹³ This may partly explain why behaviour petitions are typically stronger than is strictly needed to get over the threshold. See Section 5.2 below.

3.8 Gaming the system: competing considerations

We have established that who petitions, on what Fact and using what particulars does not necessarily provide a straightforward account of the reason for the breakdown, whether for fault or non-fault Facts. In figure 3.1 we draw together the preceding analysis to demonstrate factors that appear to influence who petitions, on what Fact and with what particulars.

At the centre of the diagram is the reason why the marriage broke down. On a literal view (not adopted by the law) that factor should be an important factor in terms of Fact selection. It can be, in some instances. Interviewee SP18, for example, had split from her husband who was addicted to gambling. As she said, “our relationship ended because of those behaviours, so for me it seemed to make sense to do it on unreasonable behaviour”. With the support of her solicitor the gambling was the primary issue set out in her behaviour petition. Of course, the respondent may have had a different perception.

Figure 3.1 Factors influencing the choice of petitioner, Fact and particulars



However, as depicted in figure 3.1, there are four other potential considerations which may, or may not, have any connection with the reason for the breakdown. The four are:

1. *Circumstantial factors*, including timescales and urgency, the likelihood of respondent cooperation (consent, admission), the availability of each Fact and practical skills (ability to use a computer, the internet)
2. *Awareness and understanding of the law*, both substantive and more importantly, how the behaviour threshold works in practice
3. *Conflict-reduction* – the salience or importance attached to harm-minimisation (see Section 7.3)

4. *The Truth* – the salience or importance attached to formally recording the reason and responsibility for the relationship breakdown

The four, or five, factors operate in different combinations as drivers for decision-making according to our interviewees, although from our qualitative sample, it was the circumstantial factors that appeared to hold sway. To illustrate:

Pragmatic use of 'behaviour': circumstantial factor – wanting a speedy resolution – WK11

The husband in this case had thought that the only Fact that would be available was two years separation. He had consulted a solicitor who had advised that behaviour would also be another option. The couple then decided that the wife would petition based on the husband's behaviour. This was a classic example of a 'collaborative' behaviour petition driven primarily by the desire to move the divorce on quickly. It was also facilitated by a new understanding of the law in practice and unhampered by any concern for asserting any particular truth about why the marriage had broken down or who was responsible. In this case the husband 'volunteered' to take on the role of respondent:

I didn't realise that there was the [behaviour] option, but not on a nasty basis, if that makes sense? It is done amicably ... 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, we had a conversation ... I agreed, to a certain extent reluctantly, but okay fine I'll be the recipient [respondent] and you are the one that puts that forward [petitioner].

Pragmatic use of 'behaviour': circumstantial factor – cooperation – SP10

It is not unusual to have petitioners who have left the marriage for a new partner petitioning on behaviour against the ('innocent' and 'abandoned') spouse to secure an early divorce. In this case the husband could have petitioned on his wife's adultery – the reason for the relationship breakdown. However, he thought that the wife would not admit the adultery so he, again, accepted his wife's behaviour petition, not because he agreed with it, but because he too wanted to ensure the divorce went through. As before, this was predicated on a low value placed on securing 'the Truth' and the reason for the breakdown was not reflected in the petition. Indeed, the husband stated that in his rebuttal on the Acknowledgement:

Well, she cited unreasonable behaviour. Well, I said it was ridiculous. But ... if I'd filed one on the basis of adultery, she would have denied it. So, she basically filed this and she said she'd pay costs, so I just agreed with it. And I found that there's a wording that goes with it. You just say, 'look, I don't accept anything that you have alleged but, you know, I do not propose to defend the divorce'. And I didn't defend the divorce.

Pragmatic use of 'behaviour': conflict reduction – SP23

In this case, the wife had left a marriage due to a history of coercive control. The selection of behaviour was an accurate reflection of why she had left the marriage. However, the content of the particulars made no reference to the real reason for the separation, as with others (see Section 3.7), as it was not safe to include the full details. Here the primary

consideration was conflict reduction rather than orientation to The Truth or the real reason for the breakdown:

He suggested one change [to the draft petition] yes. Which I didn't agree with but I did say yes just to get things going.... [particulars]... It wouldn't have served any purpose [to give the real reasons]. At the end of the day it wouldn't have changed anything. It would just get him more cross and yes it still comes down to always worrying and always not wanting to upset and what I said was just kind of as easy as possible to not have any backlash. That sounds very wimpy I know.

(Frustrated) literalist use of 'adultery': 'truth' – WK20

In this case the wife's primary goal was to ensure that her husband's 'serial' adultery was reflected in the petition and that his sole responsibility for the separation was publicly recorded. She was successful in basing the petition on adultery. The salience of the Truth, however, was muted by the strong orientation of her lawyer, and the family justice system, which dissuaded her away from naming the women involved. It was, therefore, a partial victory and, from her perspective, a partial truth:

I applied for divorce on the grounds of adultery. And when the solicitor comes back to you and they ask you not to put a name on it. I actually want to put a name on it and I want all ... of the women's names on it.... I actually wish that there was a list that said how many times – I'd have put that on. If I could have done, I'd have written every single occasion. You know?

3.9 Conclusion

The theory underpinning the use of fault as a basis for divorce is that petitions are an accurate account of who or what was responsible for the breakdown of the marriage and indeed that is precisely what many lay people think the law does or should say. What the law in fact requires, as well as the practice, are different. Rather than accurate accounts of the primary reason for the breakdown of the marriage, petitions are probably best read as narratives produced to achieve a divorce. Even if the parties were to agree on what had caused the breakdown, and our opinion poll suggested that will not often be the case, then the reason for the breakdown is just one of the potential factors that will shape the petition. Other factors, including circumstantial factors such as the need for speed, the desire to reduce conflict and understanding of how the law works in practice can be equally, if not more, important.

The elaborate and expensive charades of the hotel divorce are no longer necessary to secure a divorce. They have instead been replaced by a far more prosaic gaming of the system where behaviour has become the Fact of choice available in (almost) any circumstance and where the petition is produced using tried and tested generic formulas designed to do the job. Yet, if the petition is not a broadly accurate reflection of the reasons for the marriage breakdown, it is open to question what purpose fault is serving and what value the parties or the state accrue from what can be the ritualistic production of particulars.

4. The court's inquiries: just administrative rubber-stamping?

4.1 Introduction

The reason why lawyers and some parties are able to select Facts on a purely pragmatic or instrumental basis is founded on an awareness of the very limited nature of scrutiny by the court. Section 1(3) of the MCA 1973 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”. In practice, the investigatory activity of the court into the truth of any allegations has been limited for a very long time. As far back as 1976, Michael Freeman noted the gap between the judicial process set out in the law in the books and what, even in the early years of the MCA 1973 was a largely administrative process:

“a text book account of the rules which will gradually lag further and further behind the law in action... what is necessary is divorce law reform which rids us of our existing pretences and a procedure which admits that divorce has become an administrative rather than judicial function.”¹¹⁴ Freeman (1976: 258-9).

In the 1970s an observation study found that the then existing oral hearings in undefended cases had become an empty and expensive ritual.¹¹⁵ They were replaced by the paper-based ‘special procedure’ for all undefended cases, meaning that the parties no longer needed to attend court to give evidence.¹¹⁶ In 1985 the Booth Committee concluded that the ability of the court to inquire into the Facts alleged was “greatly circumscribed”, just as it had been with oral hearings, and that the court was “simply in no position to make findings of fact”.¹¹⁷ The Committee recommended the abolition of the duty to inquire, and reliance solely upon s1(4), that is that the court shall grant a decree unless satisfied that the marriage has not broken down irretrievably. In 1990 the Law Commission agreed that it was “practically impossible to test the facts” in undefended cases and that the “present law pretends that the court is conducting an inquiry”, but it can do no such thing.¹¹⁸

What therefore does the duty to inquire mean in practice today? In the recent defended case of *Owens*, the current President of the Family Division characterised the question for the judge or legal adviser in an undefended behaviour case as: “*assuming the facts alleged are true*, does what is pleaded amount to unreasonable behaviour within the meaning of section 1(2)(b)?”¹¹⁹ As we show in this section of the report, the President’s characterisation, and those of others, is an accurate description of the court’s approach. Other than establishing

¹¹⁴ Michael Freeman, ‘Divorce without legal aid’ [1976] Family Law, 255.

¹¹⁵ The study found that oral hearings lasted less than 10 minutes in 85% of cases. Only the petitioner attended in 92% of cases. There was only one refusal of a divorce in 763 observed cases. Elizabeth Elston, Jane Fuller and Mervyn Murch, ‘Judicial Hearings of Undefended Divorce Petitions’ (1975) Modern Law Review 609.

¹¹⁶ The ‘special procedure’ was introduced for two years’ separation with consent cases in which there were no children involved, in 1973. It was extended to all undefended cases in 1977. The same procedure also applies to civil partnership dissolution under Family Procedure Rules 2010, Rule 7.19.

¹¹⁷ Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO 1985), paras 2.17-18. The committee was appointed by the Lord Chancellor and chaired by a High Court Judge.

¹¹⁸ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.11.

¹¹⁹ *Owens v Owens* [2017] EWCA Civ 182, [93]. Emphasis added.

that a Fact has been put forward, the court does not, and indeed cannot, seek to test the truth of allegations in undefended cases, whether put forward by the petitioner or respondent.

We start the section by outlining the various stages of the scrutiny process. Then, drawing on our file study of 300 cases and 292 observed cases we explore how cases progress and the number of ‘failures’ at each stage. Where possible, we compare with a similar case file study conducted for the Law Commission in the mid-1980s.¹²⁰ In the second half of this section we explore how the court deals with any information in cases that might raise questions about the truthfulness or accuracy of the petitioner’s allegations.¹²¹ What emerges clearly from the files and from observations and interviews with legal advisers and judges is that the scrutiny process is thorough, but does not include testing the veracity of allegations. Instead scrutiny focuses on two matters. The first is ensuring the paperwork is completed correctly, particularly to establish the identities of the parties and the marriage and their legal entitlement to a divorce. The second is to ensure that a legally recognisable Fact has been put forward by the petitioner.¹²² The courts do not engage with the question about whether the Fact presented is (broadly) true in the particular case, at least where that case is undefended.

4.2 The divorce process: principal stages

Responsibility for handling divorces was transferred in 2014 and 2015 from over 150 local courts to eleven Regional Divorce Centres. The main stages of the divorce procedure and the process for scrutiny – assuming an undefended divorce which follows the standard pathway according to the rules, are set out in Figure 4.1 below.

There are three main stages at which the court will scrutinize the paperwork: an administrative check at pre-issue stage, a scrutiny of the technical and legal compliance at application for decree nisi stage and a final administrative check before decree absolute is made.

The pre-issue check stage, conducted by the Regional Divorce Centre (RDC) administrative teams, involves an extensive range of checks on the paperwork.¹²³ Partly because of the poor design and archaic language of the petition, previous data from HMCTS suggests that up to 40% of petitions are rejected on technical grounds.¹²⁴ In our court file study 14.3% of

¹²⁰ Our only caveat is that the Law Commission study included a small number of contested cases whereas the *Finding Fault* main sample reported here excluded cases where the respondent had recorded an intention to defend. In practice, this is likely to make minimal difference to the findings as in each time period fewer than 2% of divorces were contested.

¹²¹ This issue will also be explored in more detail in our second report on contested cases.

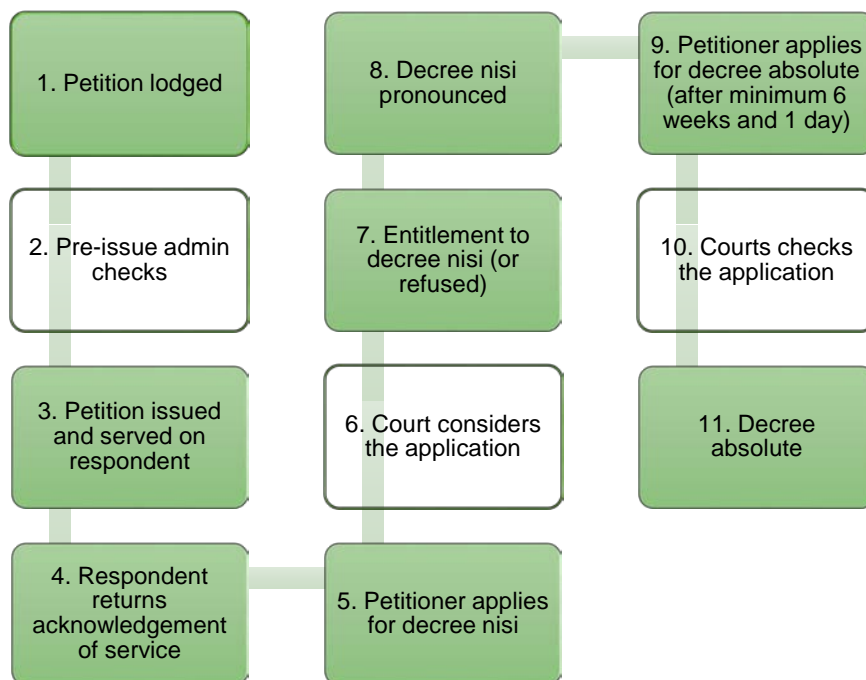
¹²² We explore in Section 5 below how the essential elements of each Fact, except desertion, have been eroded or chipped away over recent decades.

¹²³ There are further administrative checks on the acknowledgement and on the application for decree nisi and statement in support as they are received before the whole file is handed over for entitlement to decree nisi scrutiny.

¹²⁴ A key goal of digitisation is to make the process more accessible and user-friendly than the old forms designed largely for use by lawyers <https://insidehmcts.blog.gov.uk/2017/04/11/working-with-stakeholders-to-develop-an-online-divorce-service/>. The petition form has been redrafted since the fieldwork for this study and the HMCTS analysis.

petitions were identified as having been returned on such grounds before issue, but this is probably an underestimate.¹²⁵ The scrutiny at this stage is very much focused on procedural compliance, as court staff are not legally qualified. The most common errors picked up at this stage included problems in relation to establishing the identities of the parties (missing marriage certificates or details on marriage certificates not matching those given on the petition, missing signatures); incorrect fees; non-completion of sections of the petition (e.g. no or multiple Fact boxes ticked) and missing certificates of reconciliation.¹²⁶

Figure 4.1: The principal stages of the divorce process and scrutiny



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The second stage of scrutiny is the application for decree nisi stage. This is the critical occasion when the legal entitlement to a decree is considered, alongside further checks on procedural compliance. Legally qualified Assistant Justices' Clerks (also known as Legal Advisers), rather than judges, now process the majority of undefended decree nisi applications, including determining whether a Fact has been made out.¹²⁸ Any applications for other orders, for example in relation to service,¹²⁹ must be referred to a judge. The formal pronouncement of the decree nisi must also be done by a judge (or deputy).

¹²⁵ Copies of pre-issue correspondence are not always placed routinely on the court paper file.

¹²⁶ In cases where the petitioner is represented, the legal representative is required to state whether they have discussed with the client the possibility of reconciliation. See Section 9.4 below for discussion of the use and effectiveness of the provision.

¹²⁷ If the respondent states an intention to defend and subsequently files an Answer then the court will schedule a case management hearing when the petitioner applies for decree nisi. If no Answer is filed then the process continues as normal.

¹²⁸ The power was bestowed by The Justices' Clerks and Assistants Rules 2014: SI 2014 No. 603 (L.8), made under the Crime and Courts Act 2013. Legal advisers are legally trained but are HMCTS staff, not judges.

¹²⁹ In cases where there have been difficulties in locating the respondent or the respondent has not returned the Acknowledgement of Service (see Glossary).

The final check is at the application for decree absolute stage. This is a much more limited review of the paperwork than at decree nisi. There is a further check that decree nisi has been pronounced and that the application is not being made too soon or is late¹³⁰. The scrutiny at this stage is routinely done by administrative staff; applications for decree absolute are typically only referred to a judge if they are either made late, or are made by the respondent rather than the petitioner.

4.3 Getting through scrutiny – technical errors and drop outs

We turn now to consider how rigorous the scrutiny process is for the parties, particularly in relation to the legal ground for the divorce. In the 1980s a court file study for the Law Commission concluded that it was difficult to see that scrutiny had “a noticeable impact upon the outcome of cases”.¹³¹ Almost all cases in their sample eventually reached a decree. Where they did not do so it was usually because of the action or inaction of the parties themselves, rather than the court’s finding that the legal ground had not been proved. Our results, 35 or so years later, were remarkably similar.

As Table 4.1 indicates, in both the 1980s Law Commission study and our 2014-15 main court file review study, nine in ten cases surveyed had had decree nisi pronounced, the critical stage for establishing legal and procedural entitlement to the divorce. In both studies, most of those cases then went on to achieve decree absolute within the survey period. There were slightly fewer of those in the current study, due almost certainly to a shorter duration between petition issue and fieldwork than in the Law Commission study.¹³²

Table 4.1: Decrees awarded and case durations, 1980s and 2014-5

Stage reached	Law Commission 1980-84 n = 477	Finding Fault 2014-15 n = 300
No decree	9.3%	9.0%
Decree nisi	90.7%	91.0%
Decree absolute	87.6%	83.0%
Issue to nisi (median days)	-	112 days
Issue to absolute (median days)	182 days	190 days

Source: Law Commission and Finding Fault main court file review studies

¹³⁰ An application for decree absolute should be made within 12 months of decree nisi. Application may be made later than this, but an explanation of the delay will be required and certain other formalities completed,

¹³¹ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 51.

¹³² The Law Commission cases were started between 1980 and 1984. The fieldwork was undertaken in 1988, a time lapse of 4-8 years. Data collection for the Finding Fault study was at least half that period, at a median 854 days (about 2 yrs, 4 months) post-issue. In the *Finding Fault* main court file review sample there was a statistically significant difference in the time lapse from issue to data collection between cases that had reached decree absolute (827.03 days) and those that had not (784.31 days) p=0.24. This would suggest that a longer time lapse from issue to fieldwork, allowing longer for finances to be resolved where relevant, would have meant more cases in our sample reaching decree absolute.

In the main court file review study, the median length of proceedings from issue of the petition to decree nisi was 112 days (minimum 42 days) and 190 days (minimum 85 days) from issue to absolute. There were two main influences on case durations. The first was having a refusal at application for decree nisi stage, adding a median 56 days. The second was financial proceedings, adding a median 78 days to reach absolute. The Fact relied upon made no difference to case durations at either decree nisi or decree absolute stages. Representation status also made no difference to the time taken to reach nisi stage.

The Law Commission study did not report case durations to nisi. However, the length of proceedings to absolute was remarkably similar between the 1980s and the present day.

Reasons for non-progression and non-completion

As in the Law Commission study of the 1980s, the main reasons for not achieving the divorce were due primarily to the decisions of the parties rather than the court finding that the ground had not been made out. As can be seen from Table 4.2, 51 out of the sample of 300 cases dropped out of the process at different stages before decree absolute. Nearly half of those 51 had dropped out at an early stage before the court had even considered the legal merits of the application at decree nisi stage.

Table 4.2: Last stage reached, Finding Fault court file sample

Last stage reached	Number	Percent
Petition rejected before issue	1	0.3
Petition issued	16	5.3
Acknowledgement of service received by RDC	4	1.3
Application for nisi refused	7	2.3
Nisi pronounced, no application for absolute	23	7.7
Decree absolute made ¹³³	249	83.0
Total	300	100.0

Source: Finding Fault main court file review study.

Examination of the 51 non-completion files suggests that the reason for no further progress was most likely the following:

- *Passive resistance from the respondent*: no or very late return of the acknowledgement: 20 cases (16 petitions issued and 4 of the nisi pronounced)
- *Awaiting financial orders*: 7 cases (all nisi pronounced)
- *Petitioner's inability to meet procedural requirements*: 5 cases (1 pre-issue rejection, 4 refusals at nisi)
- *Petitioner's apparent change of course/mind*: 5 cases (4 acknowledgement returned but no application for nisi, 1 reconciliation after nisi pronounced)
- *Petitioner's (repeated) inability to produce a Fact*: (3 refusals at nisi)
- *Death of one of the parties*: 1 case (decree nisi pronounced)

¹³³ Including three cases where there had been an application for decree absolute but there was no record on file of the outcome. In each of these cases there appeared to be no reason why decree absolute would not have been made and the lack of recording on the file was almost certainly an administrative oversight.

In ten of the 51 cases, it was not possible to identify specifically why further progress had not been made although in none of these did it follow a decision by the court that a legal Fact had not been made out.¹³⁴

It is quite clear, therefore, that it is largely the decisions of the parties themselves that determine the outcomes, whether that is resistance from the respondent, delay while money issues are resolved or the capacity and determination of the petitioner. In only three of three hundred cases, or 1%, did the case ultimately founder on substantive legal grounds. In all three the problem was not whether the court believed the allegations or not. Instead the only cases that failed on legal grounds were those where unrepresented petitioners lacked the basic legal understanding of what was required to make out a Fact and were stuck in a legal trap:

- Court file case L055¹³⁵ had initially filed on desertion and was then refused on a two years separation petition as the respondent had not returned the acknowledgement and so there was no evidence of consent to a decree.
- Court file case L075 was refused for lack of an acknowledgement for a two years' separation petition and the petitioner appeared to give up, having amended the petition to behaviour, the respondent again failed to return the acknowledgement.
- Court file case L048 was refused twice for behaviour petitions that failed to meet the threshold (see Section 5.2).¹³⁶

In each of these cases, some good legal advice would almost certainly have enabled the petitioner to file a behaviour petition that would have met the threshold and also dealt with any non-engagement from the respondent. If so, then none of the cases in the sample of 300 cases would have failed to make out the legal ground.

The pattern of interim refusals at application for decree nisi

Table 4.2 above charts the final stage reached in each case. In our study 46 applications for decree nisi were initially refused (Table 4.3). That represents a refusal rate of 16.4%, not far off from the rate of 21.8% for the Law Commission study. As in the 1980s, the majority of first refusals were on procedural rather than substantive grounds:¹³⁷ in the main court file

¹³⁴ Four of these cases featured strong allegations of domestic violence in the petitions but there had been no further action after achieving DN. The Law Commission also noted that some of the non-completing cases that had reached DN involved domestic violence (Appendix C, para 15). It is possible that patterns of control had resurfaced.

¹³⁵ The anonymised identifiers for main sample court file cases are in the form L+number or M+number.

¹³⁶ The four non-completion *procedural* refusals were unusual cases. They included M027 in which the petitioner was (mis)represented by what appeared to be a bogus solicitor and M143 in which the application for decree nisi was twice rejected on procedural grounds and the unrepresented petitioner appeared to give up. The petitioner in M023 was represented but the case stalled, possibly due to proceedings elsewhere. M165 was treated by the court as a defended case despite the absence of an Answer. The case appeared to drift thereafter with no clear outcome.

¹³⁷ We define substantive refusals as those relating to whether the Fact or irretrievable breakdown has been made out. Procedural refusals relate to all other issues in relation to the paperwork. The procedural refusals in this sample related to eight cases of missing or contradictory information e.g. in relation to the court's jurisdiction, eight cases of problems with establishing identities e.g. non-matching marriage certificate and petition data and eleven cases with problems with service or exhibiting the acknowledgement of service.

review, 41.3% of refusals were substantive, again very similar to the 39.4% in the 1980s. In the current study, there were no differences in the initial refusal rates by Fact, legal representation or whether it was a legal adviser or Deputy District Judge who undertook the scrutiny.

Table 4.3: Outcomes of applications for decree nisi at first attempt, by Fact

	Adultery	Behaviour	Desertion	Two years	Five years	Total
Applications (number)	31	126	3	80	40	280
Total refusals (number and percentage of applications)	6 19.4%	19 15.1%	1 33.3%	9 11.3%	11 27.5%	46 16.4%
Substantive refusals (number and percentage of refusals)	3 50.0%	10 52.6%	1 100.0%	3 33.3%	2 18.2%	19 41.3%

Source: Finding Fault main court file review study.

There have been some shifts between the 1980s and the current study in the type of substantive legal problem that resulted in (interim) refusals as shown in Table 4.4.

Table 4.4: Reasons for substantive refusals at decree nisi, all Facts, 1980s and current court file studies

	Law Commission	Finding Fault
No admission or co-respondent not named in adultery cases	22	1
Parties co-residing	14	5
Date of mental separation	3	2
Petitioner agreeing to desertion	1	1
Lack of corroboration in a behaviour case	1	0
Behaviour threshold not reached	0	6
No consent in 2 year separation	0	2
No date of last behaviour relied upon	0	1
No details of adultery	0	1
Total refusals	41	19

Source: Law Commission and Finding Fault main court file review studies.

We explore how the interpretation of what is required to make out a Fact has shifted over the last two decades in Section 5 below, for example the requirement to name a co-respondent in adultery cases. What has remained the same across the decades, however, is that substantive refusals are based on petitioners failing to put forward the essential elements required to make out a Fact, as interpreted by the courts at that point in time, or they have not established irretrievable breakdown in cases where the parties have co-resided. What the courts were not doing in the 1980s or in the current study were raising any questions about the truth or accuracy of the allegations put forward. As the Law Commission report notes, the courts in the 1980s were in effect taking the allegations at face value:

*“[Judicial officers] might have been unpersuaded, either that the behaviour complained of had in fact taken place or had the effect alleged, or that however accurately described it was such that it was unreasonable to expect the petitioner to live with the respondent. The files did not reveal evidence of this.... The behaviour itself was generally proved by the assertions made in the petition and subsequently confirmed in the petitioner’s affidavit”.*¹³⁸

The situation has not changed. Despite the statutory duty to inquire under Section 1(3), in none of the 300 files was there any evidence that the court had raised questions about the truth of the allegations. That is not to say that the scrutiny was not robust or rigorous, but rather it was, and indeed logistically could only be, confined to the legal question of whether the petitioner had put forward particulars that met the current requirements for a legal Fact. If not, the petitioner is simply invited to try again.¹³⁹ Scrutiny was not designed to test whether that Fact was true. After observing 292 cases being scrutinised and analysing 300 divorce files, there was not a single example of a refusal based on doubts about the veracity or plausibility of allegations, or even questions being raised about allegations by either petitioner or respondent.

4.4 Accepting changed truths

Our finding that scrutiny does not encompass testing the veracity of allegations is reinforced by considering how the court deals with cases where the petitioner changes important parts of the petition or statement in support of the application for decree nisi, in effect, changing their story. Rather than raising concerns, the court accepts the new version of events, so long as a Fact is then made out.

Amending separation dates

One of the clearest illustrations of the court’s willingness to accept changed truths is in relation to separation dates. The two separation Facts, both require a physical separation of the requisite period of two or five years. Following the decision in *Santos*, it is also necessary that the petitioner had made a decision that the marriage was over at least two or five years earlier – the supposed ‘mental’ element.¹⁴⁰ In some instances, the petitioner will provide an appropriate physical separation date, but with a more recent ‘mental’ separation date, often close to the date of petitioning.

In court file case M022, based on two years separation, the administrative checks on the application for decree nisi picked up that the mental separation date was fairly recent. The court wrote to the petitioner to note that the decision was less than two clear years before the date of the petition. The petitioner replied by letter, with admirable honesty, saying that

¹³⁸ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 44.

¹³⁹ Most petitioners did try again and were successful. Of the 46 cases involving first refusals, 33 applications for decree nisi were successful on the second attempt and six on the third.¹³⁹

¹⁴⁰ *Santos v Santos* [1972] 2 All ER 246. Oddly, the ‘mental’ decision does not have to be communicated to the other party. Forms D80d and D80e ‘statement in support of divorce’ require the petitioner in two and five years’ separation cases to record the dates both when the parties separated and when the petitioner decided that the marriage was at an end.

“obviously separations and marriage break-ups are often not simple, clear cut things”. The petitioner explained the reasoning for the decision over the date and ended with “The ... date in Q5 was simply the date that I psychologically decided that there was no chance of any reconciliation and never would be.” The court staff wrote back again reiterating that “to move this case forward” the relevant date should be at least two years prior to the petition. The petitioner did amend the mental separation date to match the date of the physical separation, thus pushing back the date they had previously decided that the marriage had ended by many months. The application for decree nisi was approved by the legal adviser without questioning why the date, that had been previously so clearly stated and justified, had now changed.

The M022 case was unusual in having a dialogue between the court and the petitioner, and it appeared that the staff in this case had gone beyond their usual remit. More commonly the court gave a broad steer as to what was required to constitute the relevant legal Fact and the petitioner then complied as best as they could. The challenge for the court was how to help the petitioner understand what was required to get the divorce through without encouraging them to perjure themselves or falling into the trap of giving legal advice which court staff are not allowed to do. One device used was to suggest that the initial mental date might have been an ‘error’. In observation case O8:3, for example, the legal adviser’s decision letter noted that it was a legal requirement that both dates are at least two years prior to the petition and that “If the date given is a mistake this can be amended.”

The mistake device is, of course, a fiction. It is unlikely that the dates were given in error, although at the same time, as the petitioner in case M022 argues, the very concept of a definitive decision day required by law is itself likely often to be a fiction.¹⁴¹ Either way, the examples illustrate that the focus of the court was not on establishing the actual dates of physical and mental separation, but achieving a date that met the legal requirements for producing a Fact. In no cases was there evidence of any checks made into the dates provided by the petitioner. That would be impractical given the court’s resources.

Amending the petition to make a Fact

There were also examples where the statement of case was amended significantly. M080 is particularly interesting as an example of an initially very mild behaviour petition where responsibility for the breakdown was attributed equally between the parties:

“Both the petitioner and respondent feel that the marriage has broken down because we no longer have common interests and are both looking for different things from life. We have grown apart and despite trying to regain common ground we feel that the kindest course of action is for us to separate and move on in our own directions. This has led to a

¹⁴¹ There is some evidence that some of the online divorce providers had adopted a boilerplate approach to the two dates, presumably to meet the Santos requirements. Our sample included 10 cases submitted by (or in which the petitioner was advised by) online provider ‘A’. In all 10 cases the mental separation date matched the date given for physical separation. Online provider B, in contrast, used the formula of physical date + “sometime before [physical] date” in all three of its separation cases. It would appear unlikely that all provider A’s clients were coincidentally people who decided to split up and leave the matrimonial home on the same day, whereas all provider B’s clients decided to split up then move out. The legal advisers did not question the veracity of these dates; their only concern was that both dates were more than two or five years prior to the petition.

communication break down and lives within different social circles. We have lived apart since [1 year]”.

The statement is a classic example of a below threshold behaviour petition, with no details of behaviour and nothing that can be attributed solely to the respondent.¹⁴² The application for decree nisi was initially refused. The amended particulars painted a very different story, which shifted responsibility for the breakup almost entirely to the respondent and cited their behaviour as including refusal to have sex, getting drunk, constantly arguing with or refusing to speak to the petitioner, disappearing and refusing to say where they had been, and verbal abuse involving swearing and name-calling.

The amended particulars were accepted as the threshold for behaviour had been reached. There were no questions about why the story had changed and the plausibility of the new narrative.

4.5 Rebuttals – ignoring alternative truths

So far, we have only addressed the allegations put forward by the petitioner. However, the duty of the court under s1(3) to inquire extends to allegations made by both petitioner *and* the respondent. In practice, however, so long as the case remains undefended, the courts simply ignore any allegations made by the respondent, including where the respondent asserts that the account given by the petition is inaccurate or false. The starting point of assuming that the petitioner’s account is true can and does withstand direct attack from the respondent, so long as the case remains undefended. As we will see, most of the rebuttals are on the acknowledgement of service but they can also appear elsewhere in the case.

Rebuttals on the acknowledgment of service

The acknowledgement of service is a two-page document with a series of questions, including whether the respondent agrees with the petitioner’s statement on the court’s jurisdiction, intends to defend and opposes paying costs. The form is not designed to elicit the respondent’s case or version of why the marriage broke down. The questions are all closed format and in very small fixed boxes with little space in the margins.¹⁴³ Nonetheless, nearly a fifth of acknowledgements in our undefended sample contained some form of rebuttal of the petitioner’s allegations.¹⁴⁴ These were often a standard disclaimer that the allegations were not accepted, which may or may not have indicated real dissent, and/or a pre-emptive defence against the possible use of allegations in future litigation. They could be very short¹⁴⁵ e.g. “I do not agree with the allegations” (L006), or somewhat longer “No [intention to defend] although I do not accept the allegations of unreasonable behaviour as set out in the petition and reserve the right to defend those allegations should they be referred to in any subsequent proceedings” (L145).

¹⁴² See analysis in Section 5.2 below.

¹⁴³ The box for the intend to defend question is about 2cm by 8cm.

¹⁴⁴ These were most commonly written on and around the ‘intend to defend’ box. Unrepresented respondents also confused the question regarding agreement with the petitioner’s statement on jurisdiction with an invitation to comment on the particulars instead. Boxes about costs and polygamy were also used to register dissent.

¹⁴⁵ The median length of rebuttals for behaviour cases was 20 words, but with a large standard deviation of 201.057.

Some rebuttals were just straight denials, sometimes with a rebuke about a lack of consultation. The respondent in M035, for example, rejected accusations of verbal abuse and controlling behaviour stating “No [intention to defend] but I do not agree with the particulars and was not given enough time to approve them. I do not understand why the petitioner did not use the Fact of two years separation as we separated in [date]”.

Some rebuttals went beyond standard disclaimers and included quite angry and specific denials and counter-accusations, stating explicitly that the petitioner’s account was untrue and that there was an alternative account of the breakdown of the marriage for the court to consider: “I have done nothing wrong. She committed adultery not me” (L148, a behaviour petition). In some cases, the alternative accounts were extensive. L032, for example, included a 670-word attachment from the respondent starting “there are elements of truth in her statement but they are ludicrously generalised and taken completely out of context”, and which continued with a point by point rebuttal with counter-allegations of violence and concluding with “I hope this helps”. L176 included an 800-word attachment ending “The respondent believes that he has shown that the petitioner gives out the mental cruelty to others as shown in previous statements”. A long letter from the respondent in M165 complained “I would be very interested to hear what my unreasonable behaviour has been.... I have looked after her very well she just sits and does nothing” and ended by implying that the petitioner was involved in criminal behaviour.

As Table 4.5 shows, rebuttals were almost entirely restricted to behaviour petitions, where they were used in over a third of cases. The presence of a rebuttal was not related to gender of the respondent. However, represented respondents to behaviour petitions were significantly more likely to rebut (43% against 20.7% of unrepresented respondents, $p=.000$). However, the strength of behaviour petition was also significant ($p=.007$). There were no rebuttals of particulars rated as ‘mild’ or ‘mild/middling’, whereas 34.8% of ‘strong interpersonal’ and 51.2% of ‘strong abuse’ particulars elicited a rebuttal.¹⁴⁶ That is an indication that rebuttals were not just routine – they were responses to specific allegations.

Table 4.5: Rebuttals on the acknowledgement of service, by Fact

	Adultery	Behaviour	Desertion	Two years	Five years	Total
Total cases with an acknowledgement	31	103	2	77	28	241
Number with rebuttal	2	38	0	2	1	43
Percentage with rebuttal	6.5%	36.9%	0.0%	2.6%	3.6%	17.8%

Source: Finding Fault main court file review study.

Most importantly, there was, however, no relationship between the presence of a rebuttal and grant of decree nisi.¹⁴⁷ The presence or absence of rebuttal made no difference to the court’s decisions.

¹⁴⁶ See Section 5.2 for the rating of particulars. Strong abuse particulars typically involved allegations of domestic violence and drug/alcohol abuse.

¹⁴⁷ 19.1% of cases achieving decree nisi at first attempt contained rebuttals whilst 15.8% of first refusals included rebuttals.

Rebuttals other than on the acknowledgement

Rebuttals could appear in the case other than in the acknowledgement. Case L058 had strong particulars, including allegations of disposing of the petitioner's personal possessions without consent and sending abusive messages. No acknowledgement was returned, but the respondent had sent a personal email to the petitioner rebutting each point in the particulars, and making counter-accusations of theft and abuse. The respondent's 'rebuttal' email was included in the petitioner's application to the court for deemed service as evidence that the respondent had indeed been served with the petition. The court granted the application for deemed service without any investigation of whether the respondent's email cast doubt on the petitioner's case.

4.6 Accepting parallel truths on the face of an order

The clearest illustration that the court process is focused on establishing that a Fact has been pleaded, rather than Fact-testing, came from a case with two parallel petitions.¹⁴⁸ The wife in L152 had issued on the basis of the husband's behaviour, alleging adultery, controlling behaviour and serious violence. The husband failed to acknowledge the petition. The wife applied for deemed service as it was cheaper than bailiff service. The application was refused and the wife was advised to attempt bailiff service. The wife's petition then stalled as she could not afford bailiff service or further representation. The unrepresented husband then issued his own behaviour petition, without reference to the wife's petition, alleging her violence to him. The two accounts of domestic violence were mutually exclusive. For reasons that are unclear, there was a hearing attended by the wife only. The outcome was that the wife's petition was dismissed and the husband's petition became the lead case. The recitals to the order recorded that the wife had:

“not been in a financial position to proceed with the case after the court refused her application for deemed service” and that “The wife is content to allow the husband's petition to proceed, but minds the court to note the allegations made by her in her petition and the fact that she does not accept the allegations made against her by the husband”

In the rebuttal cases with 'dissenting' but not defending respondents, the court reconciled the conflict simply by ignoring the respondent's views and relying entirely on the petitioner's account. In this parallel petition case, the reconciliation could not be achieved by ignoring the wife who was the original petitioner (and whose account would therefore ordinarily be assumed to be true). Instead, the court explicitly accepted, on the face of the order, the presence of two mutually exclusive sets of allegations, that inevitably raises questions about which account was true. Those doubts were not explored by the court and decree nisi was pronounced on the husband's petition. It is important to note that it was only because the wife could not afford bailiff service that the husband's account, as the replacement petitioner, was the one that prevailed.

¹⁴⁸ In the contested court file sample, which will be reported on separately, there was at least one other instance of a case with parallel petitions where one was dismissed but where the non-acceptance of the petitioner's allegations was recorded on the face of the order.

4.7 Understanding the court’s approach

The narrow focus of the court’s scrutiny role is in a sense inevitable. From our observations and interviews with legal advisers, the average time to process a file at the application for decree nisi stage was around about four minutes, although cases with complex jurisdiction or service issues could take longer. RDCs differed on whether a target was reported to have been set, but it would not be uncommon for legal advisers to deal with up to 20 files per hour or 50-70 per day for those at the top of their game. In those few minutes, the legal advisers have to work through at least 14 pages of material, checking responses to multiple questions per page.¹⁴⁹ In each case the legal adviser will also have to complete a D30 form recording the outcome of the application, including any actions that might be required that will form the basis of the court’s letter to the parties.

Legal advisers noted that they did get significantly faster over time, developing a highly routinized approach to scanning each page for what they needed:

I can look at a page, turn it over within seconds, because I know page number two is the tick box, there, there and there – done. Next page, there, there and there – done. So, I can do it very, very quickly... I think the more you do the quicker you get. (Legal adviser #22)

Although there was a lot of information to process, and multiple checks to conduct on each file, at the same time there is very little narrative material upon which one could make an assessment of veracity, even if that were seen as relevant to the scrutiny exercise. As Table 4.6 indicates, in the main court file review the median length of statements of case in the petition was low, with 50 words for adultery and 193 words for behaviour. As a point of reference, this paragraph is 90 words long.

Table 4.6: Length of statements of case on (un-amended) petitions

	Number	Mean	Median	Std. dev	Min	Max
Adultery	33	78.15	50	69.876	10	335
Behaviour	134	234.49	193	151.152	31	888
Desertion	3	53.00	34	33.779	33	92
Two years	86	38.44	36	24.945	4	208
Five years	43	41.56	33	37.623	4	232
Total/all	299 ¹⁵⁰	131.28	67	141.132	4	888

Source: Finding Fault main court file review study.

Given these logistical constraints, scrutiny can therefore only focus on errors and omissions. In those terms, it is rigorous and detailed. Applications are gone through “with a fine

¹⁴⁹ This material includes the D8 petition (8 pages), the marriage certificate, possibly with a translation, a statement of reconciliation for represented parties (1 page), acknowledgement of service (2 pages), sometimes with attachments, the D84 application for decree nisi (1 page), the D80 statement in support (3 pages, plus acknowledgement of service if exhibited), outcomes of any applications in respect of service, and perhaps any additional correspondence on file (although observations suggested that any additional correspondence not directly related to any of the above documents was unlikely to be read).

¹⁵⁰ One petition was missing from the file.

toothcomb” (Legal adviser #17). Although some legal advisers reported that there had been some loosening over time in respect of certain requirements¹⁵¹ it was essential to have it right:

The judges told us if the form's wrong, ... there's no grey area. If it's wrong it goes back. ... even as I said it's obvious they should have ticked that box, it's not for us to tick it. It's their application. So even if it's an obvious fix, we still would have sent it back. (Legal adviser #18)

That approach was consistent across all four RDCs. Although there were some minor differences in interpretation,¹⁵² the following is a fair summary of what legal advisers were looking for:

these are the mandatories as far as I am concerned.... You want the marriage certificate reproduced exactly as it appears. You want the issue in terms of jurisdiction on page 2, whether they are part of the EU, to be marked off. You are going to check that the right ground is applicable to the reasons that they are giving to it and then signatures signed off appropriately where necessary. The acknowledgement exhibited properly. And 'Are there any amendments and, if not, do you stand by everything and petitions being true?' (Legal adviser #15)

Distilled down, there were two key concerns in relation to what was being checked. The first was focused on ensuring the identities were right; as one judge noted “the whole purpose of aligning the marriage certificate with the divorce petition is to establish you've got the right people and the right marriage”. In addition to these identity checks, which spanned the cross-checking or matching of the marriage certificate and information on the petition, the legal advisers ensured that the court had jurisdiction, that the forms had been signed and dated by the appropriate person and that the respondent was aware of proceedings and the contents of the petition, and not defending (hence the focus on correctly exhibiting the acknowledgement, or establishing other forms of service).

The second element was ensuring that the Fact put forward met the minimum requirements of what was regarded as necessary for a Fact¹⁵³ and that the Fact described in the statement of case matched the Fact chosen in the Fact selection tick box. It was not part of the role to consider the veracity of the case put forward. What the court does instead, as indicated by legal adviser #15 noted above, is to rely on the petitioner to assert in the statement in support of the application for decree nisi that the information in the petition is true and the court then checks that the petitioner has checked a box and signed to confirm that the contents are true.

¹⁵¹ For example, policy in some RDCs shifted over time to allow legal advisers to address very minor discrepancies between the wording on the marriage certificate and on the petition relating to the place of marriage, rather than having to always return the application.

¹⁵² See Section 5.5 below for differences in relation to policing the mental separation rule.

¹⁵³ Discussed in Section 5 below.

In terms of identifying whether the Fact had been made out, particularly for behaviour cases, the approach was very instrumental. Some legal advisers reported reading the whole of the statement of case, even multi-page behaviour statements, in case any contrary material was thrown up, or apparently out of politeness, sometimes out of interest:

“I read it all yeah. I think if somebody’s taken the trouble to file a petition, then you need to read it”. (Legal adviser #17)

Others reported that they could meet the requirements by reading until the point that they had found evidence of behaviour and then would stop reading or skim through the rest:

I mean to be honest with you we’re not going to read a huge amount. We read sufficient to satisfy ourselves, and then probably not going to read any more because there’s no point, is there? (Legal adviser #1)

When pressed, the legal advisers did acknowledge that they were not testing the truth of allegations. That was not their job. They were there to see if the petitioner had presented a Fact (or a Fact that matched the tick box) then the scrutiny was satisfied and they could move on to the rest of the process.

I mean, the system at the moment can be easily manipulated... it’s not as though there’s many checks made in the system. I mean, there’s no checks made of what people write on the form anyway is there really? We’re not verifying what they’re saying at all. (Legal adviser #2)

LA: I’m not deciding on what is the truth, I’m deciding on objectively is this ... have I got evidence of behaviour which is unreasonable, such that the petitioner shouldn’t be expected to live with it.

Q: On the petitioner’s case, in effect?

LA: Yes, which on an undefended divorce is the only case we’re ever going to have. And there are so few defended cases that invariably it is going to be the petitioner’s case. (Legal adviser #8)

The legal advisers were therefore very clear that any rebuttals by the respondent, if the case was undefended, were not relevant to their task. In doing so, in each of the four RDCs, the scrutineers were very clear that this was based on clear and consistent guidance from the local judiciary.¹⁵⁴ An experienced legal adviser, for example, described how the legal advisers had initially assumed that a rebuttal meant that a case was defended, until corrected by the local judiciary:

We sent it to the judges and they said, ‘Well, first and foremost they categorically said they’re not [intending to defend]. They’re just not

¹⁵⁴ Training of the legal advisers when the RDCs were being set up was conducted by the local judiciary, and sometimes by other legal advisers for more recent recruits. Training was typically two half days with reading and hands-on exercises or practice on old files. In most areas, scrutiny was conducted in open-plan offices, enabling legal advisers to discuss queries. More complex questions were referred to District Judges although in each area there was decreasing reliance upon judges as experience built up.

accepting the statement of facts. It's their prerogative, if they don't accept the statement of facts they should then oppose the petition. They don't.
(Legal adviser #5)

This position, that rebuttals were not relevant if the case was undefended, was replicated by legal advisers in each of the four RDCs. Legal adviser #19, for example, reported the same message from the judiciary who had reframed a rebuttal to the more neutral formulation of 'information':

I've sent them to the judges before, but ... and ultimately it's come back, 'They're not defended. It's just information'.

At most, the legal advisers reported that they would skim read any rebuttal or not read them at all. Any querying of the petitioner's allegations was not relevant to the question that the court was asking. What was relevant were the procedural requirements needed for the application to progress:

I don't feel obliged particularly to go through and read what [respondents] have put if they've put pages and pages on a statement... A lot of the stuff that people send in isn't relevant to what we need to see. The thing you spend the longest time looking at is ... are they disputing costs, is it defended, is there consent, is it signed and dated, if so by who and if it's signed and dated by a party, is it exhibited properly? (Legal adviser #15)

4.8 Is scrutiny sufficient?

Current practice is therefore administratively rigorous and robust in relation to identities, other legal and procedural requirements, and ensuring a Fact has been put forward. Indeed, it is now highly efficient and capable of mass processing the tens of thousands of applications each year. The general impression from legal advisers was that the time available was adequate once they had developed some experience:

I mean you know we've got as much time as we need to look at ... you know some you need to look at more closely than others. You know if you've got foreign marriage certificates with documents that have been interpreted then yes we need to be a little more careful with those, that will take a little bit longer. But I will devote what time it takes to be satisfied that it's either right or not. (Legal adviser #16)

The perception of adequacy is, however, a consequence of the restricted conception of the scrutiny role, as administrative processing rather than an inquiry into the Facts alleged, even when there is evidence, or allegations, of alternative accounts. This is not, we would stress, a new conception of the role following the creation of the RDCs. Our interviews with judges about their own practice prior to the creation of the RDCs and the findings from the Law Commission study from the 1980s indicate that the restricted nature of scrutiny is very long-standing.

It is not clear, however, that that is what Parliament had in mind when formulating section 1(3), even with the let-out clause requiring courts “to inquire, so far as it reasonably can”. Nor does what is in effect the rewriting of section 1(3) so that the respondent’s allegations are investigated *in defended cases only* appear to meet what Parliament would appear to have intended. The statute makes no distinction between defended and undefended cases.

The lack of inquiry, in effect the rubber-stamping of the divorce so long as the petitioner can navigate the paperwork and put forward a Fact, is probably also not what the parties or the public expect. There were plentiful examples amongst our qualitative interviewees of petitioners who were very anxious that their petition might not get through. WK02, for example was unrepresented and was not at all sure whether to trust assurances from the internet that behaviour did not have to be very strong to get through the court process:

It's in their hands now with it being at the Court. It's up to them to decide with what I have put forward so if [the internet] wasn't there and I hadn't read about other people's experiences then I would have thought that the reasons I put down were maybe not good enough and I think there is a little bit of doubt in my mind ... I have done the thing through Wikipedia [sic] but I don't know whether they would say this isn't right or this is.

In reality, her worry was probably groundless – the chances of rejection were minimal, and she would always get a second chance to resubmit.

Nevertheless, the assumption was held widely that the court would consider the veracity of reasons put forward, as illustrated by journey study interviewee SP48:

I often wonder if the court would have looked at her reasons and said, are you kidding? He's been on a dodgy web site and you're divorcing him because he's been on a dodgy website? I can bet you a pound to a penny that at least 50% of any courtroom had probably used adult web sites at some point, and it's going to be their personal – I think their personal opinion will come into play.

In our national opinion poll, we also asked members of the general public and those who had been divorced whether they thought that, were the option of fault Facts removed, divorce should be dealt with by a court or as an administrative process. Even without fault, 48% still considered that divorce should be dealt with by the court. What we suspect is driving this finding is the popular assumption, held by the public and our interviewees, that the person doing the scrutiny is a robed judge sitting in a courtroom, carefully reading each application and considering the truthfulness of each case. We doubt that they have in the mind the reality of a civil servant sitting in an open plan office in a 1970s court service building with a desk laden with 30-40 files and typically around four minutes to process each file.

4.9 Conclusion

There is a very longstanding recognition that although the law in the books presents the scrutiny process as inquisitorial and judicial, in effect it has for many years amounted to little

more than an administrative process, now performed explicitly by non-judges. That is not to say that the process is not rigorous. It is, but it is not a judicial inquiry, perhaps not even amounting to a 'pretend' inquiry.¹⁵⁵ Instead, the parties are being assessed on their basic form-filling skills and their basic legal knowledge or ability to describe a Fact. The allegations that are made are taken at face value. Many petitioners do get the technicalities wrong, and have to try again. A tiny fraction run into difficulties with the substantive law, all of which would be likely to be resolved with some basic legal advice. In none of the cases in our study, however, did the court raise questions about the veracity of the allegations, even where the petitioner changed their story or where the respondent was fiercely critical of the petition. Thus, as the Law Commission found in the 1980s, whether or not the decree was achieved was less a question of meeting the legal criteria, than whether the parties could cope with the paperwork. As with the production of petitions in many cases, the scrutiny process is largely an administrative, box-ticking exercise. Given the practical constraints on the court, and the information available, it is difficult to see how it could be otherwise

¹⁵⁵ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.11.

5. Finding the floor: what is a ‘Fact’ in practice?

5.1 Introduction

In Section four, we established that the court’s scrutiny is primarily administrative. While there is no attempt to test the allegations of petitioners or respondents, what is checked rigorously is procedural and legal compliance and whether there is a Fact. In this section, we examine what that ‘Fact’ means in practice.

In law, the statute sets out the sole ground of irretrievable breakdown and a definition of each of the five Facts, and there is a long (and now largely ancient) line of authorities on the meaning of each. In practice, as we will show, the pragmatic approach has meant that, with the exception of desertion, what is required to make out each Fact has reduced significantly since the 1980s. In particular, what is now required to reach the behaviour threshold is minimal, although as we will see, most behaviour petitions are stronger than is needed to get over the threshold. We show that the philosophical orientation of the family justice system towards pragmatism, as well as the logistical factors that constrain the scope of scrutiny, account for these reduced expectations of what is needed for a Fact, particularly in relation to behaviour. Our findings in relation to the interpretation of the law on the ground apply equally to all four RDC fieldwork sites with some very minor differences.¹⁵⁶

5.2 Behaviour in theory and practice

We start with behaviour as the most relied upon Fact and the one where the legal parameters are most contested. In law, the requirements are “that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent”.¹⁵⁷ Although this Fact is commonly (and wrongly) abbreviated to “unreasonable behaviour” the Fact is not based on the unreasonableness of the behaviour, but whether it is reasonable to expect the petitioner to live with the respondent given such behaviour. The test is therefore an objective one, but considered in the light of the particular parties, as set out in *Owens*.¹⁵⁸

What the authorities show is that, in a case such as this, the court has to evaluate what is proved to have happened (i) in the context of this marriage, (ii) looking at this wife and this husband, (iii) in the light of all the circumstances and (iv) having regard to the cumulative effect of all the respondent’s conduct. The court then has to ask itself the statutory question: given all this, has the respondent behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent?

A very wide range of conduct has been held to constitute behaviour in the past, including violent or drunken acts,¹⁵⁹ blameless involuntary behaviour resulting from manic

¹⁵⁶ There appeared to be no clear national guidance for legal advisers on matters of legal interpretation at the time of the fieldwork. The lead was set very clearly by the local judiciary through initial training, responses to specific questions and any auditing that might occur.

¹⁵⁷ MCA 1973, s1(2)(b)

¹⁵⁸ *Owens v Owens* [2017] EWCA Civ 182 [37] (Munby P).

¹⁵⁹ *Ash v Ash* [1972] 1 All ER 582.

depression,¹⁶⁰ cumulative acts of selfish or thoughtless behaviour¹⁶¹ and financial irresponsibility.¹⁶²

As 99% of petitions are now undefended, it is unclear where the threshold for behaviour currently lies. As the President noted, what he described as the ‘anodyne’ particulars in *Owens* were typical of many behaviour petitions and would have been likely to be unchallenged by the court had the husband not defended the proceedings.¹⁶³ In practice, therefore there are probably two thresholds: the threshold for undefended cases, as we explore below, and a higher threshold for the very rare fully defended cases, like *Owens*, that are adjudicated.

The shift away from physical violence

One of the goals of the Finding Fault study was to see how the content and strength of behaviour particulars might have changed over time by comparing our cases with those from an earlier court file study conducted for the Law Commission in the 1980s.¹⁶⁴ All statements of case for the Finding Fault court file study were transcribed verbatim. For those cases that relied on behaviour, these statements were then coded for different types of behaviour and also for strength and attribution of responsibility.¹⁶⁵ We were then able to compare our findings in respect of behaviour petitions issued in 2014/2015 with those of the Law Commission from the 1980s, on at least some variables.¹⁶⁶

The results are set out in Table 5.1. Starting, on the right-hand side, we can see that three-quarters of recent behaviour particulars are based on ‘interpersonal problems’, followed by 44% of petitions citing a range of non-domestic abuse acts of commission (i.e. financial problems, improper associations). The most striking difference between 2014/2015 and the 1980s is the significant drop in allegations of (physical) violence. In the 1980s, 64% of

¹⁶⁰ *Katz v Katz* [1972] 3 All ER 219.

¹⁶¹ *O’Neil v O’Neil* [1975] 3 All ER 289.

¹⁶² *Carter-Fea v Carter-Fea* [1987] Fam Law 131.

¹⁶³ *Owens v Owens* [2017] EWCA Civ 182 [93].

¹⁶⁴ The two samples differ in one respect. The Law Commission cases included a small number of cases where the respondent had expressed an intention to defend (21/477 cases, or 4.4% of the total). The Finding Fault main sample excluded cases where there was an intention to defend and instead we collected a separate sample of 100 cases where there was an intention to defend (which will be reported separately). As only 2% of cases nationally in 2015 included an intention to defend we believe that the differences between how the Law Commission and Finding Fault main samples are drawn make minimal difference to the analysis.

¹⁶⁵ See technical appendix for details of the methodology.

¹⁶⁶ The Law Commission report does not include a coding framework setting out how variables are defined. The variables that we are most confident that we have replicated reliably are marked with an asterisk in table 5.1. There are also some issues that were significant in our study, including false allegations and controlling behaviour that do not appear to feature in the Law Commission study. Thus, for example, we have assumed that the definition of ‘violence to the petitioner’ in the 1980s was restricted to physical violence and did not include the broader understanding of coercive control. Table 5.1 therefore shows the comparison between a narrow ‘physical violence’ to the petitioner, but we also include a further variable applicable to the Finding Fault data only that is based on the cross-governmental definition of domestic violence and abuse that includes “any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse ... including psychological, physical, sexual, financial, emotional”. The full definition is available at <https://www.gov.uk/guidance/domestic-violence-and-abuse> The researchers took an expansive view of what that would include. See technical appendix for further details.

behaviour petitions contained allegations of violence to the petitioner. In 2014/2015, it was 14.8%. There are similar declines in relation to what might be seen as the more serious behaviours of (physical) violence to children and family property and alcohol abuse.¹⁶⁷

Domestic abuse still constitutes a substantial group, with 42.2% of Finding Fault behaviour petitions alleging some form of abuse that would meet the cross-government definition of abuse, but the majority of those did not refer specifically to physical violence.

Table 5.1 Allegations in behaviour particulars, Law Commission and Finding Fault studies¹⁶⁸

Individual element	Law Comm n = c160 %	Finding Fault n = 135 %	Grouping (FF only)	% (FF only)
Interpersonal problems	-	74.8	Interpersonal difficulties	77.0%
Personality clashes	56.0	-		
No interest in home	48.0	-		
Unreasonable habits	42.0	-		
Sexual problems	20.0	18.5		
Financial problems*	38.0	20.0	Non-domestic abuse acts of commission	44.0%
Improper associations	21.0	26.7		
Serious breach of trust ¹⁶⁹	-	6.7		
Violence to petitioner*	64.0	14.8	Domestic abuse	42.2%
Violence to child of family*	21.0	2.2		
Violence to family property*	11.0	3.7		
Abusive language	30.0	-		
Cross-government definition of Domestic violence/abuse	n/a	42.2		
Mental health ¹⁷⁰	n/a	14.1	Mental health	14.1%
Alcohol abuse*	28.0	8.1	Any substance abuse	10.4%
Drug abuse	-	3.0		

Source: Law Commission and Finding Fault main court file review studies.

What this appears to show is a significant shift away from reliance upon acts of ‘cruelty’, towards a much greater reliance upon interpersonal difficulties. Assuming that there has been no significant change in the actual incidence of physical violence or alcohol abuse over three decades, then the inference can be drawn that the very different findings reflect different expectations between the 1980s and 2014/2015. In 2014/2015, it would appear that either the courts did not expect or require, or the parties and practitioners did not think the courts expected or required, a behaviour petition to contain allegations of physical violence

¹⁶⁷ Even if the 1980s definition included non-physical violence, which would appear unlikely, the drop from 64% to 42.2% is significant, not least given far greater public awareness of domestic abuse today.

¹⁶⁸ In both studies, each petition could raise more than one issue.

¹⁶⁹ Including ‘false’ allegations of abuse against the petitioner, non-disclosure of significant events such as a prior marriage or conviction.

¹⁷⁰ The respondent’s mental health impacting upon the petitioner or the respondent failing to support a petitioner with mental health problems. Does *not* include the mental health impact of the relationship breakdown itself.

and/or alcohol abuse. In the 1980s, it appears that they did, or at least in some courts. The Law Commission study notes that nearly all the petitions in Durham included allegations of violence, whilst Epsom particulars contained virtually none. The disparity is probably not a reflection of actual behaviour in Surrey or the North-East but, as the study authors concluded, “probably says much more about the expectations of petitioners, their solicitors and the courts”.¹⁷¹

The only specific allegation that appeared to increase over time is in relation to improper associations. It is quite possible that this at least partly explains the shift away from adultery petitions to behaviour since 1975 noted above.¹⁷² If there is a risk of the respondent not admitting adultery then a safer option is to file a behaviour petition citing an improper relationship.

The other difference is in relation to the need for corroborative evidence. In the 1980s certain courts did require corroborative evidence of violence, from family, friends or a professional. In 2015 no RDCs required evidence.¹⁷³

The continuing strength of particulars

Having established that the composition of particulars has changed over time, with proportionately fewer allegations of physical violence today than in the 1980s, most behaviour particulars are still fairly strong. They may be less strong than previously, assuming that physical violence can be taken to be the ‘strongest’, but most particulars in our study were by no means mild or entirely ‘anodyne’.

As part of the analysis we also rated each behaviour statement of case on two dimensions: strength and attribution of responsibility.¹⁷⁴ As Table 5.2 shows, behaviour petitions are heavily skewed towards strong petitions, whether based on strong criticism of interpersonal behaviour or domestic abuse and where the blame is almost entirely attributed to the respondent. In total, 85.9% of petitions were coded as strong (interpersonal or abuse) and with the respondent held entirely, or almost entirely, responsible.

¹⁷¹ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 46.

¹⁷² Adultery decreased from 30% to 12% of all petitions nationally between 1975 and 2015 while behaviour increased from 26% to 46% in the same period.

¹⁷³ In one case a one paragraph letter from a GP confirming that there had been domestic violence was appended to the file. This is likely to have been generating for legal aid purposes and simply added as it was available.

¹⁷⁴ See technical appendix for methodology and caveats. We divided ‘strong’ particulars between those that were restricted only to interpersonal issues and those including allegations of domestic abuse. We did not attempt to further divide particulars on strength, e.g. comparing an alleged affair with financial irresponsibility or emotional abuse with alcohol abuse, given the subjectivity of the issues. The ‘strong’ categories therefore include allegations that vary widely in ‘severity’.

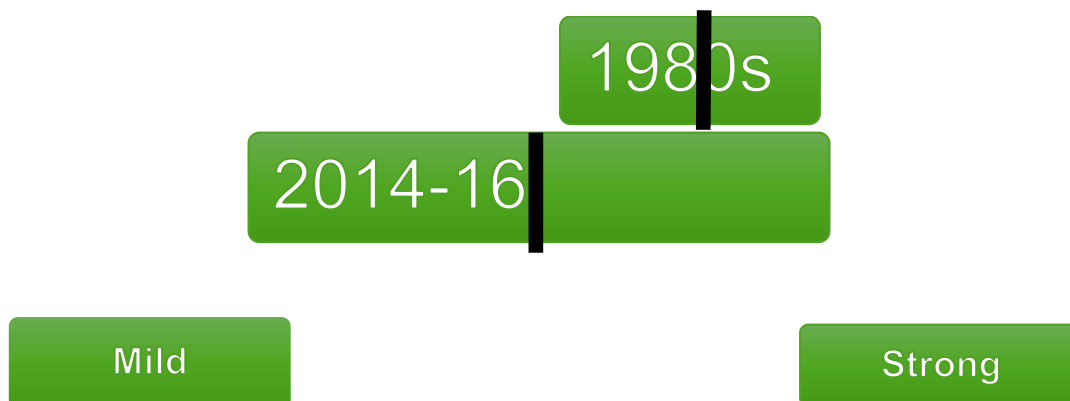
Table 5.2: Strength and direction of responsibility ratings of particulars

	Mild	Mild-mid	Strong (inter- personal)	Strong (abuse)	Total
Mutual responsibility	6 4.4%	1 0.7%	-	1 0.7%	8 5.9%
More respondent responsibility	1 0.7%	2 1.5%	3 2.2%	-	6 4.4%
Respondent responsible	-	5 3.7%	52 38.5%	64 47.4%	121 89.6%
Total	7 5.2%	8 5.9%	55 40.7%	65 48.1%	135 100.0%

Source: Finding Fault main sample court file study.

In relation to the nature of behaviour petitions the picture is therefore somewhat complex. Figure 5.1 attempts to capture the changing composition of behaviour petitions and in the behaviour threshold over time. Overall, our comparative analysis indicates that the behaviour petitions in the 1980s fell within a narrower band than in 2014/2015 and that the overall ‘average’ strength (denoted by the black line on figure 5.1) was higher than today. The absence of any refusals of decree nisi for particulars of behaviour below the threshold in the 1980s (see section 4.3 above) suggests that the threshold in the 1980s was higher than in 2014/2015. In 2014/2015 the range of cases appears wider, with petitions spanning the very weak to the very strong, but where the ‘average’ was not as strong as in the 1980s, but still considerably above what was required to cross the very low threshold. We explore the reasons for and consequences of this overshooting of the threshold in Section 6.6.

Figure 5.1: Figurative illustration of the behaviour particulars and threshold: 1980s and 2014-5 (not to scale)



Finding the floor: where is the behaviour threshold?

The 'average' behaviour petition in 2014-2015¹⁷⁵ was probably weaker than in the 1980s but where did the lower threshold lie? Analysis of the refusals of decree nisi, as well as those cases in which decree nisi was granted, suggests that the threshold was set very low, but it was discernible and it did appear to be consistent across all four RDCs.

It is very clear what would be below threshold. Five out of 126 behaviour applications from the Finding Fault court file study were refused on the basis of threshold.¹⁷⁶ The same formula adopted in the petition was evident in each of the five cases: a description of (a) having drifted apart rather than acts of commission or omission, coupled with (b) attribution of equal responsibility for the situation to both parties. Not surprisingly, all five had been coded as mutual and mild in the strength coding exercise. Case M193 is a typical example of the drifted apart and mutual responsibility formulation:¹⁷⁷

Separated on [day month] 2015. The separation is as a result of a final try by both parties which started on [date month] 2013. This was after a year of separation as well as several smaller separations from [month] 2012 onwards. The respondent has lived at her current address since the date of the separation.

The petition in M130 is a further example of the drifting apart plus mutual responsibility petition, but one that was clearly intended as a behaviour petition, whilst attempting to be as amicable as possible:

- *The parties have grown apart, they no longer socialise together and it has become apparent that they no longer have any common interests. They have different attitudes to work and life goals.*
- *There is no mutual love or affection anymore between the parties and there has not been any intimacy for a while.*
- *The parties finally separated [3 months previously] and they moved out of the former matrimonial home.*
- *For the reasons stated above, the petitioner believes that the marriage has broken down irretrievably and that there is no prospect of reconciliation.*

The application for decree nisi in M130 was rejected at the first attempt. The particulars were subsequently amended to add two sentences at the end of the second bullet point: "because the respondent became emotionally distant from the petitioner and refused to engage with

¹⁷⁵ Applications for decree nisi in the main sample date from the last quarter of 2014 to the last quarter of 2016.

¹⁷⁶ Overall, there were ten refusals in respect of behaviour petitions on substantive grounds. Besides the five 'threshold' cases, three applications for decree nisi were refused where the parties were still co-resident and the refusal was based on whether irretrievable breakdown was established, rather than the threshold. In one case no date had been provided for the last behaviour relied upon. In the fifth case the (represented) petitioner alleged an improper relationship but with minimal detail.

¹⁷⁷ In this case the selection of the behaviour Fact may have been an error by the unrepresented petitioner. The petition was amended successfully to two years' separation with consent. However, the initial particulars provide a good example of the formula.

her. The respondent also refused to share a bedroom with the petitioner which greatly saddened her”.¹⁷⁸ The addition to the particulars of a ‘behaviour’ – the refusal to engage and share a bedroom – and one that could be attributed to the respondent alone, was enough to get over the threshold on the second attempt, an indication of how low the threshold was set.

There were no examples in the file sample of the drifting apart/no behaviour plus mutual responsibility formulation that did pass scrutiny, indicating that the four RDCs had a clear and consistent understanding of what was *below* the threshold. Conversely, practice does also seem consistent on what was (just) enough. Besides the amended petition in M130, there were other examples of particulars where almost all content was about separation, but which contained one behaviour that could be attributed to the respondent. The petition in L039 contained seven almost entirely non-behaviour and mutualised points about separate lives, but with one bullet point that contained a behaviour – a refusal to engage with the petitioner for three weeks – that was attributed solely to the respondent and which presumably provided the material to get over the threshold.¹⁷⁹

Alternatively, behaviour particulars could get over the threshold even though entirely mutualised if there was some example of behaviour. L026 was unusual in having a combination of strong behaviour but with both parties equally to blame:¹⁸⁰

“Verbally abusive to each other following serious break down of the relationship. This was on an ongoing basis from [18 months ago]. Verbal abuse to each other caused serious distress to both parties. Little or no communication due to constant and serious disagreements. Have lived separately [for 16 months]”.

In sum, only 19 behaviour particulars were coded as not full strength and/or not attributing sole blame to the respondent. The petitioner applied for decree nisi in 18 of these. Five of the six mutual and mild particulars were refused at first attempt, whilst in L039, the ‘strongest’ mutual and mild case described above the application for decree nisi was granted. In the remaining twelve cases involving particulars that were not full strength, decree nisi was granted at the first attempt. The upshot is that in 2014-2016 the behaviour threshold was extremely low, but there did appear to be a clear cut-off point, i.e. no behaviour of any kind *and* nobody to blame would very likely mean a refusal. Anything above that, even citing the mildest action or inaction that could be attributable to the respondent, would very likely be accepted. Our analysis indicates that there were relatively few cases so close to the threshold, but there were some and in those cases decree nisi was granted at the first attempt.

¹⁷⁸ Notwithstanding this, overall the amended particulars were still ‘mutual and mild’.

¹⁷⁹ The relevant bullet point stated “the parties went on holiday ... and upon their return the respondent would not communicate with the petitioner at all for three weeks. This put a substantial strain on the relationship and led to both parties deciding to end the marriage”. The other six bullet points described, at length, the physical and emotional separation of the couple. Other than the communication bullet point there was no attribution of responsibility to either party. The first two bullet points set out the parties’ lack of a physical relationship and separate lives. Both points concluded with the same phrase to describe the ‘impact’ on the petitioner: “has made the petitioner feel distant and detached from the respondent”. Thus, the formulation amounted to separation (the ‘behaviour’) with an impact (‘feeling separated’). The petition was coded as mutual and mild.

¹⁸⁰ This was the sole example of a mutual attribution + strong interpersonal or strong abuse petition. The parties were unrepresented.

We cannot be sure, but we are doubtful, that the threshold was set so low in the 1980s. The absence of *any* refusals in the Law Commission study for behaviour below the threshold would suggest that particulars then were consistently pitched significantly higher.

The analysis of where the threshold was pitched in 2014/2015 based on the case file outcomes of applications for decree nisi matches what legal advisers and judges told us in interview and what we also observed in 2016/2017. Whilst there may be some variation in exactly what might or might not scrape through, in practice there was a very strong consensus. What was agreed universally was that the threshold was low and that some behaviour was required that could be attributed to the respondent, but that such behaviour could be, viewed objectively, very slight or trivial. Most legal advisers and judges who took part in our observations and interviews also acknowledged explicitly that the relevant legal test was a subjective one based on the experience of this particular petitioner in this particular marriage. As with the position in relation to rebuttals (section 4.5 above) the legal advisers and Deputy District Judges were very clear that they were following the direction set by local judges:

The district judges are asking for us not to look for much. As long as you've got something there to say it's unreasonable, even though it's not unreasonable to us, but it's unreasonable to the petitioner. Just let it go. Just simply like, he doesn't pick up socks from – put in the linen basket. Just something for us to go on. (Legal adviser #5)

... it came down to the woman [undertaking a seemingly trivial action] ... and that was just preposterous, but that's what it came down to. And we've been to the judges in the past to say it seems such a ... and the answer to that is 'Well have they got back together?' 'No' 'Have they changed their minds?' 'No' 'Let it go through'. So, we've let it go through. (Legal adviser #19)

Where possible, in interviews we also asked legal advisers and judges to comment on a short vignette involving a hypothetical petition that was designed to be deliberately ambiguous or borderline:

“The respondent and I have grown apart. We have both stopped communicating with each other. We both have separate hobbies and separate social lives. We do not show each other affection and we have both said that we want to get on with our lives and are forming new relationships with other partners. There are times when we have both shouted at each other when arguing. Both of us are unhappy in the marriage and think the marriage is over.”

All interviewees recognised that the vignette was a borderline case. Some stated that they would not grant an application for decree nisi as “there's no apportion of blame to one party” or they hedged by suggesting that they would refer it to a judge. Others would be willing to grant the application, pointing to shouting and new partners and considering that notwithstanding the mutuality aspect, it might be enough.

What emerges is that although there may be some uncertainty in individual cases, on the whole the threshold for behaviour is set very low:

I know the bar's low, but ... and I can't remember the exact words, but it was along the lines of 'We don't get on very well, we argue a fair bit' – and that was about it. So to me I thought I know it's a low bar, but as I said, a lot of people could say that that's married life. ... and I took it [to] the judge who basically said the other side's consenting to the divorce, they obviously both want the divorce they've lived apart for some time, just let it go through. And I was trying to imagine how much lower you could get, and I think that's probably sitting on the bar. But it showed me that really you know it's not very difficult at all to prove unreasonable behaviour... (Legal adviser #18)

Behaviour post-Owens

The Court of Appeal's decision in *Owens* was handed down during the latter stages of fieldwork, giving us an opportunity to ask legal advisers and judges about its impact. Despite concerns from practitioners, interviewees said they had detected no impact on the strength of behaviour petitions that were coming through.¹⁸¹

Interviewees in each of the four RDCs were also consistent in saying that the decision had not had any impact on their own practice or expectations, some having checked with local judges. The rationale was that *Owens* was a defended case whilst the legal advisers were dealing only with undefended cases, hence the 'business as usual' approach:

Q: I was just wondering whether that [Owens] had generated any discussion?

LA: Well, we're undefended cases aren't we, so...

Q: Yeah. That hasn't had any knock-on effect?

LA: No. (Legal Adviser #22)

It is not entirely clear that it can be correct in law that there are two different thresholds for defended and undefended cases. However, that appears to be the case in practice.¹⁸² Legal advisers were clear that most behaviour petitions handled by the RDCs would not pass muster on the threshold that had been applied by the trial judge in *Owens*:

I did ask [judges] if there was any guidance on [Owens]. And no, just continue as we are. That was a defended case, the ones we're doing, the majority are not, so ... I thought it might [have an impact], but it hasn't. But if it was going to it would be catastrophic, cos half of ... well 99.9% wouldn't get divorced would they if it's unreasonable behaviour? (Legal adviser #19)

¹⁸¹ Although it has to be said that they would be unlikely to pick up subtle shifts in practice and the interviews were conducted only a few months after the Court of Appeal's decision.

¹⁸² Although there are so few recent reported cases that it is very difficult to be sure.

Looked at from another angle, it is also clear, as the President noted,¹⁸³ that the particulars in *Owens* would have gone unchallenged if the husband had not taken the decision to defend them. On our coding scheme, the allegations in *Owens* of mood swings and a critical and undermining manner¹⁸⁴ would place the petition towards the lower end, but by no means the lowest, of the strong interpersonal plus respondent responsibility category. Indeed, some legal advisers would have probably only read the first two or three bullet points before deciding that they had enough behaviour to grant the decree. If undefended, *Owens* would appear to have been in no danger of not meeting the threshold.

5.3 Adultery

The statutory definition of adultery incorporates two elements: that the respondent has committed adultery and that the petitioner finds it intolerable to live with the respondent.¹⁸⁵ However, the intolerability does not have to be related to, or be triggered by, the adultery.¹⁸⁶ Only sexual intercourse with a member of the opposite sex can count as adultery, whether the marriage is same or opposite sex.¹⁸⁷ Adultery is not available as a Fact for civil partnership dissolution.

As with behaviour, the minimum requirements to make out adultery appear to have reduced over the last two or three decades. The absolutely required elements are ticks in the adultery and intolerability boxes on the petition, the date the petitioner became aware of the adultery, a brief statement of case, some form of admission from the respondent and, if co-resident for more than six months after disclosure, some description of separate living arrangements.

In our court file study three out of 31 applications for decree nisi in adultery cases were refused on substantive grounds; one each for: lacking details of co-residence arrangements, any detail of the adultery and a lack of admission. In the observation study, four out of 34 were refused: two for lack of an admission and two for continuing co-residence for more than six months after disclosure.

Where there have been changes since the 1980s are in relation to the naming of co-respondents, what is required for an admission and, most probably, the details required in the statement of case. In terms of statutory compliance, the courts are not strictly policing the requirement that adultery is opposite sex only.

Co-respondents

In terms of naming co-respondents, practice in the 1980s was varied, but in the great majority of cases the co-respondent was named.¹⁸⁸ Since then, there have been changes to the Family Procedure Rules that discourage the naming of co-respondents to help reduce conflict.¹⁸⁹ Practice Direction 7A 2.1 states that co-respondents should not be named unless

¹⁸³ *Owens v Owens* [2017] EWCA Civ 182 [93]

¹⁸⁴ *Owens v Owens* [2017] EWCA Civ 182 [4]

¹⁸⁵ MCA 1973, s 1(2)(a).

¹⁸⁶ *Cleary v Cleary* [1974] 1 All ER 498.

¹⁸⁷ MCA 1973 s 1(6); penile penetration of the vagina is required: *Dennis v Dennis (Spillet cited)* [1955] P 153.

¹⁸⁸ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, paras 40-42.

¹⁸⁹ It is also likely to reduce the length, complexity and cost of proceedings.

the case is likely to be defended.¹⁹⁰ In our study, only two of 33 adultery petitions in the court file study had a co-respondent, representing a very significant shift from the 1980s.¹⁹¹ The other 31 cases referred to an ‘unknown’ or ‘unnamed’ person or man/woman.

Admissions

An admission from the respondent remains a crucial requirement, but there have been changes in the form it takes. In the 1980s about half of adultery cases included a formal confession statement by the respondent (and sometimes co-respondent). Otherwise the court relied upon an admission on the acknowledgement.¹⁹² In our study, confession statements had been virtually eradicated. Only three were submitted, all in cases where the petitioner was represented. Otherwise, the court relied upon a single ‘yes’ in response to the question ‘Do you admit the adultery alleged in the petition?’ on the acknowledgement of Service.¹⁹³ Even there, the position appears to be changing. Whilst lack of an admission would ordinarily result in refusal of decree nisi, in one RDC the legal advisers had been given guidance that they could rely solely on a ‘reported admission’ on the petitioner’s statement in support.¹⁹⁴ We did observe one case in that RDC where decree nisi was granted on the basis that the petitioner had stated on the D80a that the respondent had confessed the adultery to them, even though the admission box on the acknowledgement filed by the respondent had been left blank.

Opposite sex requirement

Parliament made it explicit in the Civil Partnership Act 2004 and the amendments made to the MCA 1973 by the Marriage (Same Sex Couples) Act 2013¹⁹⁵ that sexual activity between partner of the same sex could not constitute adultery (though it may, as in an opposite sex marriage, readily be relied on as behaviour). Civil partnerships were not covered by our court file review, and divorces in respect of same sex marriages are currently few and far between, but we saw some evidence of this being enforced. In interview, legal adviser #14 noted that their RDC had had instances of applications in civil partnership cases based on adultery that had to be refused.

However, a common phrasing in the statement of case, of adultery with a “person unknown” or “unnamed person” meant that it was not always possible to identify the gender of the third person and thus to establish whether adultery was same or opposite sex. In three of the four RDCs, the policy appeared to be that it was not necessary to seek clarification. The formal advice from the local judiciary in those RDCs was that it was “understood” that conduct was opposite sex, unless there was direct evidence to the contrary. The stated rationale was that

¹⁹⁰ MCA 1973 s 49(1) does stipulate that co-respondents should normally be party to the suit, however s 49(2) sets out that rules of court may exclude the application of s 49(1) generally, or in specific types of case.

¹⁹¹ One case involved litigants in person from another jurisdiction who may have misunderstood the requirements. The other was a high conflict case where both petitioner and respondent were represented.

¹⁹² Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, paras 37-8.

¹⁹³ The acknowledgement for adultery and two years’ separation with consent cases must be signed by the respondent, rather than a legal representative. It does not, however, include a statement of Truth.

¹⁹⁴ On the basis that the D80a asks the petitioner to confirm that the contents of the petition are true and includes a signed statement of truth by the petitioner.

¹⁹⁵ The 2013 Act inserted new subsection (6) into Section 1 of the MCA 1973: “Only conduct between the respondent and a person of the opposite sex may constitute adultery for the purposes of this section”.

the petition form does state that “only conduct between the respondent and a person of the opposite sex may constitute adultery for this purpose [i.e. to rely on adultery]” and therefore that the petitioner would be aware of the legal requirement when they tick the adultery box. Notwithstanding the strength of that argument,¹⁹⁶ there was no indication of the gender of the third party in five of the 31 adultery applications for decree nisi. All five passed scrutiny.

Specificity of statement of case

The guidance notes to the divorce petition form state that the petitioner should state the date(s) and place(s) the adultery took place. In practice, the statements of case in adultery petitions were short, a median 50 words and generally included very little detail.¹⁹⁷ The shortest statement was 10 words long: “Mr [Name Name] committed adultery which he has confessed to”.¹⁹⁸ The statement in M115 only adds the month of the adultery to what was otherwise a paraphrase of the statute:

*The respondent has committed adultery with a man whose name and identity are unknown to the petitioner in [month] 2014. The adultery is continuing. The petitioner finds it intolerable to live with the respondent by virtue of the said adultery.*¹⁹⁹

A fairly full statement was given in L040, where the date, place and gender of the third party involved in the adultery were disclosed, although the only detail on ‘location’ was the name of a European country with a large population and land mass:

“The Respondent has had sexual intercourse with a female whose name and identity are unknown to the Petitioner in or around [country]. The Respondent admitted the adultery on [date]. The Petitioner and Respondent separated on [3 months later]. The Petitioner finds it intolerable to live with the Respondent.”

In all three of the cases above, decree nisi was granted at first attempt, despite the lack of detail. We do not have specific statements from the 1980s to compare with, but we think it is unlikely that such statements would have been sufficient then.

No petitioner elaborated on why it was intolerable to live with the respondent. This was the same as in the 1980s, presumably because the intolerability does not have to be related to the adultery.²⁰⁰

¹⁹⁶ See Section 6.3 and 6.4 below for the difficulties unrepresented parties had in navigating the forms and understanding the substantive law.

¹⁹⁷ The D80A statement in support of application for decree nisi does require the date the petitioner became aware of the adultery.

¹⁹⁸ Main court file case M031.

¹⁹⁹ Strictly speaking, it goes further. Intolerability does not have to be linked to the adultery – *Cleary v Cleary* [1974] 1 All ER 498.

²⁰⁰ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 43.

5.4 Separation Facts

For the two and five years' separation Facts, the 'separation' entails both a physical separation and a 'mental' element – a recognition that the marriage is at an end. The mental element, does not, however, have to be communicated to the respondent.²⁰¹

In theory, there should be no scope for reduction in the requirements of the two separation Facts, given that the only elements are the mental and physical separation dates, plus the respondent's consent to the divorce in the case of two years' separation.²⁰² We found that consent remains an essential element of the Fact in practice.²⁰³ There is, however, some rolling back on the legal requirements in relation to the 'mental' separation, at least in some areas. There were three two years' separation cases from the main court file study that had mental separation dates that were less than a year before the presentation of the petition. All three cases were from the same RDC and none were challenged. This could have been an oversight. However, we also observed a separation case at the same RDC where the legal adviser only counted back in respect of the separation date in the petition and did not check the physical and mental separation dates on the D80d statement in support. When asked about the dates of mental separation the legal adviser noted that it was not something that they routinely checked as "can you pinpoint when the relationship broke down?". The non-statutory basis of the mental separation date might be what accounts for the apparent erosion of its importance, in some areas at least.²⁰⁴

5.5 Desertion

Desertion requires a two-year physical separation, an intention to desert, lack of consent from the petitioner and that the desertion is without just cause.²⁰⁵ In practice, the desertion Fact has been little used for many years, as either behaviour or two years' separation with consent would be easier to establish.

In the Law Commission study, one petition was refused because the petitioner stated that they had agreed to the separation.²⁰⁶ The problem of understanding of the Fact continues today. In our observation sample, applications for decree nisi were refused in all four of the desertion cases on the basis that the petitioner said they had agreed to the separation. There were three desertion cases in the court file sample. In one, decree nisi was granted

²⁰¹ *Santos v Santos* [1972] 2 All ER 246. Forms D80d and D80e 'Application in Support of Divorce' require the petitioner in two- and five-year cases to record the dates when the parties separated and when the petitioner decided that the marriage was at an end.

²⁰² The Law Commission study reported that separation cases progressed faster and had fewer issues than the other Facts.

²⁰³ There were one or two cases where the respondent had been sent the wrong version of the acknowledgement of service form and so was not asked whether they consented. The legal adviser did not pick up the absence of consent and decree nisi was pronounced. These appeared to be errors rather than changes in practice.

²⁰⁴ A judge from another RDC commented "there is no statutory basis for the question about when you concluded the marriage was at an end. That's nothing to do with the grounds for divorce. The ground for divorce is how long you've been separated, so I don't really care what they say about that".

²⁰⁵ MCA 1973, s 1(2)(c) and equivalent CPA 2004, s 44(5)(d); *Lang v Lang* [1955] 1 AC 402, *Hopes v Hopes* [1949] P 227.

²⁰⁶ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 32.

correctly. In the other two cases, the petitioner said they had agreed to the desertion. Decree nisi was refused in one of these cases, in the other it was granted incorrectly, probably due to an oversight.

Unlike all four other Facts, desertion is the only Fact that does not appear to have been hollowed out over time, but, as noted, the numbers involved are very small.

5.6 Irretrievable breakdown and co-residence

The sole ground for divorce or civil partnership dissolution is irretrievable breakdown as evidenced by one of five Facts. There is a presumption that the court will award the decree if the Fact is made out, unless the court is *not* satisfied that the marriage has broken down irretrievably.²⁰⁷ In practice, the court's attention, and that of petitioners, is devoted solely to the Fact relied upon, so long as the petitioner ticks a box on the petition confirming that the marriage has broken down irretrievably. As in the 1980s, the only exception to that in undefended cases appears to be if the parties are, or were recently, co-resident but had provided no details of separate living arrangements. For the separation Facts, adultery cases where more than six months had passed since the petitioner became aware of it or for behaviour where the last incident relied on was more than six months ago, the MCA states that 'living apart' requires physical separation, i.e. separate households.²⁰⁸ If the parties are still living under the same roof, case law dating back to the early 1970s requires that the parties establish two distinctive households under the same roof with separate sleeping, cooking, washing facilities etc.²⁰⁹

The rules on separate households are still enforced. However, the level of detail required appears to be fairly minimal. One judge noted that practice had previously been to insist on details of separate arrangements for sleeping, cooking, financial arrangements and childcare. However, that had shifted so that simply stating that the parties were living together as lodgers would be sufficient. Indeed, in our study the most minimal descriptions were accepted. In the court file review, L173, initially refused as a behaviour petition, was amended successfully to two years' separation. The revised particulars simply asserted that the parties had separate living arrangements without any further detail:

During this time I lived completely separately from the respondent, separate rooms, living arrangements etc. We only continued to live at same property for financial reasons, until I was able to secure rented accommodation.

Little further detail was provided in the behaviour case of L116:

The accommodation is shared at the present time, as the parties cannot afford to live separately. In respect of this matter the house is large enough that the parties do not share a bedroom. The petitioner does not perform any wifely duties for the respondent, the parties are civil for the sake of the children but are in essence 2 lodgers living under the same roof.

²⁰⁷ MCA 1973, s 1(4)

²⁰⁸ MCA 1973, s 2(6) and CPA 2004, s 45(8).

²⁰⁹ *Mouncer v Mouncer* [1972] 1 All ER 290. See Section 3.6 above.

In this respect, L116 bears a strong resemblance to *Mouncer v Mouncer* in 1972 where the parties slept separately, but shared the cleaning and sometimes had shared 'family' meals for the sake of their children. The only difference from *Mouncer* is that the L116 statement in 2015 does not go into any detail and it was accepted by the court.

It is worth noting that L116 is one of the few co-resident cases that does mention the children, albeit briefly. It is possible that petitioners thought that the reference to "domestic arrangements" on the D80s form did not include children. An alternative explanation might be that the petitioner found describing the reality of separate lives or 'two camps' under the same roof incompatible with their sense of being a 'good parent' and so found it easier to omit reference to the children who were listed on the petition. We do not have any definitive evidence that that is the explanation. But it was striking how invisible the children were in the co-residence cases and certainly L116 was very conscious of child welfare considerations.

5.7 Understanding the hollowing out of the Facts – the reorientation of the family justice system

Based on comparisons with the Law Commission study from the 1980s, there does appear to have been a hollowing out or chipping away over the last three decades in what is needed to make out four of the five Facts. This is particularly evident for behaviour and adultery, but even holds for the two separation Facts, at least in some areas. The position on desertion is less clear but desertion is so infrequently relied upon that it has become almost an irrelevance.

The logistical constraints on the system, explored in section 4.7 above, may explain part of the reason for the relaxation of requirements. A strict interpretation takes more time, effort and information to police and, especially, to correct that is simply unrealistic given the constraints. However, what may be as significant is what appears to be a collective philosophical shift in the orientation of the family justice system to divorce, led by the judiciary.²¹⁰ Rather than approaching the scrutiny role as an inquest where petitioners have to prove their case, instead the current approach conceptualises the court's role as a largely administrative process where the court tries to help people to get what they have asked for, provided that they have filled out the paperwork correctly. This shift from inquisitor to enabler and problem-solver is summed up by one judge:

I think when we were all young and keen and many years ago, we were stickier about things in a way that we've sort of evolved over a period.... I think generally if you can get a petition to work, and it's not got what are obvious problems that are actually going to make it impossible, then make it work. That's the point.

The role of the court therefore is perceived as being to help people get their divorce, despite the difficulties and complexities of the substantive law and procedure and despite the limited

²¹⁰ There are indications from the variation in practice reported in the Law Commission study that the shift to a pragmatist position had already started in the 1980s, if not earlier.

legal literacy of some of the parties. This was made very clear to the legal advisers by the judges. Their role was one of enabling, if at all possible:

One piece of advice that one of the judges gave us is, you've got to remember these are the two people who want to separate. They want to divorce. And that is the ultimate thing. So, sometimes you can allow something like that to get in the way, just because somebody, two people are not represented, they're filling in the forms as best they can. (Legal adviser #5)

Sometimes you'll get a really long [behaviour] one and it's 'we we we we we' ... and I'm sitting there thinking 'Find me something that I can hang on the respondent'. (Legal adviser #8)

This positive and pragmatic orientation when dealing with applications for divorce – looking to make it happen, rather than looking for a reason to refuse – is founded on a recognition and acceptance of the reality of relationship breakdown. It is also embedded within broader shifts within the family justice system to include an emphasis on problem-solving, cooperative post-divorce co-parenting, and autonomy – supporting the decisions of the parties – rather than a focus on punishment, blame and paternalism.

Linked to this is a sense that trying to attribute and apportion blame is a fruitless and inherently non-justiciable task. It is not a proportionate use of the court's limited resources and there is a reluctance to get dragged into refereeing arguments between the parties. In another (rare) defended case reaching the Court of Appeal, Black LJ (as she then was) urged the parties in a contested behaviour case to drop their cross-petitions and proceed instead on the two-year separation Fact to avoid engaging in "hurtful, time consuming and distracting litigation over how they behaved during the marriage".²¹¹ That reluctance is reflected in the approach of the legal advisers, particularly in relation to behaviour allegations and cross-allegations:

If it's a very lengthy document I'll probably find enough to move on and move on. I'm not interested in reading the whole dirty washing of parties. If there's sufficient ... I move on. (Legal adviser #19)

If I know they're consenting I'm not really that interested in what they say.... You know tit for tat or what have you, I say this, you say that ... well yeah fine, you know. (Legal adviser #20)

Underpinning this, and what may give legitimacy to the focus on accepting the petitioner's case as the starting point, is the idea that if (at least) one party has made the decision that the marriage has broken down then there is nothing that the court can do to save it. This position has long roots. In 1971, Lord Simon of Glaisdale noted the futility of the court trying to persuade one party that the marriage had a future if one party had decided that it had not:

²¹¹ *Lindner v Rawlins* [2015] EWCA Civ 61, [31]

“If even one of the parties adamantly refuses to consider living with the other again, the court is in no position to gainsay him or her. The court cannot say, ‘I have seen your wife in the witness-box. She wants your marriage to continue. She seems a most charming and blameless person. I cannot believe that the marriage has really broken down’. The husband has only to reply, ‘I’m very sorry; it’s not what you think about her that matters, it’s what I think. I am not prepared to live with her any more’.”²¹²

That belief continues to the present day. In *Owens*, Lady Justice Hallett observed that the marriage was over despite the husband’s denial, but within the constraints of the current law, could only urge him to reconsider to allow the divorce.²¹³

5.8 Conclusion

There has been a significant diminution, or chipping away, of what is required to make out a Fact since the 1980s, with the exception of the largely irrelevant desertion Fact. This is particularly evident for the behaviour Fact where the threshold is now extremely low and even the most minimal allegations will get through, providing there is some element of behaviour that can be attributed to the respondent. That understanding is not widely shared, however, with the consequence that many behaviour petitions are stronger than they need to be. We explore the consequences of that below.

The reduction in expectations of what is required appears to reflect a collective shift in attitudes of the judiciary and family justice system. That shift is from an inquest where petitioners have to prove their case, to a pragmatic approach that conceptualises the process as an administrative one, with the court as enabler to help people secure their divorce so long as they can navigate the paperwork. That is rather a long way from the original intentions of legislators and probably what the public understand to be the case.

²¹² Lord Simon of Glaisdale, President of the Probate, Divorce and Admiralty Division, Riddell Lecture 1971.

²¹³ *Owens v Owens* [2017] EWCA Civ 182 [102]

PART C. CONSEQUENCES

6. The Great Pretender: is the law intelligible, clear and predictable?

First, the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.

*Lord Bingham*²¹⁴

6.1. Introduction

In this section, we explore whether the current divorce law and procedure meets Lord Bingham's first principle of the rule of law, that the law must be intelligible, clear and predictable. In the context of divorce law, the principle has more than usual importance, since that law – whatever its precise content – deals with an important question of legal status: in short, people need to know where they stand. But further than that, a divorce law – fault-based or otherwise – that requires that substantive reasons be given before a divorce will be granted, might be supposed to be intended thereby to prevent precipitate separations and so to protect marriage. If the law is to have that effect, it needs to be clear and accessible so that it can communicate the intended messages, particularly to the many parties, especially respondents, who will not have received the benefit of legal advice, and the public at large.

One promising development in terms of public understanding of the law is the current move towards digitisation of the divorce process. This project, at its heart, is designed to ensure that the complex forms and archaic language that are used currently are replaced by more user-friendly online forms.²¹⁵ As we see below, digitisation, if done well, ought to help greatly with the significant problems that the parties have in navigating the current procedures.

However, what digitisation will not do is overhaul the complexity of the substantive law. In this section, we show that the substantive law – the ground for divorce and its proof via one of the five Facts, as interpreted by case law and as played out in the context of the paper-based procedure for undefended divorces – is not well understood by a diverse population commonly with limited access to legal advice. This misunderstanding has real consequences, which may include the inability to secure a divorce. The lack of understanding also undermines arguments that fault is a protector of marriage – if the substantive law is not clear and understandable then it is difficult to see how fault can perform that role effectively.

²¹⁴ Lord Bingham, 'Rule of Law' (2007) 66 C.L.J. 67, 69-70.

²¹⁵ For an insight into the customer-centred rationale and approach of the project see <https://insidehmcts.blog.gov.uk/2017/04/11/working-with-stakeholders-to-develop-an-online-divorce-service/>

As is clear from previous sections, any consideration of the intelligibility, clarity and predictability of the law has to address not just the *appearance* of the substantive law in the statute book, but also how that law has been interpreted by case law and operates in practice. In sections 6.5 and 6.6 we set out two major issues in this respect. In section 6.5 we note that the gap between how behaviour is perceived and how it operates in practice means that those who do not have access to that insider information – litigants in person without legal advice – are less likely to be able to avail themselves of the real ‘quickie’ divorce. The second problem is that 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 following the Court of Appeal’s decision in *Owens* in early 2017.

6.2 Access to legal representation and advice

Parties’ access to legal advice was very variable in this study. In the Finding Fault main court file sample, just over half of petitioners were represented or getting some form of legal advice. That varied significantly from 65% in one area to only 25% in another. Respondents were much less likely to be represented or legally advised than petitioners, with only 24% represented or receiving advice. Taking petitioner and respondent together, both parties were represented (or receiving legal advice) in 23% of cases, only the petitioner was represented in 32% of cases and neither party was represented or getting legal advice in 44% of cases.²¹⁶

The qualitative interviews with the parties in the journey study indicated that for most, the main reason for not seeking legal advice was affordability, particularly in the light of the high level of the court fee for filing the divorce petition.²¹⁷ Whilst most, if not all, of the interviewees, would have liked legal advice, for some it was just prohibitively expensive. Some interviewees would try to save money by doing the divorce themselves and saving what money they were able to spend on legal bills, for help with sorting out child arrangements and/or finances. Others tried to get as much free advice as possible, taking advantage of multiple 30 minute free sessions provided by lawyers or trying to access Citizens Advice Bureau services.

For some in the qualitative interview sample, the sole sources of information and advice were online sources, whether government or others. There were some criticisms of the government sites for lacking detailed and accessible information. Interviewee SP02, for example, had found the main gov.uk site of limited help to her as a non-lawyer:

²¹⁶ These figures exclude 41 cases (13.7%) in which whether the respondent had received legal advice and/or was represented could not be ascertained. In most instances that was due to an acknowledgment of service (the key source of such information) not being filed.

²¹⁷ This was £410 at the start of fieldwork but was raised to £550 in March 2016. There is a help with fees scheme though restricted largely to those dependent upon means-tested benefits. See <https://www.gov.uk/get-help-with-court-fees>.

I think I expected [gov.uk] to be a bit on layman's terms rather than it's all professional. You know if you don't speak solicitor language you are a bit stuck. I think it would have been more helpful to have something a bit more simplified with examples. Which it didn't have.

Those who had used unofficial sites had concerns about whether the information could be trusted. Interviewee WK18, for example, was worried about relying too heavily on non-government sites wondering: "is this a credible source"?²¹⁸

6.3 Problems with language and procedure

The current project to digitise the process for applying for a divorce is founded on a recognition that the current procedure and forms are difficult for lay people to navigate. Previous data from HMCTS has suggested that up to 40% of petitions are rejected on technical grounds.²¹⁹ In our court file study we found that 14.4% of petitions were refused before issue due to a range of problems, including missing or incomplete information.

The forms in use at the time of fieldwork were widely criticised by our interviewees in the qualitative journey study, some of whom had had petitions returned to them for technical errors.²²⁰ Criticisms included the number of different stages, the inaccessibility of the language and the lack of detailed guidance. Interviewee WK18, for example, drew an unfavourable comparison between the step by step guidance accompanying the passport application process and the information on gov.uk about applying for a divorce. SP08 was a senior professional in the education sector but found the language of the forms archaic, remarking that "My vocabulary increased amazingly when I went for a divorce".

When applying for decree nisi, interviewee WK12 had had his forms returned at least once. His argument was that if the forms were publicly available then it should be possible for members of the public to complete them without having to get legal advice. His experience captured many of the problems with the process. One point he picked up was the need for the petitioner to mark the exhibited copy of the acknowledgement of service with an 'A'. This was the common reason for an application for decree nisi to be refused in our court file study.²²¹ The reason for it – to show that the petitioner has identified the respondent's signature – is poorly explained. The result, along with other features of the process, led to a

²¹⁸ This is a legitimate concern. There was at least one example in our court case file review study (case M027) of an individual mis-representing themselves as a solicitor, a criminal offence. The individual, in purporting to represent the petitioner, made a series of catastrophic errors in the case, including completing the Acknowledgment of Service themselves and applying for decree absolute without decree nisi. The RDC queried their qualifications and the 'adviser' withdrew, leaving the petitioner floundering. Separately, another court file revealed involvement by a practitioner who appeared to have established a number of different online divorce provider sites. In correspondence with the RDC, after errors made with an application from one of their services subsequently re-submitted via another, the practitioner neglected to mention that the sites were connected, even though they were registered at the same postal address.

²¹⁹ <https://insidehmcts.blog.gov.uk/2017/04/11/working-with-stakeholders-to-develop-an-online-divorce-service/>

²²⁰ A new D8 petition has now been released as part of the move towards digitisation. The current version of the form is a significant improvement in terms of the accessibility of the language and layout but will be subject to further testing and revision. It also incorporates the guidance notes rather than having them as a separate document.

²²¹ See Section 4.3

perception, shared by WK12 and others, that the forms were designed deliberately to trip people up to encourage the use of lawyers:

Everything else in the world has moved on but this. It's like so old-fashioned it's almost laughable. And you could laugh about it if it wasn't so annoying.... There's actually a process where you've got to write A on a piece of paper and that's evidence. Right? You've got to call it exhibit A. Why do you have to do that? You're not a policeman. Why not just have a form to fill in? It's like they almost make it knowing that you're going to get it wrong.... And 'decree nisi': why can't they just call it 'nearly divorced'? ... And then you have to wait something stupid like six weeks and one day before you can apply for the absolute. I mean, where does that come from? How stupid is that? I mean, this is why I say it's olde worlde. Well, six weeks – fair enough – but why six weeks and one day? And if you apply before then, it's rejected.

WK12 was not alone in finding the six weeks and one day rule incomprehensible and frustrating. In our main file study, there was a 6% failure rate in applying for decree absolute; all but one of these cases failing because the petitioner had applied before the six week and one day limit.²²²

There was also some evidence from our court file study that a lack of understanding of procedure and the complexity of the forms meant that some parties were agreeing to things that were not necessarily true or that they did not understand. Some respondents, for example, had been issued with an older version of the acknowledgement of service form asking whether they had seen, and agreed with, the statement of arrangements for children.²²³ That provision had been withdrawn previously and none of the respondents in our sample would have been sent a statement. Even so, there were a number of cases where respondents stated that they had seen the statement and agreed with the proposals. Similarly, we found instances where the petitioner stated that they identified their spouse's signature on the acknowledgement even where it had been signed by a solicitor, not the respondent.

For some interviewees in the journey study, the procedural difficulties could be more than an annoyance. SP17 reported being trapped in an abusive marriage and was desperate to secure her divorce. She had had her petition returned three times, each time for a minor technical mistake. She had not been able to afford legal advice, or even a form-checking service, as well as the £410 court fee. The technical errors meant months of delay in her case.

The lawyers in two focus groups also raised concerns about the three-stage process of lodging the petition, applying for decree nisi and then for decree absolute, noting that some

²²² It would be very helpful either if the new system could automatically generate an individually tailored earliest date for applying for decree absolute instead of relying on the petitioner to calculate the date and/or to allow earlier (online) applications to be lodged in advance of the earliest date, ready for processing on expiry of the time limit.

²²³ Requirements on parties in respect of statements of arrangements were repealed by the Children and Families Act 2014 with effect from 22nd April 2014, well before any of the petitions in our sample were issued.

clients were not aware that it was not sufficient just to file the petition to get the divorce. It is possible that some of the non-completions noted in our court file study may have been unrepresented parties not appreciating the need to apply for decree absolute to finalise the divorce.

The technical challenges also produced significant costs for HMCTS. Aside from having to handle numerous technical errors, the complexity of the forms and process meant that some unrepresented litigants were relying on the RDCs to help them navigate the process. One example from our court file study was the petitioner in case L049, who once she had realised that she could email the RDC, sent a series of seven emails to the RDC asking a series of open-ended questions about how to proceed.²²⁴ The RDC replied at least five times by email and a number of times by letter.

Some of the technical challenges noted above ought to be addressed by the digitisation of divorce. The findings from this study underline how important and necessary that process is and the benefits that it could bring in terms of reduced anxiety, costs and delay. Where the process had already been modernised, such as the very accessible help with court fees guidance material, that had been appreciated by our interviewees.

There are limits on what can be achieved with digitisation, however well the project is implemented. Digitisation does not in itself address problems with understanding the substantive law, as will be seen below. It is very difficult to present the law in clear, simple and accurate terms when the substantive law and the five Facts are so complicated, and even more so when there is a gap between the law in the books and in practice.²²⁵

The substantive law is acting as a drag on realising the potential of digitisation in another sense. The continuing requirement to include narrative particulars means that the process will continue to require human scrutiny, preventing significant cost savings for the Ministry of Justice and HMCTS.

6.4 Not understanding the five Facts

Aside from the difficulties of understanding language and procedure, the substantive law was hard for parties to grasp as well. Lawyers in the focus groups noted that it was common for clients to have no or limited prior knowledge of the law and have to be talked through the ground and five Facts at the first meeting. Unrepresented parties, such as interviewee WK21, had to do their research from scratch by themselves: “I had to literally just sit down and read what the grounds were and whether or not I fitted any of that category”.

Where parties had some knowledge of the law, it was not always accurate. The myths and misunderstandings about the ground and the five Facts in Table 6.1 were reported by the lawyer focus groups or were evident in our journey study interviewees with the parties:

²²⁴ For example, “Can I now apply for decree nisi now or do I need to wait receive some sort of communication from yourselves before sending it off? Look forward to hearing back from you. Thanks in advance!”

²²⁵ An illustration of this occurred in the summer 2017 when the newly-designed petition form attracted national media attention over whether it would encourage more petitioners to name co-respondents. ‘New divorce form ‘invites name and shame’ of adulterers’ <http://www.bbc.co.uk/news/uk-40899859> Accessed 21/08/2017

Table 6.1: Myths and misunderstandings about the substantive law

<ul style="list-style-type: none"> • The fact relied upon in the petition should be based on the ‘real’ reason for the relationship breakdown
<ul style="list-style-type: none"> • Divorce can be based solely on ‘irretrievable breakdown’ or ‘irreconcilable differences’²²⁶ (without reference to one of the five Facts)
<ul style="list-style-type: none"> • (Unreasonable) behaviour can only be used where there has been domestic violence or alcoholism
<ul style="list-style-type: none"> • It is possible to petition on the basis of one’s own adultery
<ul style="list-style-type: none"> • A sexual relationship with a third party initiated after a (physical) separation is not adultery
<ul style="list-style-type: none"> • Online dating or an ‘online affair’ is adultery
<ul style="list-style-type: none"> • Adultery or behaviour will affect financial outcomes or child arrangements
<ul style="list-style-type: none"> • Divorce is only ever possible after two years’ separation
<ul style="list-style-type: none"> • If one party ‘won’t give a divorce’ the only option is to wait for five years

It is impossible to quantify the extent of the legal misunderstanding. There were multiple examples, however, amongst our interviewees of misunderstandings that without any further advice would have the potential to delay, or derail, a divorce. The following two examples provide an illustration where both speakers think (correctly) that somebody else is wrong about the law but, worryingly, they are not aware of their own misunderstandings. In this first example the husband believes (wrongly) that his wife can amend her petition to rely on her own adultery although he correctly identifies that adultery will not impact on child arrangements if such arrangements are decided by the court:

I just felt [recently] that she’s got somebody and it is adultery; now that makes me really, really feel like upset and angry.... I just wanted to change what grounds, what reason we are divorcing. I just want to put adultery so she can still be the petitioner, I can still be the respondent. I believe it doesn’t make any difference. I believe [we should tell] the truth but I don’t think she will accept it ... she thinks if she puts adultery she thinks she’s going to lose the child, she thinks that she’s going to be guilty. (WK09)

In this second example, both the interviewee WK19 and her friend are thoroughly confused about the six-month rule in relation to behaviour, even though the interviewee had consulted a solicitor:

My interpretation of it as a lay person to law, reading the grounds for unreasonable behaviour, it sounds as though you must do it within the first six months of being separated and actually you don’t have to file within that six months, you just have to reference to two instances that were within six months of you being together. And that was explained to me by a solicitor... and I have a friend who thought he had to wait the two years if he’d passed

²²⁶ One interviewee insisted that his divorce was based on “inconsolable differences” whilst claiming that he was “pretty knowledgeable about the law” (SP27).

the six months mark for unreasonable behaviour, but there is a lot of confusion there, and it was only after speaking to several people that I truly understand my rights.

In law, the six-month rule is only relevant in behaviour cases where the parties co-reside for periods of more than six months after the last example of behaviour relied upon – and even then, unlike in the case of adultery, it is not a bar, just a fact that may be taken into account in deciding whether it is reasonable to expect the petitioner to live with the respondent. The suggestion that people would wait two years based on a misunderstanding of this (admittedly) complicated rule is a concern. In effect, the complexity of the law in this case was acting to delay the divorce through lack of understanding, but was not preventing family breakdown (independently from the question of divorce) due to the deterrent effect of fault.

There were other examples of long delays due to misunderstanding of the substantive law in the court file sample. L053, for example, was an unrepresented but well-educated petitioner with a professional occupation. It took three attempts for her petition to be issued after she had initially ticked the Fact boxes for desertion, two years and five years separation,²²⁷ as well as including an application for decree nisi at the same time as filing the petition. The application for decree nisi based on five years separation was refused at first attempt because the mental separation date given on the D80e was only a few weeks before filing the petition, rather than the requisite five years. The petitioner amended the mental separation date to comply with the required five years and applied again. A second refusal was based, not on the sudden change in the petitioner's story, but on the failure to re-sign and re-date the form in red ink. The entitlement to decree nisi was granted on the third attempt, nearly 18 months after the first petition was lodged.

Delays can cause frustration and problems for some. There were also examples in our court file study where a lack of legal knowledge meant that some unrepresented people were (at the time of data collection) unable to get a divorce. In our court file study, there were three cases refused at application for decree nisi stage that were stuck in a legal trap of attempting to rely on an unworkable legal Fact with no (apparent) understanding of how to work around it. In each case a small amount of legal advice would, almost certainly, have enabled the petitioner to put together an adequate behaviour petition. Whilst three cases out of a sample of 300 sounds a relatively small problem, scaled up for England & Wales that would represent in the region of 1,000 cases per year where a divorce was denied or delayed because the substantive law is not sufficiently clear or intelligible for people unable to afford or access legal advice.

One of the three cases stuck in a legal trap was court file L048. Both parties were non-native English speakers, with unskilled low-paid jobs and were unrepresented. Both wanted the divorce to proceed and did their best to comply with the requirements of the process. The petition was initially based on the adultery and behaviour Facts but the reliance on adultery appeared to be an error and the statement of case was a classic example of a drifting apart

²²⁷ It is usually only possible to divorce on one Fact, the exception being that the adultery Fact may be used together with the behaviour Fact.

plus mutual responsibility formulation that would fall below the threshold for behaviour, and consequently the application for decree nisi was refused.²²⁸

The respondent does not sleep in the same bed as the petitioner and has not done so since [month] 2011. We have not sexual relationship since [month] 2011. Also we live in the same house but everything else is separate. Money, bills and all other everyday things.

The refusal letter stated that, amongst other issues, “There are no particulars of unreasonable behaviour by the respondent which the petitioner finds intolerable [sic]”. The message was not understood as the amended petition submitted in response contained no further particulars of behaviour and just restated the drifting apart:

We not living together anymore. Everything now is definitely finish – between us. I not love him long time, and I don’t feel and don’t thinking about him like about husband

Decree nisi was refused again on the basis that the particulars still simply described a separation rather than behaviour. Nine months later, there was a referral to a judge, prompted it would appear, by a phone call to the RDC. The directions given, with limited concessions to the petitioner’s language skills and evident lack of understanding, were “The petitioner needs to comply with the requirements of [the earlier] order ... To clarify, the statement of case does not provide any allegations of the respondent’s unreasonable behaviour. Please add the allegations of the unreasonable behaviour in green at part 6 – statement of case. I herewith return the amended petition for your attention. If you are in any doubt I suggest you seek legal advice or call into your local Citizens Advice Bureau for help.” There was nothing further on the file.

If the petitioner had been able to afford legal advice then a competent solicitor would no doubt have been able to draft a petition within minutes on the basis of two years separation or some mild behaviour particulars. As it was, the petitioner had got no nearer to divorcing 17 months after filing the first petition and having had to find £410 for the court fee and a further £95 for the amended petition.²²⁹

The problem of the complexity of the substantive law is compounded by a legitimate concern that court staff and judicial officers should not be pulled into giving legal advice. The court’s explanations to the parties about what they have done wrong on the paperwork, and what is needed to put it right, can therefore be difficult to formulate, and that appeared to be a factor in the court’s responses in the above case. The court file review indicated that instructions to parties often employ complex legal terminology, and make few concessions to low levels of knowledge of law, process and procedures. Parties may continue to repeat errors, as in L048, because they do not understand what the court is asking them to do.

²²⁸ See Section 5.2 above for the requirements to get over the threshold for behaviour.

²²⁹ The petitioner was not eligible for fee remission but was probably earning a low wage given the occupation listed on her petition.

6.5 Getting in on the secret – the behaviour threshold

The third problem in relation to intelligibility, clarity and predictability relates to how the Facts work in practice, specifically the behaviour threshold. We demonstrated in Section 5.2 that the threshold for behaviour is low, and that it is not restricted to serious cases of domestic violence and drug/alcohol abuse. That knowledge of how the law works in practice is not universally shared, however, as lawyers reported in the focus groups:

A lot of people seem to think that there won't, there won't be sufficient evidence of [behaviour] and that they'll have to wait two years. Lawyer focus group B

I think to clients, unreasonable behaviour sometimes can ... they say 'well you know he's never beaten me or he's never done this'. They think it has to be really really bad stuff. Lawyer focus group E

The erroneous belief that behaviour means violence or abuse is reinforced, rather than clarified or corrected, by the official government guidance. A petitioner searching on gov.uk would be given the following examples, strongly orientated towards more extreme behaviour:

Your husband or wife has behaved in such a way that you cannot reasonably be expected to live with them. This could include:

- *physical violence*
- *verbal abuse, such as insults or threats*
- *drunkenness or drug-taking*
- *refusing to pay for housekeeping²³⁰*

Similarly, the accompanying notes to the petition in force during the fieldwork (version 04.14) asked for “details of a course of conduct, or, particular incidents, including dates, but it should not be necessary to give more than about half a dozen examples of the more serious incidents, including the most recent”.²³¹ The use of the term “more serious” and suggestion that there may have been more than six serious ‘incidents’ does imply that behaviour is not simply everyday relationship problems and instead points more clearly towards domestic abuse and drug and alcohol problems.

²³⁰ <https://www.gov.uk/divorce/grounds-for-divorce> accessed 10th August 2017. The refusal to pay for housekeeping is a somewhat odd item to include and perhaps is intended to point towards financial abuse.

²³¹ The D8 petition and separate guidance notes have now been replaced as part of the digitisation process by a single D8 form incorporating guidance notes that are more neutral though still repeat the ‘incident’ phrase: “You should include examples of your spouse's/civil partner's behaviour which affected you the most, and the most recent incidents. You can describe how they have behaved over a period of time or use particular incidents. Include dates if relevant. Provide enough detail to satisfy the court that you cannot reasonably be expected to live with them. Please remember that they will be sent a copy of this application”. As one of the judges interviewed also pointed out, incorporation of the guidance notes means that the petition form has increased in length, from 8 pages to 15; this illustrates the difficulty in explaining the complexities of the law and procedure involved.

Those who are able to afford lawyers will be told that the behaviour threshold is low and therefore (all other things being equal) will be able to access a quick divorce, as we showed above in Section 3.6. It is much more of a lottery for those who cannot afford legal advice or obtain good quality free advice. If people use official government information, as noted above, they will be given the misleading impression that behaviour requires strong allegations, rather than the reality, which is that mild allegations are perfectly adequate. Ironically, because gov.uk has placed such a premium on providing clear, simple and authoritative information for citizens, that may be all that people search. Without knowing that the law in practice is different, then there is also no reason to do any further searching – the real behaviour threshold is a classic example of an unknown unknown. We are left with the problem, therefore, that access to information about the reality of what is required is restricted to a section of the population, primarily on the basis of ability to afford legal advice.

Not having access to this insider information is an access to justice issue. Not knowing that particulars based on fairly mild everyday disagreements are sufficient means that people may not be able to get the divorce they would otherwise be entitled to, or that they have to wait a further two or five years. Alternatively, they may use the behaviour Fact but at the risk of perjuring themselves by fabricating strong particulars to meet the (perceived) threshold or alternatively loading the particulars with the strongest evidence of actual incidents and risk greater conflict that might otherwise be avoided by a mild(er) petition. These are not theoretical possibilities, but ones that were experienced by participants in our study.

Some unrepresented litigants are fortunate enough to stumble across websites with forums and, exceptionally, with free helplines like Wikivorce who will let them into the secret for free. There will be many others who do not have access to that information. Two of our qualitative interviewees in the journey study reported that if they had not happened to phone Wikivorce for general advice about how to proceed with the divorce they would never have known that a (quick) divorce using behaviour would have been possible. Both had been expecting to wait for two years, contrary to their wishes. As WK11 said, what is in effect concealment of information is unfair given that the difference between a few months or at least two years does have a material impact on people's lives:

I can't remember all the options [five Facts] but you'd look at them and think well the only one that really stands out to me in our circumstances was the one that said you've been separated for two years. I think well when does two years start? I was trying to find that out and that's where it came out that we had this option where one of you is cited for unreasonable behaviour but it's done in a friendly way. But that doesn't come across in any of the information. You know it wasn't obvious that that was something that you could choose. In which case, you look at the other options and you think what's the most appropriate to me? Are you really telling me I've got another two years to go through before we can finalise all this and I can finally move on with my life? That just didn't feel right to me. But that's effectively the way it's presented. And I kind of look at that and think well, yes, that doesn't feel fair.

Interviewee WK04, similarly, had been expecting to have to wait for two years, having assumed that behaviour meant behaviour. If she had not phoned Wikivorce then she and her husband would also have had to sit out a two years' separation:

A little bit surprised [to hear about the low threshold]. When you first read about it then you think it must be, you know, absolutely dreadful things like domestic violence and stuff like that. But the people at Wikivorce they explained that, you know, as long as you can demonstrate examples and the effects that it can be a number of relatively trivial things in essence, in order to be able to transpire the criteria. It was a relief to be honest that we could get things completed and finalise the divorce rather than having to wait two years because that was a source of apprehension for both of us.

6.6 The unpredictability of the law: over-egging for certainty

The second consequence of people's misunderstanding of what is legally required, especially in the context of undefended divorces, is that uncertainty over the threshold for behaviour would appear to result in particulars that are stronger than they perhaps need to be. We showed in Section 5.2 that, objectively, the behaviour threshold is very clear, but that the strength of most behaviour petitions is quite a way over what is a very low threshold. Somewhat surprisingly, in the main court file review lawyers were significantly more likely than unrepresented petitioners to produce stronger particulars.²³²

Why is this, especially given the very strong and genuine commitment of family lawyers to trying to reduce conflict?²³³ It may be partly due to client insistence on having their say. However, there is also evidence from our lawyer focus groups that the over-cooking of particulars may be based on a lack of certainty amongst family lawyers about the threshold. Whilst the threshold was very clear to HMCTS legal advisers, and became abundantly clear to the research team during the fieldwork, exactly what is, and what is not, needed in practice is not made available publicly. There are no public information statements from the courts, HMCTS or the Ministry of Justice setting out exactly how low behaviour petitions can go, and it is difficult to see how there could be.

The legal advisers interviewed for the scrutiny study recognised that there was an issue with over-shooting of what was required for unrepresented petitioners:

I think it's a fairly low threshold I would say. I don't think it's probably as high a threshold as some members of the public think. (Legal Adviser #17)

Legal advisers also reported that it was also true for cases in which petitioners were represented:

²³² Ninety per cent of behaviour petitions filed by lawyers were 'full strength' i.e. rated as strong interpersonal or strong abuse with the respondent entirely to blame. This compares with 74.3% of those produced by unrepresented petitioners ($p = 0.026$). It should be noted that 'mild' petitions from unrepresented petitioners were more likely to fail to reach the threshold.

²³³ See especially Section 7 below.

I have noticed quite a few ... great long lists [of particulars] maybe eight items on, and two of them would have got them home.... Whether solicitors give advice 'Look you know you've told us all this, but we only need this to convince the court' – whether those discussions go on behind closed doors in the solicitor's office, I don't know. But some of them do put an awful lot of information in it, and probably 90% of it we don't need for the purpose of getting over the bar. (Legal Adviser #18)

From the other side of the desk, however, there was a very clear degree of uncertainty about what was needed to 'get home' or get over the bar. But the priority is to avoid the time, money and stress of getting it wrong and having the petition returned.²³⁴ The following exchange from lawyer focus group B demonstrates the degree of uncertainty about the threshold in the context of the need to get the decree:

L1 ... We carry on as we're doing...

L2 ... but as gentle as they can be but not being quite sure where the threshold ...

L1 Where the threshold is, absolutely.

L3 Yeah, we don't know where the threshold is. We really don't.

L1 But, yeah then perhaps we're only looking for one example of behaviour, as opposed to the six that we all seem to think you need to have. You know if I do a petition with maybe four in, I think 'Oh gosh, that's a risk because there's only maybe four examples in there'. But maybe that's wrong?

L3 Cos that's frustrating from our perspective, isn't it? That we're then citing things that ... you know some people can't cope with any behaviour, unreasonable behaviour being cited against them, can they? So, for us to draft things ... we have upped the ante to some extent unnecessarily so, haven't we, which is a shame. (Lawyer focus group B)

It was not just lawyers who were over-shooting for certainty. Journey study interviewee WK04 conceded that she had put more reasons in the particulars than had triggered the breakdown "in order to look sufficient on the form in order that the divorce would be granted". SP12 was unsure about the six months rule on cohabitation, and she did not hold anything back to make sure that she had enough to get through the process:

So, some of the grounds, I did make quite strong.... and I also said that the behaviour was continuing. So, it's all very true but I emphasised that a lot because I wanted them to not, not wonder why we had waited because it had been a good six months since we'd split up before I started the paperwork. I was concerned that they would, I don't know whether they can even say that, you have to wait for two years, but I didn't want that to happen.

²³⁴ In the case of L173, noted in Section 5.2, the lawyer appeared to have been 'sacked' by the petitioner after a (mutual and mild) behaviour petition was refused for being too weak.

This is not the first empirical finding of behaviour petitions being pitched consistently over the threshold. In their empirical study of cruelty in the 1960s under the Matrimonial Causes Act 1937, Chester and Streather noted how the judicial interpretation of cruelty had gradually shifted from “danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it” to embrace a range of non-violent behaviour including threats, false accusations of infidelity and nagging. Despite the lowering of judicial expectations of what constituted cruelty, Chester and Streather found that 90% of cruelty petitions in their sample contained allegations of physical abuse, with repeated physical abuse in 81% of cases.²³⁵ Their conclusion was that what drove petitions was not the need for speed, but for certainty in securing the decree.²³⁶

The current uncertainty can only have been heightened in the light of the *Owens* decision. Although we noted above that those undertaking scrutiny in RDCs say their expectations have not changed, there is no mechanism for that message to be circulated to practitioners or litigants in person. Indeed, it is not at all clear whether the ‘business as usual’ position is legally correct even on the basis that legal advisers are only dealing with undefended cases. Either way Resolution’s Standards Committee has issued guidance for members regarding the drafting of petitions following the *Owens* decision in response to member queries.²³⁷

6.7 Conclusion

The rule of law is dependent upon intelligible, clear and predictable laws. In this section of the report we explored the multiple ways in which the current divorce law fails in this respect. Some of the arcane and archaic language and processes of the current law and procedure will be addressed as the digitisation process progresses. However, the lack of understanding of the substantive law makes the process more difficult for unrepresented parties, to the extent that divorce may be unobtainable. The complexity of the substantive law also acts as a drag on the digitisation process and the aim to provide a clear and accessible service for citizens at what is often a time of immense stress and personal difficulty.

Possibly of most concern are the two issues that stem from people’s misunderstanding of what is legally required to make out the behaviour Fact. The first is the access to justice issue, that only those ‘in the know’, typically those who can afford legal advice, will be aware that the behaviour Fact can be used in almost every case, negating the need for a long wait. The second issue is that it appears that the uncertainty over how low the behaviour threshold actually is in practice is resulting in particulars that are stronger than necessary in both represented and unrepresented cases with the potential to exacerbate conflict between the parties that may, for example, rebound on children and undermine attempts to use non-court dispute resolution processes such as mediation, thereby undermining other core objectives of the family justice system.

²³⁵ Robert Chester and Jane Streather, ‘Cruelty in English Divorce: Some Empirical Findings’ (1972) 34 *Journal of Marriage and the Family*, 706.

²³⁶ Robert Chester and Jane Streather, ‘Cruelty in English Divorce: Some Empirical Findings’ (1972) 34 *Journal of Marriage and the Family*, 706, 711-12.

²³⁷ <http://mailchi.mp/resolution/owens-v-owens-guidance-on-drafting-divorce-petitions>

7. Fanning the flames: does fault increase conflict?

7.1 Introduction

Many people will be angry, upset and possibly devastated after relationship breakdown. There may be differences in adjustment and acceptance of the separation between the leaver and the left, those to 'blame' and the 'blameless'.²³⁸ Conflict will occur on separation whether the divorce law includes fault or not. What we explore in this chapter, however, is whether reliance on fault appears to *create* conflict that was not there before or to *exacerbate* existing conflict. Conversely, we also explore the argument that fault can act as a release valve or lightning conductor, enabling couples to work through conflict in the divorce itself rapidly to prevent spill over into discussions over children and finances.

We start by looking at the evidence of a relationship between the use (or avoidance) of the fault Facts and conflict between the parties and in relation to child arrangements and finances. We then explore the range of harm-minimisation strategies, such as sharing draft particulars, that are used by lawyers and parties to try to reduce the impact of fault, particularly behaviour. In the third section, we consider what factors increase or decrease the risk of conflict. Our study shows that there is clear evidence of a relationship between fault and conflict, and that harm-minimisation strategies may reduce, but not eliminate, the risk. We found no evidence to support the lightning conductor argument that fault can be a mechanism to work through conflict quickly.

7.2 The relationship between fault and conflict

There is a strong public perception that citing fault in divorce is likely to cause conflict. The cause seems rather obvious – blaming one person for the breakdown of the marriage and listing their failures is likely to cause difficulties in what may well already be a fairly fraught relationship where any trust may be quite fragile, if it exists at all. As a lawyer from focus group E put it: "It's just actually naming seven examples of why you were a pain in the backside during the marriage and this is why I decided to leave, which just doesn't go down well".

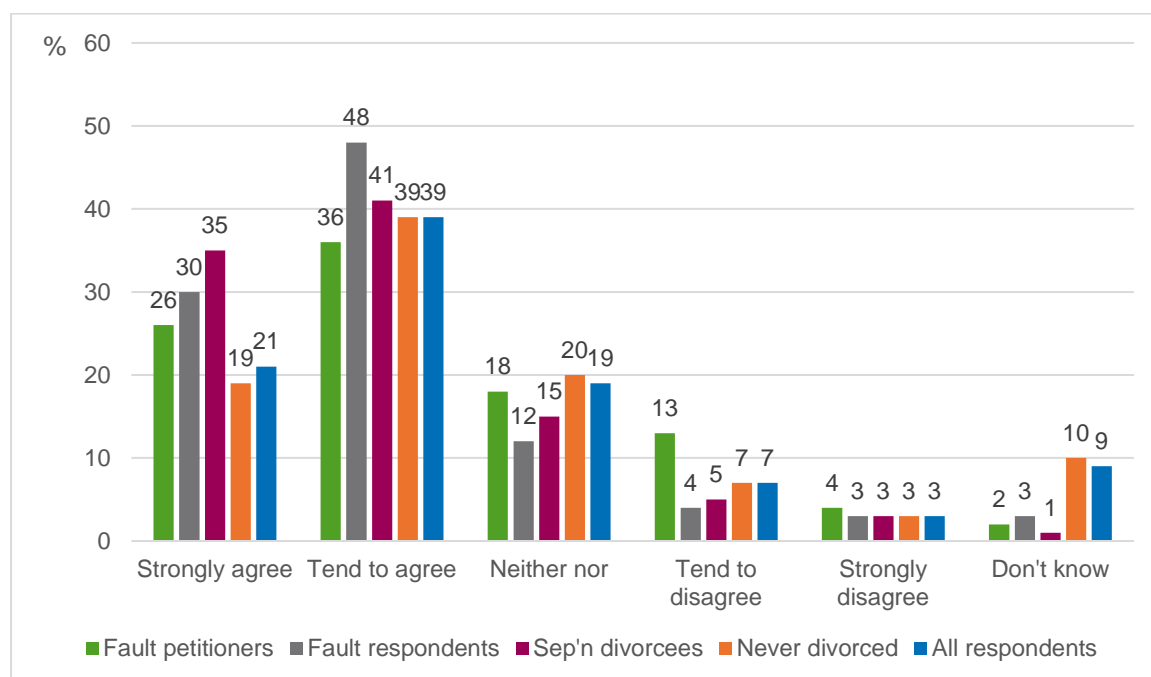
Our national opinion poll participants were asked whether or not they thought that citing fault makes the divorce process more bitter than it needs to be. Six in ten of all participants, whether divorced or not agreed with the statement (Table 7.1). Interestingly, those who had been divorced using fault were more likely to say that attribution of fault made the process more bitter, with 62% of petitioners and 78% of respondents to a fault-based divorce agreeing.

The picture was broadly similar when we asked divorcees who had divorced within the past ten years about their own divorce and the impact of citing or not citing fault on their relationship with their former spouse (Table 7.2). Of those who had divorced on separation grounds (two or five years), only 11% thought that the use of separation, rather than fault,

²³⁸ Paul Amato, 'The Consequences of Divorce for Adults and Children' (2000) 62 *Journal of Marriage and the Family* 1269.

had made relationships more difficult. In contrast, 40% of respondents in fault cases thought that the use of fault had made relationships harder. Petitioners in fault cases were more evenly split between those reporting that it had made relationships more difficult (29%), had made no difference (48%) and had made relationships easier (20%).

Table 7.1: “If you have to cite one spouse as being at fault, it makes the whole divorce process more bitter than it needs to be”



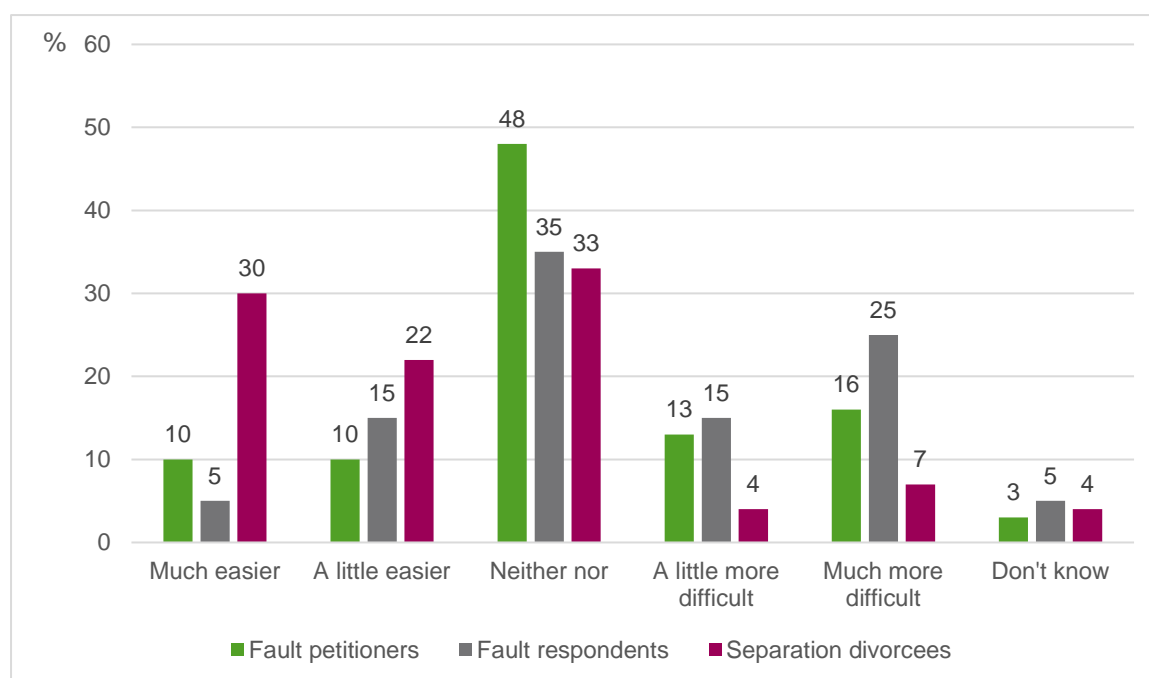
Base: all survey participants

Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

There was also some recognition amongst some petitioner interviewees that the particulars of behaviour had exacerbated existing tensions. The most obvious examples were where fault was being used pragmatically by a petitioner who it was agreed was in fact responsible for the separation. Interviewee R04, for example, had left his wife after starting a new relationship. His wife would not start divorce proceedings so the ('guilty') husband was having to petition on the wife's behaviour to avoid a long wait for the divorce. Although the husband's solicitor had advised trying to make the particulars as mild as possible to avoid further hurt, the husband still recognised, to some degree, the further harm caused by the use of behaviour against the ('innocent') wife:

“In her eyes, it was me that did wrong because I've committed adultery, but she said she would never divorce me.... She still hasn't seen the funny side of it if you like ... [she's] pretty waspy.... It impacts massively. Having to come up with reasons for somebody that's 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. And there is no other way unless you're both amicable and you're prepared to wait.

Table 7.2: Overall, given your situation with your former spouse at the time, would you say that citing fault (fault divorces)/or not having to name someone as at fault (separation divorces) made your relationship with them easier or more difficult than it might have been?



Base: Divorcees currently divorcing or divorced in past 10 years
 Sample sizes: Fault petitioners 240; Fault respondents 137; Separation divorcees 195

Some interviewees who were having to share a house until the divorce and financial settlement were finalised reported that the use of behaviour had greatly increased tension in a situation where there was no escape from the hostility. SP14 had, for example, toned down her behaviour particulars but still reported that when her husband saw the petition “it just escalated into horrific ‘this is all bullshit’. ...It got a lot worse. I was fearful when I went to bed and locked my bedroom door”. Similarly, WK01 reported that after her husband received the behaviour particulars “it’s gone downhill since then, really. It’s just the whole thing is getting worse and worse ... This is having the most horrific effect on me”.

There were also indicators from the main court file study that fault was associated with conflict, although it was not possible to establish from the files whether fault generated conflict or more conflicted relationships triggered the use of fault. As an indicator of conflict between the parties, fault-based cases were significantly more likely to include a claim for costs.²³⁹ Only a fifth of the separation cases included applications for costs, compared to 42.4% of adultery and 61.2% of behaviour cases. Fault cases were also significantly more likely to have some form of ‘resistance’ shown by the respondent, whether in the form of a rebuttal or failing to return an acknowledgement of service.²⁴⁰ In all, 36.9% of respondents to behaviour petitions who returned an acknowledgement of service included a rebuttal of the particulars on the acknowledgement, compared to 2.6% for two years’ and 3.6% for five

²³⁹ That is the costs of the proceedings, potentially including the court fee and the petitioner’s legal costs. We explore the issue of costs in greater detail in our second report on contested cases.

²⁴⁰ Although some respondents may not receive the papers or may be unable to understand their significance or what is required.

years' cases. Acknowledgements were returned in 83% of behaviour cases compared to 93% of 2-year separation cases. In our contested cases sample, fault was disproportionately associated with an intention to defend. Out of 81 identifiably genuine disputes in the contested cases sample, 77.8% were behaviour cases, 6.2% adultery, 1.2% desertion, 6.2% two years and 8.6% 5 years.²⁴¹

Fault and the impact on contact and other child arrangements

The whole direction of family law for the last few decades has been about trying to reduce the impact of parental conflict on children by encouraging cooperative parenting and shared parental responsibility, with arrangements decided wherever possible by parents themselves outside of court. Family lawyers have therefore long raised concerns about the disjunction between a blame-based divorce law and attempts to limit the impact of parental conflict on children. Not surprisingly, the family lawyers in our focus groups emphasized the problem of encouraging one of the parties to blame the other for the breakdown and then to change tack completely by trying to promote parental cooperation on child arrangements:

As soon as you start saying you have to blame someone... it kind of sets a tone for the case, and if you're dealing with children, if you're dealing with finances, it's sometimes really hard to put that fire out. (Lawyer focus group B)

I think that the danger is ... because the petition issue is the first process where people engage, if that's out there at the outset it's often ... It sets the tone for everything [i.e. children and finances]. Whereas at least if you can try and keep things on an even keel for as long as possible, there's perhaps a chance you're not going to then going into all these other issues, and then become a mud-slinging match where children are involved. You can't eliminate it, but it just reduces the risk. (Lawyer focus group F)

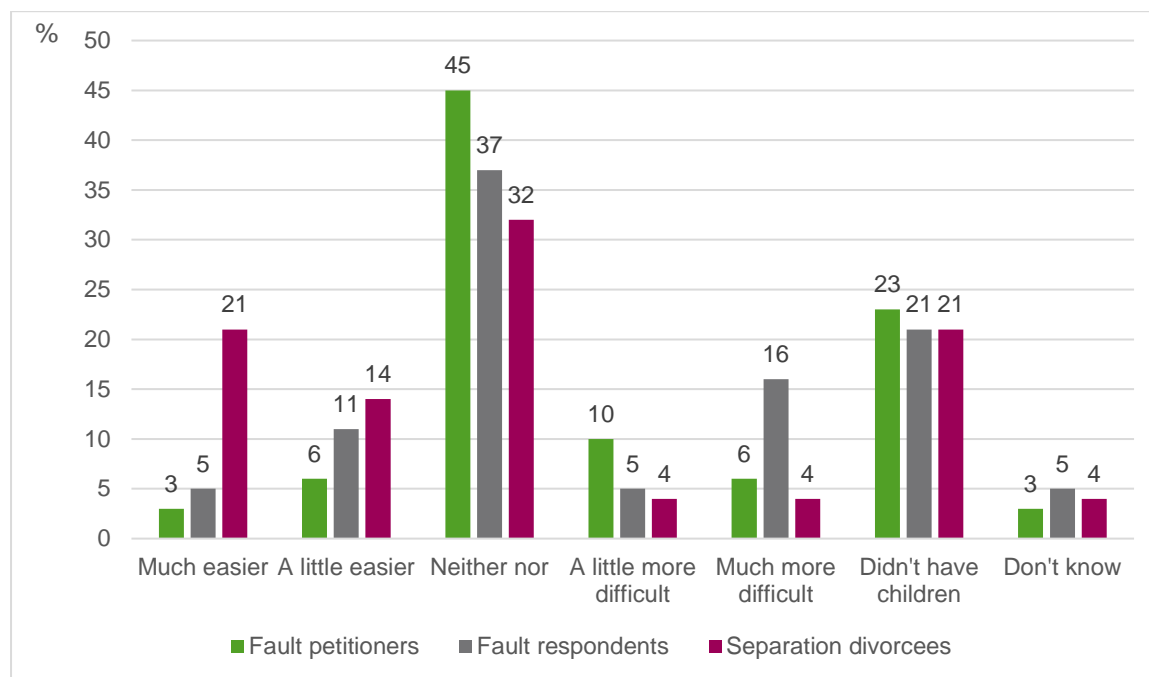
Previous research from the 1970s suggested that disputes over children were over-represented in behaviour cases.²⁴² It was not possible in our court file study to test this finding with a contemporary sample as the petitioner is no longer required to file a statement of arrangements for the children with the petition.²⁴³ There is some indication from divorcees in our national opinion survey, however, that citing fault had made sorting out arrangements for their children more difficult (Table 7.3). Among those divorcing in the past ten years, one in five (21%) fault respondents and 16% of fault petitioners said that citing fault made things more difficult, while a third (35%) of separation divorcees said that relying on separation made it easier to make arrangements for their children.

²⁴¹ A full analysis of the intend to defend cases will be reported on separately but for current purposes it may be noted that a proportion of the contested cases sample were ones in which it appeared that the respondent had indicated an intention to defend in error.

²⁴² John Eekelaar and Eric Clive, with Karen Clarke and Susan Raikes, *Custody after Divorce* (SSRC Centre of Socio-Legal Studies, 1977).

²⁴³ Part 4 of the D8 petition does ask for details of other proceedings, including any in relation to children of the family, however in only a very small number of cases were children proceedings reported on the petition and in some cases we had evidence from elsewhere on the file (usually on the form E in financial remedy applications) of Children Act proceedings predating the divorce proceedings, but not being reported on the petition.

Table 7.3 Do you think that naming someone as at fault (fault divorce) / not having to name someone as at fault (separation divorce) made it easier or more difficult than it might have been to make arrangements about your children?



Base: Divorcees currently divorcing or divorced in past 10 years
 Sample sizes: Fault petitioners 240; Fault respondents 137; Separation divorcees 195

Some insights into how fault could impact on child arrangements can be garnered from our qualitative interviewees. There were a number of interviewees, both petitioners and respondents, who thought that fault, specifically a behaviour petition, had raised the stakes. One male respondent to a case where there were later private law proceedings with social services involvement, was clear that the use of fault had made a difficult situation worse:

She [alleges] I've been controlling, or making her feel that I've done something to affect her friendships. When I'm pretty sure that, from my point of view, I didn't. But the fact that she put them in there, that sort of raises the stakes slightly. Particularly when there are other issues, such as access to our [child(ren)] that these things could well come into it. And they have actually. Some of these things have been mentioned in the quite nasty [contact] battle that followed.

Respondent interviewee SP10 was angry about allegations about his parenting in the behaviour petition, which he linked to subsequent disputes over children and money. Some petitioners also thought that their behaviour petition had come back to haunt them in relation to arrangements for children. SP46, who had been involved in major litigation over children and money said: "It's also had a massive impact on my son which I'm quite embarrassed about to be honest. It had a detrimental effect on his mental health." SP02 thought that her husband had "manipulated the kids" as a result. SP15 was involved in litigation over money as well as applications for enforcement of child arrangements orders, all of which he attributed to his behaviour petition:

In my instance, it fuelled the whole situation, because I put things in she didn't like. It's reactive and it's probably put us back so many months and probably, detrimental thing for me with my child, because she's used that basically. ... Because I was divorcing her, it's like a, she's not in control and it's a bitterness, power thing.

There were also examples from our qualitative sample where parents reported that they, or the other parent, had threatened to show the details of the behaviour petition to the children. Interviewee SP48 was already mortified that his use of pornography websites had been cited in his wife's behaviour petition, and more so when she threatened to share the details of with their children:

Only [recently] she has said that she will tell the children when they're old enough the reasons that she divorced me... It's horrible because I know one day that, you know, she's going to tell them this [accessing pornography sites]. I'm then going to have to try and explain myself, which isn't going to be easy because they're probably already going to be preloaded with this information and they're going to see it on a legal document.

Another interviewee reported that his respondent wife was threatening to show their children her police statement regarding domestic violence. In this case, interviewee SP24 thought that it would be helpful for him to record his side of events in the petition "this is my kind of police statement about it". Of course, involving children in these adult disputes using official legal documents is entirely inconsistent with widely held understandings of child welfare.

The cases above largely involved relationships where there appeared to have been difficult or conflicted separations, and where the availability of behaviour had exacerbated the conflict and provided a further weapon for the adults to use against each other in parenting disputes. There were also cases in our journey study sample where contact had been going well and parents had established what would, in family law terms, be the ideal of child-centred arrangements, agreed between themselves without needing to involve mediators, lawyers or the court.

Interviewee WK19 was one of those who had established child-centred arrangements but reported that the impact of drawing up the behaviour petition had undermined the ability of the parents to cooperate. In this case, she described not only the hurtful impact of the allegations in the particulars, but also how the process of thinking up examples had brought back all the issues that the couple had worked through previously:

We had a childcare schedule that we both sat down and agreed without mediators. We had ups and downs with a lot of hurt to begin with but we managed to get to a good place where we had conversations about the children and organised events jointly with our families for special occasions. And in the last month on the lead up for him organising the paperwork for the divorce there has been a definite change in his behaviour towards me and that has negatively impacted on the children because they have seen him be rude to - they have seen us snap at each other. It has brought up a

lot of things that we had actually discussed a long time ago, and he has had to start thinking of all these things again because he is trying to pick out his reasons for unreasonable behaviour and it has reminded him of everything that we had actually sorted a long time ago... And actually, what my husband decided to write was that I was emotionally abusive which I really disagree with... that was a hurtful thing to read and that will have an effect on our relationship which will [not] benefit the children. You know, they are very young but they will still pick up on key interactions... It has caused a huge shift in behaviour and attitudes. It was all about the kids, and suddenly it was been brought back to somebody's seemingly bad behaviour from one person's perspective, rather than actually both of us were at fault and neither of us put the work in, and this is what led us to this point. It is your fault because you did this.

None of our qualitative interviewees cited examples where the use of fault was reported to have improved relationships or eased negotiations in respect of children or finances.

Fault and the impact on sorting out finances

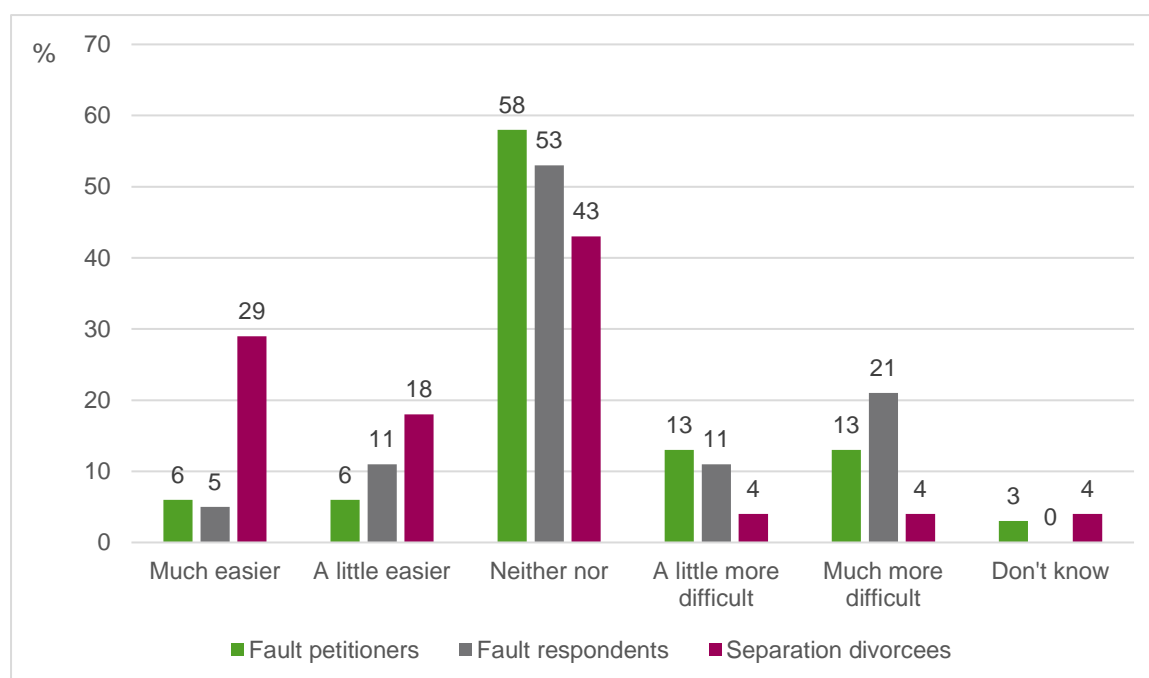
There is also a relationship between reliance on fault and conflict over finances. As before, we asked our national opinion poll divorcees (who had divorced in the past ten years) whether using or not using fault in their own divorce had made it more or less difficult to sort out the finances (Table 7.4). The great majority of separation divorcees thought that using separation Facts had made it easier (47%) or made no difference (43%). Again, while at least half of fault petitioners (58%) and fault respondents (53%) thought that the use of fault had made no difference to sorting out finances, about a quarter (26%) of fault petitioners and a third (31%) of fault respondents thought that it had made it harder.

In a recent study of financial remedies orders following divorce, Hitchings, Miles and Woodward found a difference between behaviour and two years' separation with consent cases, in terms of whether applications for financial orders had been initially contested or whether the application had been by consent from the outset. In their sample of 399 cases, behaviour petitions made up 64% of the sample, but only 60% of all pure consent order applications and 73% of contested applications, while two-year separation cases constituted over 14% of the sample, but 18% of consent applications and just 7% of contested applications.²⁴⁴

A broadly similar pattern was evident in our sample. Only 103 of our main court file sample of divorce cases included financial applications, only 27 of them initially contested. The behaviour cases represented 57% of the 103 financial application cases, but 67% of those that were initially contested. Only two of the two-year separation cases were initially contested (7% of the 21 two-year cases).

²⁴⁴ Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the jigsaw puzzle: understanding financial settlement on divorce* (University of Bristol 2013) 187.

Table 7.4: Do you think that naming someone as at fault (fault divorce) / not having to name someone as at fault (separation divorce) made it easier or more difficult than it might have been to sort out your finances when you separated?



Base: Divorcees currently divorcing or divorced in past 10 years
 Sample sizes: Fault petitioners 240; Fault respondents 137; Separation divorcees 195

A related issue is the fairly common public belief that fault (or conduct) will, or should, influence how family finances are divided on divorce. One of the interviews with solicitors about contested cases²⁴⁵ highlighted some of the consequences that can continue to permeate a case after fault has been raised early on in the proceedings. In this case, the wife had leapfrogged the husband’s petition with her own strong behaviour petition. The solicitor reported spending “near to an hour talking [the husband] down” from defending the petition. There was a further very difficult conversation when the wife’s side refused to amend her petition. The solicitor persuaded the husband again not to defend using a classic pragmatic (and legally correct) argument that the content of the petition would not affect outcomes in respect of the children or finances. However, behaviour (or ‘conduct’) remained a live issue in the case with the wife subsequently trying to claim that the husband’s behaviour should have an impact on the financial division. The husband’s solicitor took a firm approach with the wife’s side to block that, but then had to deal with their own client who then wanted to bring up the wife’s behaviour which the lawyer then also had to manage: “my client rang this morning and said, well I want you to write back and bring up the affair that she had, and I said well, I’m not going to do that, because it’s just not helpful”. The lawyer’s concern was that the tit for tat arguments between the spouses, triggered by fault, were delaying and potentially derailing sorting out the finances. They felt that the finances would otherwise have been cracked already “because everyone would be on the same page and very focused about what we’re trying to do”. Instead they were constantly having to fire-fight

²⁴⁵ Contested interview D03. The data from these interviews, where lawyers were asked to discuss two to four higher conflict cases, will be dealt with in more depth in our second report on contested cases.

and to keep their client focused on what they viewed as his longer-term interest, which was a rational decision-making process.

7.3 Harm-minimisation strategies

In recognition of the potential for fault to trigger or increase conflict, family lawyers have adopted a range of harm-minimisation strategies.²⁴⁶ The Resolution Code of Practice, for example, emphasises the importance of avoiding inflammatory language to reduce or manage any conflict. The Resolution *Guide to Good Practice on Drafting Documents* also warns that petitions are “likely to be viewed as aggressive and hostile by other parties” and that that will be compounded where the particulars are drafted “in an aggressive and emotional manner”.²⁴⁷

The Resolution guide sets out three main strategies for reducing conflict, all three of which featured repeatedly in the lawyer focus groups. They are:

1. *Keeping behaviour particulars as brief and as ‘mild’ as possible.* The Resolution *Guide to Good Practice on Drafting Documents* notes, for example, that it is unnecessary for allegations to be “particularly severe” or all instances cited”.²⁴⁸ This was a central feature of the advice to clients reported by lawyers in interviews and focus groups and was reflected in some of the qualitative interviews with parties. SP42, for example, had been asked to produce an initial draft of the particulars. She reported that her lawyer had advised her to stick to the facts. The lawyer had then cut SP42’s draft down by a third.
2. *Agreeing draft particulars, where possible.* The same Resolution Guide on drafting notes that the petition should be agreed in advance, where possible. The purpose, aside from harm-reduction, is also instrumental – it is far quicker and cheaper to negotiate over a draft petition than to have to formally amend a petition that has been issued. This is an area of practice that appears to have changed significantly since the research of Davis and Murch in the 1990s. At that point, they reported that behaviour particulars had been discussed by very few of the parties.²⁴⁹ In our journey study, there was a very strong expectation that draft particulars would be shared, including with a litigant in person, even if the draft was not always agreed. Not sharing drafts is now seen by lawyers as exceptional and requires explanation. In one focus group a participant felt compelled to ‘confess’ having not shared particulars in a case where the low-income privately paying client could not afford the

²⁴⁶ See the Law Society *Family Law Protocol 4th* (2015) <http://www.lawsociety.org.uk/practice-areas/family-children/> and the Resolution *Code of Practice* <http://www.resolution.org.uk/code/>. The Law Society Protocol endorses explicitly the Resolution *Code of Practice*.

²⁴⁷ Resolution *Guide to Good Practice on Drafting Documents 2017* http://www.resolution.org.uk/site_content_files/files/25_drafting_documents.pdf p5.

²⁴⁸ Page 6. In two of the focus groups the participants noted that there are no restrictions on the length of statements of case in divorce proceedings and it is highly unlikely that anyone would be sanctioned over even the most inflammatory particulars. This was noted to be in contrast with Children Act proceedings where the court will exercise firm control on what length of statements can be filed and when, and indeed on whether statements should be filed at all.

²⁴⁹ Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 90.

cost of negotiating over multiple drafts, where the unrepresented client had been dragging their heels.

3. *In adultery cases, avoiding the naming of co-respondents where possible or trying not to allow clients to gather or file additional 'evidence' of adultery,*²⁵⁰ both to avoid inflaming the situation and helping to reduce potential delay and costs.

Underpinning these strategies was a very strong orientation among family lawyers towards a pragmatic approach to the divorce, designed to ensure that a divorce can be achieved while limiting any collateral damage. The purpose was to focus clients, and to a degree the other party, on looking ahead, even whilst drafting particulars that focus on past behaviour:

I think the protocol really helps, because often [if the other side is represented] then you are essentially working on it with your professional colleague. So, it's two heads are better than one in terms of taking out potentially inflammatory content and finding something that's palatable for everyone. (Lawyer focus group A)

It was not just the family lawyers who adopted these conflict management strategies. They are now widely shared by other advice agencies, such as the Citizens Advice Bureau (CAB) or Wikivorce, who advise litigants in person. Interviewee SP012 had, for example, been advised by the CAB to share her draft behaviour petition with her 'volatile' ex to prevent problems later. Similarly, WK04 and her husband had sat down and filled in the divorce paperwork together, following advice from Wikivorce, to try to ensure the divorce was as smooth and speedy as possible. Other unrepresented interviewees in our qualitative sample, either using their own good sense or having done internet searches, also reported having shared drafts of the petitions before filing.

7.4 Pragmatism meets literalism: the balance of harm

Although harm-minimisation strategies were widely used by lawyers, and some litigants in person, they are an imperfect solution to the problem. For a start, not all parties will be aware of, or willing to use, the strategies that can be deployed. Some lawyers are not oriented towards harm-minimisation, or may have a rhetorical, but not a practical, commitment to harm-minimisation.²⁵¹ Equally, some unrepresented parties will not know that they can produce short and mild particulars or share drafts. Or, in some cases, the parties, represented or not, may have a literal orientation towards fault and be unwilling to tone things down.

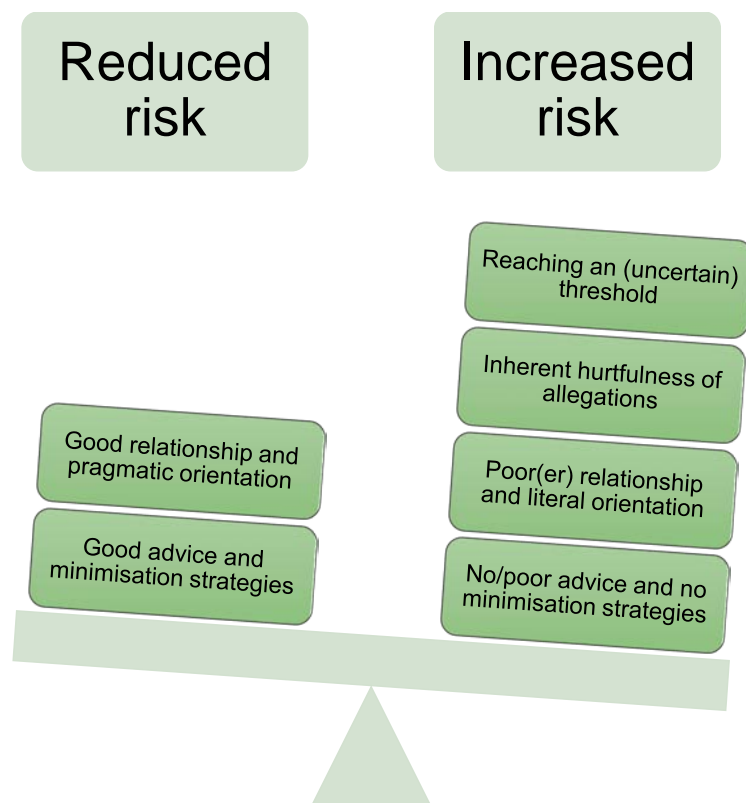
In Figure 7.1, we set out the factors that appear, from our qualitative data, to either increase or decrease the risk of fault triggering or exacerbating conflict. In summary, having a good pre-existing relationship, a pragmatic orientation to the divorce, together with access to good advice and harm-minimisation strategies is likely to reduce the risk of fault triggering conflict.

²⁵⁰ E.g. in the form of social media material etc.

²⁵¹ The lawyers for the focus groups were all members of Resolution. The parties for the qualitative interviewees were recruited primarily through Wikivorce or the One Plus One 'Splitting Up' service and a small number through Resolution solicitors. A proportion of the parties had had legal advice at some point, or had been represented, but some of the lawyers used may not have been members of Resolution.

Conversely, a poor(er) relationship, literal orientation and no access to or unwillingness to use harm-minimisation strategies is likely to increase the risk. However, good intentions and good advice are not enough. As the diagram shows, the two additional factors of having to reach an uncertain threshold and the inherent hurtfulness of allegations will apply to most, if not all parties relying on fault-based Facts, and tilts the balance of harm towards conflict. These two additional factors – reaching the threshold and inherent hurtfulness will not necessarily derail positive relationships but they do make it harder, as we show below. For those with poor intentions and poor relationships, fault provides an ideal way to start a fire or fan the flames of existing conflict.

Figure 7.1: The balance of harm



Access to advice and harm-minimisation strategies

One of the critical factors in relation to the balance of harm is whether the parties have access to good advice and/or good containment or harm-minimisation strategies. We noted above that some unrepresented parties did adopt harm-minimisation strategies, but not all in our journey study sample appeared to be aware of the possibilities. The case of WK19, noted above, was a good example of where the description of the wife as “emotionally abusive” in a non-agreed draft caused collaborative parenting arrangements to be disrupted. In that case, the husband appeared to be acting out of ignorance, rather than malice. In other cases, unrepresented petitioners appeared to be aware that they could, or should, share particulars but chose not to do so.

The reasons for not sharing drafts could be a desire to avoid an argument, for now, or a wish to remain completely in control of the process. Interviewee WK06’s husband, for example, had asked for a copy of the draft petition but she just gave a verbal summary rather than “go

into detail because I knew it would just cause a row and I thought, well, he's going to get them eventually anyway". Interviewee SP20 did not even inform his wife that he was filing for divorce, let alone share a draft: "There was not really the opportunity to discuss it with my ex-wife because back then she was still very unreasonable". Perhaps, not surprisingly, that was a case where there was later litigation over child arrangements and finances.

There were also cases where lawyers did not share drafts of particulars either. That may reflect a more litigious orientation on the part of some lawyers, or client pressure. Or in some cases, it may be that it is simply not economic to share drafts. A lawyer in focus group E, for example, argued that it was simply not possible in legal aid cases to negotiate over multiple drafts for a fixed fee of £86 per divorce, and so usually just offered to send the respondent a copy. Given that legal aid is now restricted to clients where there is a background of domestic violence, it can also be anticipated that spouses in such cases may be less co-operative about the particulars.

Literal and pragmatic orientations

The second factor in the balance of harm is the relationship between the parties and their orientation towards a literal or pragmatic approach to the divorce. Those with a positive relationship and pragmatic orientation had less conflicted relationships and this factor is also likely to influence their willingness to engage with and accept harm-minimisation strategies. Parties with a literal orientation were less amenable to being persuaded of the benefits of harm-minimisation. The struggle between a pragmatic and literal mind set did put lawyers in a difficult position, not least as it is the client who is giving instructions. Lawyers had to balance the need to respect their client's concerns with a professional duty to offer the best advice as they saw it, even if that did not accord with their client's view or their wish for someone to fight their corner. The lawyers typically reported appealing to clients' self-interest in keeping potential costs down by producing mild particulars. Those pragmatic appeals to reason were not always successful. Some of the lawyers did recognise that emotions cannot always be managed out of the process by harm-minimisation strategies and pointed to a need for clients to find an outlet for emotion:

The reality is that it's actually ... as a practitioner it's quite a difficult thing to control because for our clients the reason why the marriage broke down is a very sensitive and massive issue in their minds. (Lawyer focus group F)

In some instances, petitioners appeared to use the opportunity provided by the availability of fault to issue 'revenge particulars'. This could be the perception of the respondent. SP06, who went on to litigate over children, thought that his wife used the petition as "she wanted to really get her pound of flesh which fits with how she is, has been". The respondent SP48, who had also had disputes over children and money, was angry that his wife had refused to issue on two years separation and consent but noted that "She wanted to hurt me".

There were some examples amongst our petitioner interviewees too where they freely admitted that they had used the behaviour particulars to get back at their spouse. SP13, for example, had toned down his behaviour petition on the advice of his solicitor so that it would not be defended. However, he stated that he had purposely left something in the particulars that he knew would greatly upset his ex-partner and her extended family.

The effectiveness of harm-minimisation strategies is dependent upon not just upon the petitioner reaching out, but on the respondent engaging as well. Not all respondents were willing to listen. The respondent husband of WK02, for example, failed to reply to emails asking to discuss or comment on a draft petition and the husband of SP42 was reported to be “in denial” about the divorce and to have found the draft petition too upsetting to read. SP11 reported meeting her husband to discuss the draft, but she thought that “not much went in” at that stage as her husband was too angry about the divorce to listen.

The combination of poorer relationships, a literal orientation and no containment or harm-minimisation strategies could mean a toxic recipe for conflict. There were a number of cases from our main court file study where the opportunity to use fault, whether behaviour or adultery, provided a platform for the parties to play out their conflict through the court process in a way that could only make poor relationships worse.

Both parties in court file case L176 were unrepresented. The wife filed a very strong behaviour petition, focusing specifically on the husband’s failings as a father and accusing him of mental cruelty. The husband responded with a 2.5-page point by point rebuttal of the petition and counter-attacked on the wife’s “dictatorial attitude” and undermining of contact with the children. The divorce was not defended but, unusually, there was a hearing in respect of costs, which was an indicator of the level of conflict. It appeared highly likely that the divorce process exacerbated the existing problems over child arrangements.

The parties were also unrepresented in court file case L138. Here, the husband was petitioning on adultery, unusually adding a pointed reference in the particulars that “within a week [of separation] my wife was with another man”. The dispute immediately escalated with the wife refusing to admit to the adultery and objecting to costs because “my husband left me with nothing he was physically and mentally abusive”. The husband when applying for decree nisi then sought to alter the petition to name the co-respondent, whilst also making allegations of criminal behaviour against the man and offering to provide witnesses. It was only the intervention of the court that prevented any further escalation. The court wrote to the petitioner noting that the papers would have to be re-served, warning “it will be similar to starting the whole process over again”. Sense prevailed. The respondent admitted the adultery and the petitioner applied for decree nisi without naming the co-respondent. It seemed that without the discouragement of the court, the parties would most likely have continued to conduct their fight through the divorce process.

Reaching an uncertain threshold

Reducing conflict in fault cases is not just a question of harm-minimisation strategies and intentions which are benign or unforgiving. There are two universal risk factors in behaviour cases that apply regardless of the quality of the relationship between the parties and their approach to harm-minimisation. The first is about the need to reach an uncertain threshold. However well-intentioned the parties, allegations still have to be produced that will satisfy the court. That fact was not lost upon the lawyers even as they emphasised the need to try to make the process as low-key as possible:

L1: Which just means one person’s got to say, you know, unpleasant things about the other. No matter how hard you try and not raise the temperature and not say any more than you have to say, to satisfy the judge -

L2: But they may have just got, they may have actually got over the really painful bits and then you bring it full centre stage and thrust it upon them again. Absolutely mad. (Lawyer focus group B)

Lawyers were therefore constantly having to balance the need to keep particulars as mild as possible, but still strong enough to meet the threshold. The goal of 'minimum sufficiency' meant that lawyers were attempting to pitch at a relatively narrow band where the petition was strong enough to pass the court's threshold, but not so strong as to cause conflict (and especially not lead to the petition being defended):

We encourage [clients] to give us incidents of unreasonable behaviour, but it's that balance, we don't want it to be too serious. Because the worst thing is for you to be advising someone who's received a divorce petition and it's saying things about the children isn't it and other things about finances – it can force you down the route where you might have to advise the client to defend. (Lawyer focus group E)

Hitting that narrow band of minimum sufficiency may be more difficult for litigants in person who may undershoot or overshoot, or not appreciate that there is a balance to be struck. However, as we saw in Section 6.6. the uncertainty over the threshold has meant that represented petitioners are also likely to overshoot the threshold, tipping the balance towards conflict.

The inherent hurtfulness of allegations

The second universal risk factor is the inherent hurtfulness of allegations. Avoiding conflict whilst allegations of behaviour are generated, submitted to a court of law and then, in the minds of the parties, recorded for posterity requires a very high degree of trust and cooperation. Both are likely to be in short supply after relationship breakdown. As lawyers noted, it is easy to describe the petition as a means to an end, but not so easy when the allegations are about you:

From a purely kind of practical point of view when you deal with clients, you do find that the grounds for divorce they get quite upset about. It's seen as really personal, and sometimes it can escalate a situation from 'these people just want to separate' to 'Oh they're saying this and that'. ... I think lawyers tend to look at it and think, 'well it's a means to an end', it's the first step really in dealing with the rest of the matters. But if that's about you, people do take it to heart. (Lawyer focus group A)

A represented respondent who had had the rules of the game explained to him, and accepted pragmatically that the allegations of his behaviour were a means to an end, still found the processing upsetting and difficult to manage:

Obviously, kind of the depth and the breadth of which the 'unreasonable behaviour' have been laid out is kind of upsetting to be honest and that's going to be the case for pretty much everyone I guess. But at the end of the day I accept that it's a process and we've talked about it and [wife's] kind of said as well that this is just what we have to do and I'm accepting of that fact

and at the end of the day it's just a process that we've got to follow... Whilst it's personal, it's not personal if you see what I mean. WK04

Both lawyers and the parties reported that there is something transformational about seeing things written down in black and white, particularly when those documents become official records. One lawyer in focus group A noted that “seeing it written down in a petition can be really challenging for a lot of people”, and another in focus group F that for all the talk about it being a means to an end and not mattering, “When you’ve got it in black and white in a court document it rings a bit hollow”.

The respondent SP01 had been very upset when receiving a behaviour petition: “It’s awful to read what people are saying about you, especially you know, if it’s untrue. But even so, it’s not nice”. It may not be easy for the petitioner either. WK13 had tried to draft a mild petition but reported waiting with trepidation for the response as the petition landed on the respondent’s doorstep: “I keep waiting to see a mushroom cloud come up in the distance”.

While harm-minimisation strategies emphasise agreeing drafts of fault-based, and in particular behaviour, petitions, it is important to recognise the impact of the draft itself. The draft may not be the final word, but, once it is received, any damage can be hard to undo. The petitioner SP15, for example, was quite happy to produce ‘revenge’ particulars. He had sent a draft to his wife including allegations about her parenting. She had reacted very negatively, he reported, saying “she didn’t want that on the petition. I don’t know why, because we were going to get divorced, but it was just her, I don’t know, her ego type thing. She didn’t want it in.” The husband did agree to take out the strongest allegations but the damage appeared to have been done. That was a case with subsequent disputes over children and money. The draft petition may well have added to the conflict.

There were other cases in our interviewee sample where seeing the petition, in draft or final version, served to concretise the dispute. SP08, for example, in whose case there were later disputes over children and finances, thought that the turning point was when his wife ‘wasn’t very happy’ when she received his behaviour petition: “It was almost like, right, now we are fighting, kind of thing. Well, it just made it more acrimonious”. From a respondent perspective, the transformational effect of the petition was evident. In both the following cases, the relationship between the parties had been manageable, but took a turn for the worse when the petitions landed on the doorstep:

At the time when I got all that through, [my feelings] went from just being okay to really resenting her... from the woman I used to know and love, it was a case of how can you do that to someone that you've been with for 15 years? You know, yes sometimes I might have been up, sometimes been down but why put a whole load of lies in a piece of paper? (SP45)

Once my eyes were opened to how much I annoyed her, for want of a better phrase, it is quite hard to go back.... Obviously, you just see ‘unreasonable behaviour’. It covers a multitude of sins, doesn’t it? But when you see a list of multitude of sins, it’s a different matter. It just made me less trusting of her. I suppose, you know resentful would be a strong word, but yes. (SP07)

7.5 Conclusion

The dominant theme of family law and policy over the last few decades has been to emphasise the need to minimise conflict post-separation, based particularly on a very robust body of evidence on the negative consequences for children of parental conflict. The evidence from this study, that the current divorce law may trigger or exacerbate parental conflict that may rebound on children, is a real cause for concern, though is not a surprise. The relationship between fault and parental conflict has been recognised since the 1980s, if not earlier.

We explored in this section the issues that appear to influence whether the divorce process itself is a contributory factor or not, including awareness of, and receptivity towards, harm-minimisation strategies such as keeping particulars short and mild and sharing draft particulars. We noted, however, that even with the best will in the world, there are limits to what harm-minimisation can achieve. Even so-called mild or anodyne behaviour particulars are still liable to hurt the receiving party and risk upsetting or preventing co-operative approaches to children and finances. The need to reach what is also a very uncertain threshold is also likely to result in particulars that are stronger than they might otherwise need to be. In the next section, we explore what impact the particulars have on the respondent.

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

“adjudicative procedures provided by the state should be fair. The rule of law would seem to require no less.... a matter should not be finally decided against any party until he has had an adequate opportunity to be heard...”

Lord Bingham²⁵²

8.1 Introduction

We noted in Section 7.3 above that petitions may be jointly produced between the parties and with a narrative that both can accept, more or less. However, it is also clear that in many instances the drafting, particularly of behaviour particulars, is not a collaborative process and the respondent will disagree with some, or all, of the allegations contained in the petition. That lack of consensus does matter given that, as we saw in Section 4 above, the court's starting point in undefended cases is to accept that the petitioner's version of events is true. We established that this position remains the case even where there is evidence that the petitioner's account has changed substantially or where the respondent rebuts the allegations without formally defending.²⁵³ In the vast majority of cases, the petitioner is therefore placed automatically in a very strong, and largely unchallengeable position, whilst the respondent is placed in a correspondingly weak position. On the face of it, the court's endorsement of the allegations of one of the parties against the other, regardless of the truth of the allegations, appears to be procedurally unfair and contrary to Lord Justice Bingham's seventh principle of the rule of law: that adjudicative procedures provided by the state should be fair.

In this section, therefore, we explore the question of procedural fairness between petitioner and respondent. We begin with evidence that a number of respondents do indeed feel a sense of injustice about being on the receiving end of allegations, notably in behaviour petitions. We then consider what options are available to respondents to shape or challenge petitions. We note that respondents do have some options available but that these are dependent upon the cooperation of the petitioner or, in the case of rebuttals, are in essence a way of letting off steam without influencing the content of the petition. Defending petitions is very rarely a viable option and respondents face an uphill battle to submit a defence given the pragmatic orientation of a family justice system that discourages defences.

8.2 Being on the receiving end

As with almost all issues explored in this study, the identification of the unfairness of the respondent's position is not a new phenomenon, particularly in relation to behaviour petitions. In the 1980s, Davis and Murch reported that 63% of respondents in behaviour

²⁵² Lord Bingham, 'Rule of Law' (2007) 66 C.L.J. 67, 80.

²⁵³ Sections 4.4-4.6 above.

cases were “shocked” by the particulars,²⁵⁴ and reported feeling like they were on the “receiving end” of a one-sided or distorted petition where a single “grain of truth” had been taken out of context.²⁵⁵ Davis and Murch noted a “strong sense of grievance” amongst respondents, particularly on the basis that the court would accept the petitioner’s account at “face value”.²⁵⁶

Little has changed. Our qualitative interviews with respondents in the petition journey study also yielded evidence of widespread dissatisfaction and a sense of unfairness. The following quotation is unusually eloquent, but the sentiments are not unusual. In this case, respondent WK22 was incensed that the petitioner had produced particulars covering 1.5 sides of A4 relating to his behaviour in the draft petition, whereas he held the petitioner responsible for the failure of the marriage. Aside from the perceived misplacement of the blame, the respondent was most angry that the allegations would not be tested by the court, but would be accepted by the court at face value:

Well her account doesn't mention any of that [her infidelity]. She makes me out to be a monster in 1,500 words. So, the thing that causes me upset is the fact that she can do that and doesn't need my agreement, doesn't need to be able to substantiate a shred of it. That is the thing which has, you know, laid me bare on more than one occasion. ... It is the account of one individual, right? So, it isn't even factual. It is perspective and heavily distorted actually. In this case it is quite heavily distorted. It 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 to in my case 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.

It is very difficult to assess the extent of respondent dissatisfaction. However, the findings from the national opinion poll sample amongst those who had experienced divorce, for example, did suggest quite wide disparities between petitioners and respondents on the accuracy of the petition in fault-based divorces – only 26% of respondents thought that the Fact relied on very closely matched the reason for the breakdown compared to 65% of petitioners.²⁵⁷

In our main sample court file study, we found that 36.9% of behaviour cases included a rebuttal of the particulars.²⁵⁸ Some of those were routine disclaimers, but others were real protests. Similarly, we also noted in Section 5.2 above that the great majority (89.6%) of behaviour particulars placed all responsibility for the breakdown of the marriage solely on the respondent. In law, the behaviour Fact relies upon the petitioner setting out why the respondent is responsible for the breakdown of the marriage, but the lack of *any* acknowledgement of petitioner culpability in the great majority of petitions is striking,

²⁵⁴ Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 92-3.

²⁵⁵ Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 90.

²⁵⁶ Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 94.

²⁵⁷ See above Section 3.3

²⁵⁸ See above Section 4.5

particularly in a pragmatic context where harm-minimisation is an important consideration. It was also something that particularly rankled with our respondent interviewees from the journey study, who were willing to take some responsibility for the end of the marriage, but not all of it.

What is also striking about the particulars in the main court file sample was the rarity of any attempt to provide any context for behaviour. The particulars in L081 – where controlling and aggressive behaviour were attributed to the respondent’s “childhood and life experiences” – were exceptional in attempting to explain the behaviour, instead of simply presenting a list of the respondent’s failings.

8.3 Options available to respondents

Respondents do potentially have a wide range of options available to them to influence the Fact selected and the content of petitions, as set out in Table 8.1. What is clear is that although there is a long list of such options, none are both risk-free and available in any circumstance. The best options for shaping the petition are the two collaborative approaches - jointly producing the petition and sharing drafts – but both require an effective working relationship between the petitioner and respondent. The two blocking options of refusing consent/admission and not returning the acknowledgement of service can be effective options for creating delay and can sometimes derail the divorce completely.²⁵⁹ However, the first option is only available for the adultery and two years Facts, the second could lead to adverse cost awards. Producing an alternative petition involves significant costs and can escalate conflict.

If respondents are unhappy with allegations then the most powerful weapon available is to defend the divorce. The recent case of *Owens* indicates that a defence can be successful, at least as a temporary measure until the five years’ separation period has elapsed.²⁶⁰ However, as we explore further below, defence is not a realistic option for the great majority of respondents, given the financial and emotional costs, let alone the legal challenges.²⁶¹

What is left is the rebuttal. Any collaborative approaches aside, that appears to be the most common tactic deployed where respondents have concerns about the particulars. As we see below, rebuttals are commonly used by lawyers to assuage concerns and persuade clients away from threats of defence, but in practical terms they do not, of course, alter the content of petitions in any way and will not be taken into account by the court.

In sum, therefore, whilst there are a range of possible tools in the respondent’s armoury, none is guaranteed to work or to work without collateral damage or financial costs. The petitioner will always call the shots unless the respondent is able to defend the case.

²⁵⁹ Of the 16 cases in the main court file sample where no further progress had been made following the issue of the petition, in only three cases had there been an attempt at alternative methods of service, only one of which was by an unrepresented party. None were successful. An example was case L68. The wife’s petition alleged serious domestic violence against the husband. The husband failed to acknowledge service. The wife applied successfully for permission to attempt bailiff service but attempts to serve the husband via the bailiff failed three times and all attempts at service ceased. There was nothing further on the file.

²⁶⁰ Subject to the decision of the Supreme Court, expected in early 2018.

²⁶¹ Mr Owens is a multi-millionaire mushroom farmer.

Table 8.1: Options for the respondent to influence the petition

	Option	Likely effect	Constraints	Financial cost to respondent
Collaborative approaches	Jointly produce the petition	Most likely to incorporate the respondent's perspective	Reliant upon cooperation of the petitioner	None, unless agree to split the issue fee and/or any legal advice
	Comment on the draft petition	Likely to limit the most contentious material	Reliant upon the willingness of petitioner to share drafts and to accept amendments	None, other than any legal advice
Rebuttal	Rebuttal on the acknowledgement of service or in accompanying letter or statement to the court	Will not change the Fact or particulars. May make the respondent feel better. In rare cases, may reduce risk of 'conduct' influencing financial orders	Not all respondents will be aware of the possibility of rebutting	None
Blocking tactics	Withholding consent to a decree on two years separation or withholding admission of adultery	Effective method of delay – will usually require amendment to a different Fact	Relevant only for adultery or two years separation cases.	None
	Refusal to engage by not returning the acknowledgement of service	Will create some delay. May stall the divorce if the petitioner is in person and unable to effect service	None	If costs of service awarded against the respondent
Threats to defend and actual defence	Registering an intention to defend on the Acknowledgement of Service	May worry the petitioner but the court will not act unless the respondent files an Answer and	None	None

Option	Likely effect	Constraints	Financial cost to respondent
	pays the correct fee		
Registering an Intend to Defend and writing to the court	As above, the court will only act if the respondent files an Answer on the correct form with fee	None	None
Defending the petition	Defence on the basis the marriage has not broken down irretrievably is unlikely to succeed. Defences of particulars is most likely to result in compromises over Fact or particulars.	Emotional and financial cost of defence. Requires degree of legal literacy to proceed. If represented, will need to overcome lawyer's likely advice not to proceed.	£245 fee for filing the Answer and cost of any legal advice
Producing an alternative petition	Leapfrogging a draft petition by filing a petition without consultation before the other spouse can issue	Will seize control of the process but likely to be highly inflammatory	Requires very quick action
	Cross petitioning	Opportunity to select a Fact and particulars but will not negate the first petition. The respondent's petition is likely to be perceived as a hostile act	Risk that the first petitioner may defend the respondent's petition
			Issue fee of £550
			Court fee to issue own petition of £550 and any legal advice

8.4 Why don't more respondents defend?

If respondents do feel strongly about defending on the basis that the marriage has not broken down irretrievably and thus can be saved, or more commonly, want to contest the

allegations against them, then they are entirely within their rights to defend the proceedings. There is a procedure in place to do so, but in practice, although there is a procedure available, it is very difficult to take advantage of it. In 2016 an intention to defend was registered by respondents in about 2,600 acknowledgements of service, representing just 2.3% of the 113,996 divorces granted in that year. The number of respondents who went on to file Answers was even smaller, at about 760 or 0.7% of all petitions.²⁶² We explore three reasons for this below: the systemic barriers to defence, the capacity and vulnerability of (unrepresented) respondents and the pragmatic orientation of family lawyers who, in the great majority of cases, will dissuade their clients from contesting particulars unless the allegations are exceptionally serious.

Systemic barriers

Part of the explanation for the low numbers of defences lies in the systemic barriers placed in the way of defence. Whilst in most cases it will not be in the long-term interests of the respondent to seek to defend a divorce, in the interests of procedural fairness it is necessary that the procedure is clear and transparent and accessible to all, regardless of means. It is evident, however, that the family justice system as a whole does little to facilitate respondents defending petitions where they feel aggrieved. Rather, there is some evidence, in terms of fees and information about the process, of systemic discouragement of defences. The current application fee for filing an Answer is £245. That is out of reach for some respondents. Help with court fees might be available, but only for those on the lowest incomes and who are aware of the provision. Respondents, including those seeking help with court fees, also have limited time to act – the seven days for the acknowledgement plus a further 21 days to file their Answer.

Little information about how to defend a petition is made available to respondents. At the time of fieldwork, all the guidance that respondents were sent routinely by the court were the notes on completing the acknowledgement of service form which accompanied the petition when served. The only guidance in relation to defence was the following paragraph (in a very small font):

*“If you answer **Yes to Question 4** [do you intend to defend] you must file in the Court office an answer to the petition together with a copy for every other party to the proceedings. You must file your answer within 21 days after the time limit for giving notice of intention to defend has expired, which is in turn seven working days after the notice has been served on you. You will have to pay a fee.”*

What the notes did not state clearly was that filing “your answer” meant completing the mandatory D8b Answer form (or legal software equivalent). Nor did the RDCs in any of our four fieldwork sites send out copies of the D8b automatically if an intend to defend was recorded on the Acknowledgement.

The small minority of respondents who are represented will be made aware of the D8b form by their lawyer. Some unrepresented respondents may have stumbled across the D8b on gov.uk, or they may get through to the RDC on the phone and be told about the D8b. However, there were (unrepresented) respondents in our contested file sample who were

²⁶² Unpublished HMCTS data reported in *Owens v Owens* [2017] EWCA Civ 182 [98].

clearly not aware of the formal requirements and simply sent in letters to the court that appear to have been intended as a defence. Unless the correct D8b form was filed, with the fee, those letters were ignored and cases progressed to consideration of the petitioner's entitlement to decree nisi on the basis that no Answer had been filed.²⁶³

The limited provision of information on the process provided to the respondent was in contrast to the material sent routinely by the court to petitioners. In all four fieldwork sites, if there was an intention to defend recorded on the acknowledgement, the court sent petitioners a D9E Notice to inform them of the intention. The notice also informed the petitioner that they may apply for decree nisi within the next month if a copy Answer is not received. Petitioners are also referred to leaflet D186 "*The respondent has replied to my petition – what must I do*". There is no equivalent leaflet for respondents.²⁶⁴

Respondent capacity and vulnerability

In the 1990s, the Law Commission noted how difficult it was "to resist or counter allegations of behaviour". The reasons were, it suggested, that defence "requires time, money and emotional energy far beyond the resources of most respondents".²⁶⁵ There was direct evidence of these constraints amongst some respondents in our contested court file study who had registered an intention to defend, but who did not go on to file an Answer.

The wife in contested file sample M007, for example, was on the receiving end of allegations of her domestic violence that she strongly disputed. She wrote several times to the court recording, at length, her objections to the petition, but stated in the end that she could not afford to pay the £6,000-8,000 legal fees that she had been quoted to defend the proceedings. Her last letter complained:

"I will never agree to irretrievable breakdown due to my unreasonable behaviour. How it is takes two people to sign a marriage certificate but one party can totally lie about the other to obtain a divorce? Whilst I no longer wish to be married to this man I do not see why his fabricated lies and the fact he can afford a solicitor should be allowed to blacken my name." (Contested file sample M007).

Our contested file sample indicated that those seeking to defend do include people with significant vulnerabilities who are likely to find mounting a defence particularly challenging. These vulnerabilities include mental health issues, language and literacy issues, living outside the jurisdiction and age. Case L067, for example, concerned a respondent who wrote to the court stating: "I am a 73-year old lady who never thought would be put in this position". There was little the court could do except suggest that she should seek legal advice.

The respondent in case M003 was also wanting to contest behaviour allegations. He contacted the RDC who explained that he would have to complete a form D8b, pointed him

²⁶³ We explore these cases and the court's response to intend to defend in depth in our forthcoming report on contested cases.

²⁶⁴ In undefended as well as defended cases, if petitioners were unrepresented, they would also routinely be sent the forms necessary to take the next step of applying for decree nisi, when the court forwarded any acknowledgement of service filed by the respondent.

²⁶⁵ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.14.

to the help with fees process and suggested that he contact the CAB for advice. The RDC did not reply to the respondent's second letter when he reported that he could not afford a solicitor, did not understand the D8b and fee remission forms, could not use a computer and that the CAB had said they were not qualified to complete the forms for the respondent.

Advice to 'suck it up'

Aside from sufficient resources, represented clients who wish to contest the divorce or the particulars will also need to persuade their lawyer that it is an appropriate course of action. The pragmatic orientation of family lawyers, evident in both our focus groups and interviews with lawyers about high conflict cases, meant that although they recognised their client's anger and upset, it was very rarely viewed as in the client's long-term interest to mount a defence.

Hence lawyers had a range of techniques used to dissuade clients from defending. Pointing out the potential cost of contested proceedings was a standard technique with a range of stock phrases being deployed:

'Yes, you've got these principles' ... that's one of my stock phrases. 'Can you afford these principles?' is the bottom line. (Lawyer focus group E)

You say to them, 'Do you agree we need to try and deal with this in as a conciliatory and the most cost-effective way possible?'. Generally, as soon as you mention the word 'costs' they're quite happy to go along with what you're suggesting. (Lawyer focus group B)

The focus on costs was set in a broader pragmatic approach that recognised that, however unfair the petition might be, the worst option would be to try to defend it. Defence was seen by lawyers as a futile and expensive option in contrast to a rational, future-oriented, problem-solving approach. The tough love message was that respondent clients should think of the end game and 'suck it up', despite the acknowledged unfairness:

I always say to people, 'Look, just think of it as a means to an end', particularly if you've got the respondent sitting there with a horrible behaviour petition... I just say, 'Take a deep breath and just go with it, because we all want to get to the same place, and it doesn't matter'. And some people will get that quite quickly. And other people really can't get past that for quite a long time (Lawyer focus group A)

Clearly, however, sucking it up is very difficult for some clients, particularly those who might have a literalist orientation, and they might need considerable amounts of persuasion. We found a number of examples in our court file study where the 'client' had clearly taken some time to accept the lawyer's advice. In our main court sample case M063, for example, a handwritten "yes" to the intend to defend question on the acknowledgement had been struck out and, in handwriting that matched the solicitor's signature, the phrase substituted "No [to intention to defend]– but I do not accept the allegations levelled against me but recognise that the marriage has irretrievably broken down." As one of the lawyers in focus group F noted, the opportunity to rebut the particulars provided the psychological or emotional leverage to move the divorce forward without having to defend.

Aside from citing costs, and offering the opportunity to rebut, a third strategy used to dissuade clients from defending was the futility argument – that the court would not be interested in counter-allegations. In the journey study, there were a number of interviewees who had taken their lawyer’s advice to suck it up as, even if they had been able afford to defend, they had been informed that the court would not be interested in hearing the minor details of their dispute. Whilst they accepted that the advice made sense in the long-term, there was also a strong sense of unfairness and injustice in that their spouse had, in effect, ‘got away with it’. SP06, for example, was furious with the content of a behaviour petition that had not been shared before filing. He had reluctantly accepted the message that there was no point in attempting to ‘correct’ the allegations and so was willing to sign the acknowledgement of service to get the divorce through:

Some of it was flyaway in Fairy Land... The best lie is an element of truth and then thrown around a cloud of detail that actually doesn't fit well. ... And having spoken to the solicitor, that nobody's really very interested, these are small scale little things, the formality was basically to get your divorce through. And I didn't want to delay the divorce because things had got so nasty.

The respondent WK04 also accepted that any defence would be “incredibly expensive and incredibly unsuccessful”. SP08 found accepting the lawyer’s advice more difficult. In the research interview, for example, he went through each item on the petition and rebutted each one in detail. Eventually, however, he also had had to accept that there was no point in trying to contest the allegations:

Even though I've been told [by solicitor] not to react, I ended up saying 'You said this but what about when I did that? What about when you did that?' It really didn't help at the end of the day. Especially when it's not worth the paper it's written on, because you could just say that's totally wrong, but you still get divorced. I mean, you could write anything you wanted on that piece of paper... There's no point going around in circles but you just accept it and say I don't agree with it but, yes, we're still getting divorced. (SP08)

The awareness of how difficult it was to defend was shared by some petitioners in the journey study. We do not have any direct evidence that petitioners used that knowledge to further strengthen particulars, but there were some hints that some petitioners felt confident enough to include material even though they knew it would cause upset as they were aware of how difficult it was to defend.²⁶⁶ WK06, for example, was quite willing to take the risk of pushing further than was strictly necessary to get her divorce:

I don't think [he'll defend], no, because he doesn't want to spend money. And he wants to push the divorce through. And he just wants it done. So, I don't think he'll contest. I don't think he'll like the reasons but he won't contest it... he'll probably just get a bit defensive and say, 'oh, well, you

²⁶⁶ At the same time, there were petitioners who toned down particulars for fear of conflict or any repercussions, particularly where there was a background of domestic violence.

know, she's blowing it out of proportion' or whatever. So, I would imagine there might be a bit of conflict for a while straight after but I would imagine it will blow over as it always does and goes in cycles.

8.5 Conclusion

Being on the receiving end of particulars, especially behaviour particulars, could be a deeply uncomfortable and upsetting experience for respondents. For some, it also felt a deeply unfair process, where the petitioner was given free rein to say what they wished about the respondent and the court would take that at face value. Unless the petitioner is willing to draft the petition collaboratively, the respondent is in a weak position. That is particularly so for the behaviour Fact, which is not reliant upon the cooperation of the respondent. There are options available to the respondent to try to shape or challenge the petition, including defending, but in reality, none is available in all circumstances or without costs. Defence is not a realistic option for many respondents, and even after *Owens*, is likely to be a waste of resources, both for respondents and the family justice system.

The one-sided nature of the process, which enables petitioners to make allegations that are then taken at face value by the court and can only rarely be challenged by the respondent, does not seem consistent with Bingham LJ's definition of procedural fairness.²⁶⁷ Whilst endorsement of the petitioner's allegations is unlikely to impact upon the court's decisions in relation to child arrangements or finances, our data suggests that the sense of unfairness does matter hugely to respondents.

²⁶⁷ And contrasts with the clear requirement of procedural fairness in actually defended cases: *Butterworth* [1997] 2 FLR 336, at 339.

9. Does fault protect the institution of marriage/deter divorce?

9.1 Introduction

One of the arguments made in favour of fault is that having to give a reason for a divorce protects the institution of marriage and deters divorce. In this section, we test the strength of those arguments. Overall, we find little evidence that fault protects marriage, and that instead fault simply enables a quick exit from a marriage. We also find little evidence of the effectiveness of the various legal provisions contained in the Matrimonial Causes Act 1973 to promote reconciliation.

One issue to emphasise is the crucial distinction between the relationship breakdown and the legal divorce. It is likely that the grounds for divorce may influence the timing of the divorce proceedings, but it would appear to overstate the influence of the law in people's lives to suggest that the law might influence whether the personal relationship does or does not break down.²⁶⁸ It is in any case an unlikely argument that having to provide evidence of fault would mean that people tried harder to stay together or did not split up. Martin Richards has previously suggested that this 'sluice' argument overstates the influence of the law on personal decisions:

*'Those who argue for harder divorce seem to have an exaggerated view of the power of the law to control people's domestic living arrangements. Their model seems to be that of a sluice gate which stands between the married and the divorced. The wider this sluice is opened, the more of the married that will become divorced. Such a view suggests that it is only the difficulty of getting out that keeps people married.'*²⁶⁹

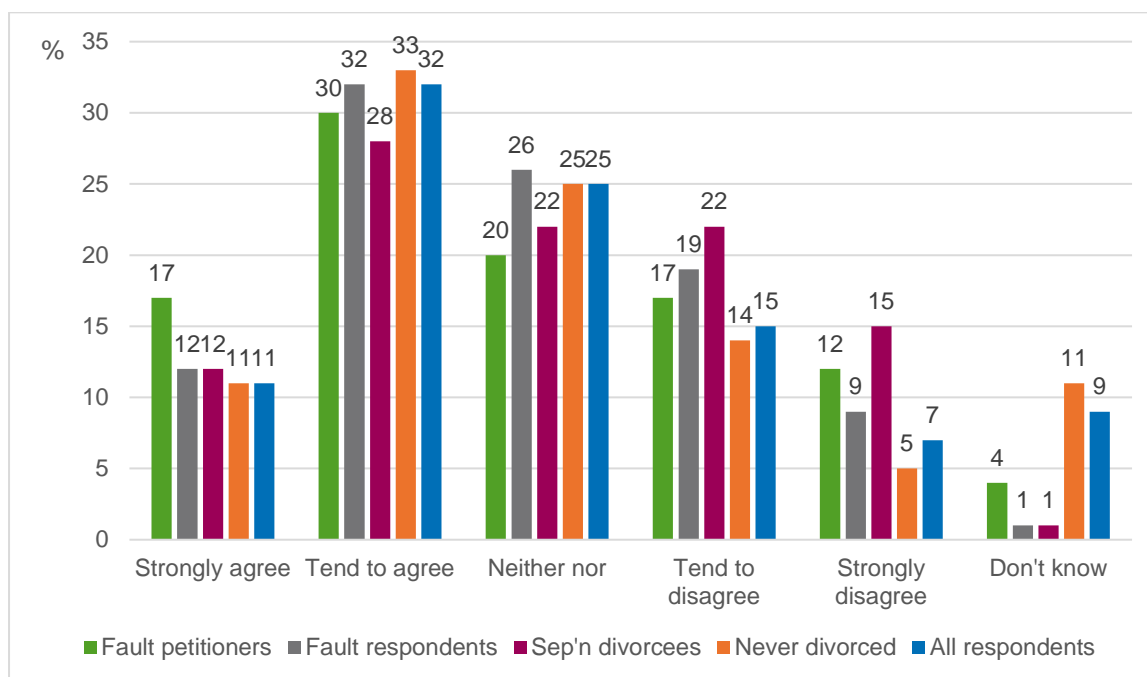
9.2 Does fault make people think twice?

We start by looking at the evidence for an overall link between fault and relationship breakdown. In our national opinion poll, we asked the general public and those who had been divorced whether having to say who is at fault for a breakdown may help people think through whether divorce is really the right thing to do. Although the weight of opinion was somewhat in agreement with the statement, opinion was quite divided between those agreeing (43%), disagreeing (22%) and not able to say (34%). As in other questions, those with and without experience of divorce were divided, with separation divorcees more likely to disagree (37%) than fault divorcees (29% of petitioners and 28% of respondents) while, in turn, only one in five (19%) of those never experiencing divorce disagreed that fault may have this deterrent effect.

²⁶⁸ Several decades of research suggest that there is no clear and direct relationship between fault (or the grounds for divorce) and the rate of relationship breakdown. See Section 11.2 below.

²⁶⁹ Martin Richards, 'Private Worlds and Public Intentions – the Role of the State at Divorce' in Andrew Bainham and David Pearl (eds), *Frontiers of Family Law* (Chancery Law Publishing 1993) 15.

Table 9.1: “Requiring couples to say in the application who’s at fault may help them to think through whether divorce is really the right thing to do”



Base: all survey participants

Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

The question is predicated, however, on the idea that the public are aware of what the grounds for divorce are currently. As we showed in Section 6.4, public awareness and understanding of the current law may often be lacking. Nor is there much merit to the suggestion that having to produce fault-based particulars is an effective deterrent when the threshold for behaviour is so low. Indeed, family lawyers in the journey study were very clear that the idea that fault would promote reconciliation where the marriage had already failed was risible:

L1: ... even though you go through all that [the five Facts], it doesn't necessarily stop the clients from proceeding, does it? It just makes it harder and more bitter. But people don't turn around necessarily and say ...

L2: 'I'm not going to get a divorce' [laughter]

L3: ... 'Well I'll leave it then'

L2: 'That sounds like too much hard work'.

L1: I think the stigmatism has just changed hasn't it, you know from generation ...

L3: I think once you get to the point where you're taking advice there's few that go back ... they may try and reconcile but ... more often than not they come back as clients. (Lawyer focus group E)

The position of the lawyers is not surprising. As we show in Section 11.2 below, there is very little if any evidence of a relationship between divorce law, fault and divorce rates internationally.

9.3 Does fault speed up or slow down the decision to divorce?

What do the data show about the relationship between marriage duration and fault? The first point to make is that there are relatively few very short marriages. In our main court file study, the median duration from date of the marriage to decree nisi was 10.9 years and 11.5 years to decree absolute. That is broadly similar to the national median of 11.9 years in 2015.²⁷⁰ Only two of 300 marriages in our main court file study were less than two years in duration and only 10% ended within four years of the date of marriage.

It could be argued that fault is somehow delaying dissolution and thereby limiting the number of short marriages. In practice, our court file data suggests that it is the opposite: fault is associated with shorter marriages. When we restrict our analysis to all marriages in our main sample of over six years (72 months) duration from marriage to the petition, to allow two and five years separation cases to age into the sample, there remains a significant difference ($p=0.038$ anova) between marriage duration in behaviour cases (mean 192.69 months) and in two years' separation cases (mean 230.84 months), although there was no significant difference with five years' or adultery.

A further question is whether fault has any impact on how soon petitioners initiate the divorce after the relationship has ended. We can get some insight into this question from our court file data. However, we should be careful about not placing too great weight on these findings given that the information from petitioners on which it is based was provided to secure the divorce in the context of specific legal requirements, including the six months co-residence rules. What we can conclude, however, is that the data provides no evidence that the availability of fault is slowing down decisions to divorce and some indication instead that fault is a vehicle for those who would prefer a faster legal exit.

In terms of adultery, 23 of 29²⁷¹ petitioners in the main court file sample stated that they had moved out of the former matrimonial home immediately upon learning of the adultery. Signing the petition occurred a median 134 days from the date on which the petitioner said they learned of the adultery, with no differences between genders. In contrast, in separation cases, the time lapse between the stated date of physical separation to signing the petition was a median 335 days *in addition to* the two-year period for two year cases and 461 days *in addition to* the five-year period for five years' separations. Even allowing for inaccurate reporting, the adultery ground appears to be facilitating quicker decisions about proceeding with the legal divorce, not slowing things down.

There is some suggestion of a similar pattern with behaviour. Just 56 out of 126 behaviour petitioners in the main court sample gave a date of the last behaviour that they were relying upon, a possible indicator of separation.²⁷² For those cases, the time lapse between the last behaviour cited and signing the petition was a median 139 days, very similar to adultery and far less than for the separation Facts.

²⁷⁰ Divorces in England and Wales: 2015

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2015>

²⁷¹ Information was not available for two of the adultery cases.

²⁷² In the other behaviour cases the behaviour was stated to be continuing.

9.4 Does the law facilitate reconciliation?

The Matrimonial Causes Act 1973 (and mirrored in the Civil Partnership Act 2004) includes a number of provisions designed to facilitate reconciliation of the parties, reflecting a view that divorce law should both “buttress rather than undermine the stability of marriage” as well as provide a fair and just means to end marriages that have failed.²⁷³ For all five (or four Facts for the CPA) there is a provision that the parties may continue to live together, or to resume cohabitation, for up to six months whilst still being able to rely on the specific Fact.²⁷⁴ The court also has the power to adjourn proceedings where there exists a “reasonable possibility of a reconciliation between the parties”.²⁷⁵

The provisions include:

- allowing the parties periods of up to six months of co-residence to attempt reconciliation before the adultery and desertion facts can no longer be relied upon; in the case of behaviour, continued cohabitation beyond that point will simply be taken into account in deciding whether it is reasonable to expect the petitioner to live with the respondent.²⁷⁶
- a power to enable the court to adjourn proceedings where there exists a “reasonable possibility of a reconciliation between the parties”.²⁷⁷
- the requirement that where the petitioner is represented that the legal representative file a statement certifying whether they have discussed with the petitioner the possibility of reconciliation and given them a list of persons qualified to help effect a reconciliation.²⁷⁸

In practice, there is little evidence of the effectiveness of the provisions. At least one couple in our main court file sample did reconcile during the course of proceedings and had the decree nisi set aside. However, that was the independent decision of the parties and was not as a result of the court adjourning proceedings. Indeed, there were no examples of the court adjourning proceedings to enable reconciliation.

Whether the six months rules facilitate or undermine reconciliation is a moot point. A number of participants in our journey study suggested that six months was an unrealistically short period to try to repair a marriage after the disclosure of adultery. The respondent husband WK04 had had an affair. The couple had tried to save the marriage but ultimately it broke down after the permitted six months had elapsed. The husband reported that his wife was angry that she had had to rely on behaviour, rather than adultery, due to the restrictive rules and suggested that the law was “weighted against people trying to make their relationship work” rather than facilitating reconciliation. At the same time in our court observation sample

²⁷³ Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Cm 3123, 1966).

²⁷⁴ MCA 1973, s 2(1-5) and CPA 2004, s 45(1-7). There may be more than one period of such cohabitation, so long as the total does not exceed six months.

²⁷⁵ MCA 1973, s 6(2) and CPA 2004, s 42(3).

²⁷⁶ MCA 1973, s 2 ss(1-6). The adultery ‘clock’ starts at the point of disclosure, behaviour from the last incident of behaviour relied upon.

²⁷⁷ MCA 1973, s 6(2) and CPA 2004, s 42(3).

²⁷⁸ MCA 1973 s6(1) and CPA 2004, s42(2).

we did see an example of an adultery case (#164) where decree nisi was refused because the parties had been co-resident for 18 months.

There was little evidence too that the statement of reconciliation has any effect. The provision only requires the legal representative to report on what they have done. The provision does not require them actively to discuss whether there is potential for reconciliation, merely to state if they have or have not done so. As such, the provision appeared to both lawyers and courts to be a meaningless ritual.

In focus groups, lawyers reported finding the reconciliation certificate pointless and patronising. It was not that they were not interested in supporting marriage, far from it as it was a topic that would always arise in discussions with their clients. What they found patronising was the assumption that clients had not already thought long and hard about their marriage, which may have included having counselling:

I think it's part of any initial meeting. There is a general chat about the state of the relationship. And, it kind of comes out naturally without you having to actually say, 'Have you thought about reconciling?' Often, they'll say to you, 'We've been seeing Relate for the last two years'. My chap today had been in with Relate for a year. You know, I'm fairly confident these two professional people have tried their very best. For me to say, 'Have you thought about reconciling'. It's just patronising, isn't it? (Lawyer focus group A)

The result was that lawyers generally approached the certificate as a box-ticking exercise. Of the 125 certificates of reconciliation filed in our main court file study, in only 52% did the lawyers report that they had discussed the possibility of reconciliation and 10% of certificates said that the lawyer had given out a list of organisations that might facilitate reconciliation. Those figures are lower than in the Law Commission study of 68% and 23.2% respectively, although even then they were not high.²⁷⁹ Whether or not the issue was discussed in the current study, or a list provided, was unrelated to features of the case that might be expected to shape the practitioner's decisions, including the gender of petitioner, the Fact relied upon, whether there were allegations of domestic violence or the identifiable presence of minor children. Those figures should not be a surprise: the message from the focus groups was that lawyers generally completed each certificate in the same way, regardless of the case and regardless of how much, or how little, they had discussed reconciliation.

The RDCs also treated the certificate as a routine activity or a piece of paper to be collected, rather than an effective potential marriage-saving tool. Although the form is a statutory requirement, there was some variation between the RDCs in whether the filing of the form was a red line, i.e. its absence would lead to decree nisi being refused. Even where it was a local priority, there were cases where statements were not filed. In total, statements were filed in only 80% of cases in which petitioners were legally represented, ranging from 80% in one RDC to 95% in another. That is a reduction from the 1980s when certificates were filed in 97% of cases where lawyers were acting.²⁸⁰

²⁷⁹ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 21-22.

²⁸⁰ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 22.

Whilst lawyers reported that the certificate was not a useful tool for them, they assumed that the court might monitor what was recorded on the certificates. In practice, the legal advisers were very clear that they were not interested in the content. They were simply checking that a certificate had been filed. What was recorded was not relevant to the decision:

I'm just checking the fact that it's there. I'm not reading them, no. Because they can either say "I have discussed it", or "I haven't". And so I don't really care what they say, as long as it's there. ((Legal adviser #1)

Of course, it is worth noting that the provision is entirely ineffective in those cases where the petitioner is unrepresented and therefore no certificate is required.

9.5 Thinking and reflecting before separation

The provisions for reconciliation in the statute appear of very limited relevance and effectiveness. For many clients, it may simply be too late in the process. The clear message from the lawyer focus groups was that most of their clients had already made the decision that the marriage was over and were now starting to explore what the options were in relation to the legal divorce. This echoes the findings of the evaluation of the information meetings that were piloted as part of the Family Law Act 1996. The evaluation concluded that meetings that were held with people who were seeking information about divorce were already too late to save 'saveable' marriages. By the time that parties were thinking seriously about divorce it was already too late with more than half of information meeting attendees having already separated and those who had been unsure saying they were more, rather than less, likely to proceed with the divorce after attending.²⁸¹

The decision that the marriage was over was generally one that the parties in the journey study reported was not taken lightly or in a hurry but one that they had thought long and hard over. Once the realisation that the marriage was over had crystallised, many would then seek the fastest and easiest way out, but getting to that point was not typically a rapid process or one that was taken on a whim. Across the qualitative sample there was almost universal belief in the importance of marriage and a concern that making divorce too easy would be wrong. However, for their own circumstances or their own separation, there was a very strong emphasis on how difficult the decision had been to separate. The sole exceptions were a couple of adultery cases where the disclosure was a complete shock and led to an instant decision to divorce.²⁸²

It is important to recognise therefore the range of emotions and reactions experienced by the interviewees. The decision to separate and then to divorce was typically associated with strong feelings of regret, some of failure and, in circumstances where the marriage had become abusive, some of relief. It was rarely something that was done on the spur of the moment, or without consideration for others, particularly the children. From the interviewees, it was not the law that was acting like a sluice, using Martin Richards' metaphor, in delaying

²⁸¹ Janet Walker, *Information Meetings and Associated Provisions within the Family Law Act 1996* (Lord Chancellor's Department 2001).

²⁸² WK07, for example, decided to seek a divorce on the day his wife disclosed her affair, filed a petition immediately and expected to get decree absolute four months from the disclosure.

divorce, but rather people's common sense and decency and commitment to their marriages. None reported giving up easily, but they did get to a point where they needed to move on, whether to start a new life or, in some instances, to exit from an abusive relationship.

The extracts below from our journey study capture best the thoughts and moral reasoning that underpinned people's decisions to separate and divorce.

Divorce preceded by a long period of drifting apart:

It's a big step to take. To make a decision to live separate lives. It's one thing not living together but it's another thing to become divorced and to actually physically walk away from a marriage. Thankfully we are still friends, but it's a big decision to have to make and you know it takes some running through in your head. And there is doubts that go through. You know I mean at the end of the day we've got two children, all be that one's [30s] and one's [30s], so it's, you know it's a big decision to come to from their point of view. But you know, providing we talk about it and we get it out in the open it doesn't, from my point of view I think it's, it's the only thing and the sensible thing to do at this stage. (WK21 Male petitioner, 2 years with consent, married for thirty years or so)

I think it's still very sad that it happened. You know it's a case of practically it has to happen, everything, but it still feels like failure. So yes, sometimes it is heart-breaking but at the same time there's nothing there.... (WK16, female petitioner, 2 years with consent, married for c20 years)

Divorce after the spouse's multiple affairs:

I said that's it I'm not doing this again, this is it... So, I wasn't really giving him the benefit of the doubt then, but you know I kind of wanted to, I didn't want to believe he'd done it again. So, I think the final straw was in, you know the absolute final straw was when I found a [further] text saying I'm coming to see you and you know other things like that. That was absolutely it. (SP42, female petitioner, behaviour, married c6 years)

Divorce after chronic relationship problems

I said if I knew my mum stayed with my dad for the sake of us, the kids, I would be, it would kill me. I would want everyone to be happy and I said if my friend was in the same situation as me I would tell them to get out. So I thought I can't do it. ... And I think at first, he just laughed. I went, I am serious, I am, I can't do this anymore, I tell you I am unhappy, I tell you what all the problems are but they don't change. It is getting worse, it's not fair on these, not fair on you, it's not fair on the kids, this is no way to live and the minute I made it I can't tell you the weight that was lifted off my shoulders. It was the right thing to do, 100%. I was almost said to myself you are stupid, why didn't I do this sooner? (WK17, female petitioner, behaviour, married c7 years)

Divorce to escape (belatedly) from an abusive relationship

I wish considering how obviously it has been very rough, very emotional and very stressful as the situation is but I wish it was, I wish I had been brave enough and to have done it before now. You kind of look at yourself and just think how did I turn into this person and it's having the strength and if you have been put down for so long it is really hard to get, to change that. You just, yes, I have been very foolish. Love is a wonderful thing. (SP23 female petitioner, behaviour, married c15 years)

9.5 Conclusion

One of the arguments in favour of fault is that having to produce a reason for the divorce will act as a deterrent and hence protect marriages. There was little evidence in this study that that was the case. Rather, fault appeared to be associated with shorter marriages. There is also some suggestion that fault was also related to shorter gaps between the actual physical breakup and the filing for the legal divorce though that may be an artefact of the rules on co-residence. That said, there was no evidence at all that fault was protecting marriage. That is probably not surprising given gaps in the public understanding of the grounds for divorce and the ease with which a fault divorce can be obtained, especially with legal advice.

There was also no evidence that the various measures within the MCA 1973 to support reconciliation were at all effective and indeed the use of the reconciliation certificate process is a fairly meaningless ritual. 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 reaching that point of seeking advice about ending the marriage is one that is not taken lightly at all. Marriage is highly valued as an institution and as a relationship, and not one that people give up lightly.

PART D. FAULT AND DIVORCE LAW REFORM

10. Doing the right thing? Fault, morality and responsibility

10.1 Introduction

Having outlined the problems with the existing law, in this section of the report we examine whether, and how, the law might be reformed. We start by look at the responses of the general public and of divorced people to a series of hypothetical questions about the role of fault. We then explore in more depth the range of views and experiences of fault, drawing upon our qualitative interviews with petitioners and respondents. This section concludes by summarising the arguments for and against fault, drawing on sources from within and outside this study.

We argue in effect that views on fault reflect two opposing moralities, a traditional one based on ideas about individual justice for the petitioner that links to the literalist approach and a more modern one linked to pragmatism that emphasises personal responsibility and relational responsibility for the wellbeing of others, including children. Not surprisingly, interviewees endorsing the responsibility morality were very strongly in favour of the abolition of fault. However, some who had subscribed to a justice orientation also recognised that the collateral damage caused by fault was counter-productive and had shifted towards endorsing a no-fault approach. What both moralities, indeed all interviewees, had in common was 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 marriage and opposed to anything that would undermine marriage as an institution.

10.2 Should there be a role for fault?

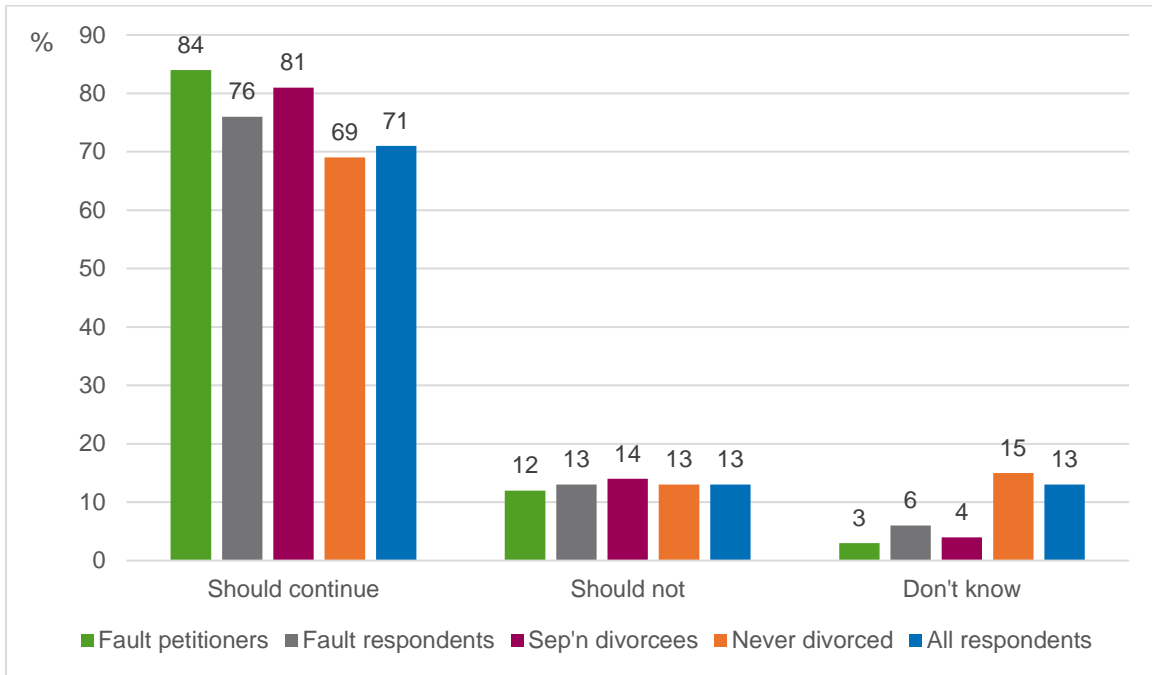
As part of our national opinion survey, we asked the general public and those who had been divorced whether they thought that fault should continue to be one of the grounds for divorce.²⁸³ On the surface, the views were fairly uniform. The majority (71%) thought that fault should continue to be part of the law,²⁸⁴ with those experiencing divorce (particularly fault petitioners and those using separation) more likely than others to support this (Table 10.1).

Having said that, the responses to further questions showed a degree of inconsistency in attitudes to fault. As indicated in Table 10.2, the majority (61%) of those surveyed agreed that it was unfair to blame just one spouse for the marriage breakdown, which is what reliance on fault requires. Indeed, even among those who used fault (the fault petitioners), 62% agreed that this was unfair.

²⁸³ Survey participants were asked to choose from one of two statements: "Fault, such as adultery or unreasonable behaviour, should continue to be **one** of the possible grounds for divorce" or "Fault, such as adultery or unreasonable behaviour, should **no longer** be a possible ground for divorce".

²⁸⁴ As indeed did the general public surveyed for the Law Commission report in 1990.

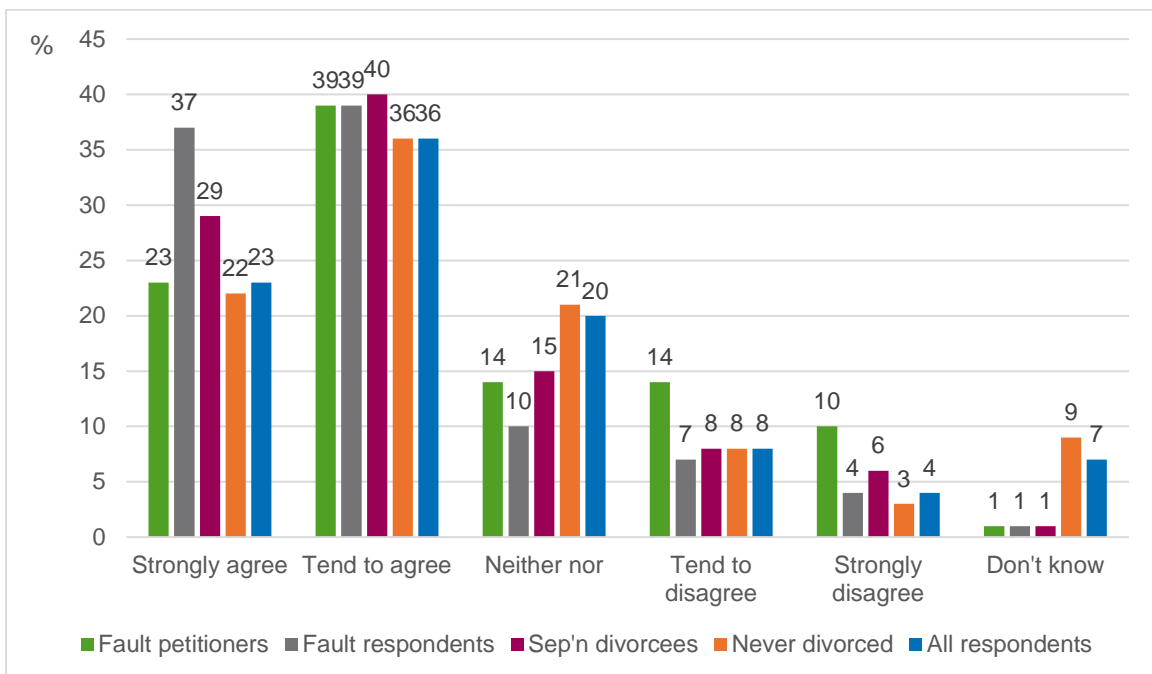
Table 10.1 “Should fault continue to be one of the possible grounds for divorce?”



Base: all survey participants

Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

Table 10.2 “In many cases it’s unfair to blame just one spouse for the marriage breakdown”

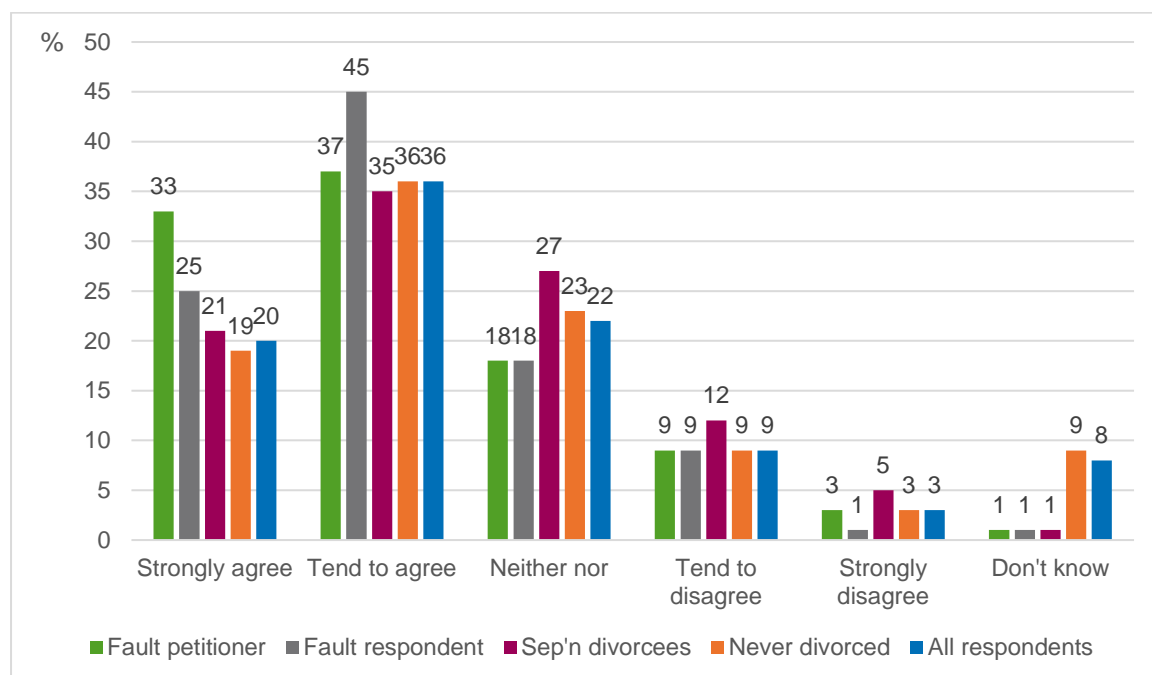


Base: all survey participants

Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

At the same time, nearly as many survey respondents (56%) agreed that if someone has done something wrong towards their spouse, it is only right that it is given as the reason for the divorce (Table 10.3). It is quite difficult to reconcile these two statements – that it is in many cases unfair to blame just one person, but if one person has done something wrong that should be the reason given for the divorce. A possible explanation is that the public think that the courts will be seeking to identify correctly if a spouse has done something wrong. However, as we established in Section 4 above, that is not what the court does, (or can do, given the constraints within which it operates), rather the court simply accepts what the petitioner has said is true unless the case is defended.

Table 10.3 “If someone’s done something wrong towards their spouse, it’s only right that it’s given as the reason for the divorce”



Base: all survey participants

Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

10.3 A Tale of Two Moralities – Justice vs Responsibility

The qualitative interviews with the parties in the journey study provide a perhaps more in-depth and nuanced account than is possible asking fixed hypothetical questions of a general nature. We analysed all the qualitative interviews with petitioners and respondents in relation to their normative values in relation to fault, divorce and marriage and their actual experience of the divorce process.

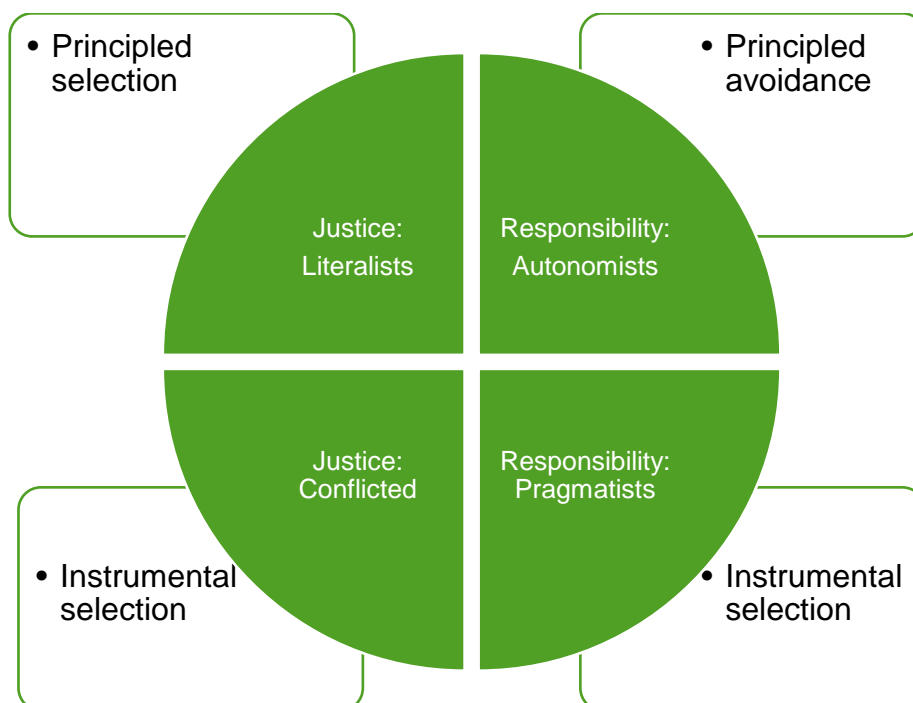
We start our analysis by looking at the norms held by the petitioners in relation to fault. In broad terms the interviewees subscribed to two different sets of norms or moral codes. The first are those subscribing to an individual justice orientation, where fault is an important tool to ensure that the responsibility for the marriage breakdown is located accurately with the respondent and absolving the petitioner of blame. Those subscribing to a justice orientation

could be further sub-divided into literalists and the conflicted. As we describe in detail below, the literalists sought actively to use fault on a principled basis – establishing the truth was important, whilst the conflicted were more likely to use fault on an instrumental basis to secure their divorce whilst willingly taking the opportunity offered to ensure that it was their spouse who was held responsible for the breakdown of the marriage.

The second moral code or set of norms – of responsibility – emphasises personal responsibility and relational responsibility for the wellbeing of others, including children. In contrast, with the individual justice norm, the moral code about responsibility is typically forward-focused. There is no interest in seeking to attribute blame or responsibility for the relationship breakdown, rather the focus is on reconfiguring relationships for the future and therefore there is a very high priority given towards minimising the possible fallout from the divorce. As with the individual justice orientation, the responsibility norm can be subdivided into instrumental and principled groups. The instrumental pragmatists are, in effect, the human face of the pragmatic orientation of the family justice system outlined above, using fault tactically to secure a divorce whilst attempting to minimise harm. The autonomists, in contrast, were principled avoiders of fault, having chosen to rely on separation Facts to ensure that nobody took the blame for the separation.

These four orientations are summarised in the table below, followed by short case studies illustrating each of the four groupings.

Figure 10.1: Orientations towards fault



Justice and fault

The literalists

The literalists were a small but coherent group of petitioners and a single respondent. This group took a principled stand on the issue of fault, considering it essential that where fault had contributed to the breakdown of the marriage that that truth should be reflected in the petition and blame accurately apportioned. The emphasis for this group was on justice and accountability for the wronged party, with minimal attention given to harm-minimisation. For this group, there was strong support for a literal interpretation of the substantive law. Given the emphasis on truth, the focus was on robust policing of the use of fault rather than manipulation of the threshold and, for the sole literalist respondent, a robust inquiry into Facts alleged to ensure that guilt and responsibility was accurately attributed. For this group, divorce should be difficult, or made more difficult. Indeed, literalists would go further in supporting a return to a much greater role of fault, including conduct shaping the outcome of finance and money. This group had no concerns about state involvement in private family matters and indeed endorsed the role of the law as setting a standard for moral behaviour, with personal relationships as a legitimate site of legal regulation.²⁸⁵

A classic example of a literalist was interviewee WK20 who had discovered that her husband had had a succession of affairs over an 18-month period. She had no hesitation in wanting the petition to accurately record his actions in undermining the marriage, although the husband had wanted to use the two years separation Fact. She was opposed to no-fault and instead wanted his culpability, and her innocence, in breaking the marriage vows, publicly recorded:

I feel like my husband should be in prison because he committed a crime and whilst I understand the divorce process is going to be fair, what do they call it? 'No blame'? Well, there is blame. I married for the whole of my life. I didn't marry for 20 years; I wanted to be married forever. And I feel that my husband has broken that commitment. ... I felt I failed in maintaining a marriage but by actually being able to say, you know, that my husband committed adultery – therefore, I haven't failed.

Conflicted

For the conflicted group, the use of fault was embedded in existing poor relationships between the spouses. Rather than using fault on a principled basis to hold the guilty spouse responsible, petitioners in the conflicted group used fault in a largely opportunistic way. Rather than a principled fight, fault provided both the opportunity for a quick divorce and the opportunity to continue or escalate their fight with their former partner. In common with the literalists, there was little or no emphasis on harm-reduction.

SP46 is an example of a conflicted petitioner. He had filed a strong behaviour petition, citing his wife's affair, an assault on him and undermining his contact with the children, finding it "quite easy" to produce the particulars. The draft petition was not shared on the basis that

²⁸⁵ For their equivalents in the policy-making community see Ezra Hasson, 'Setting a standard or reflecting reality? The 'role' of divorce law, and the case of the Family Law Act 1996' (2003) 17 *International Journal of Law, Policy and the Family* 338, 354.

the relationship was already so fraught. The case had reached decree nisi but there had been protracted litigation over the children and the finances.

Responsibility and fault

Pragmatists

The pragmatist grouping were also instrumental or opportunistic users of fault, but very different from the conflicted group in the emphasis on harm-minimisation. For this grouping, the goal of both petitioners and respondents was to achieve the divorce as soon as possible, with fault the only option to achieve this, but by trying to do things in the 'right way'. In this context, the right way was not about holding the other spouse accountable or responsible for wrong-doing, but trying to ensure that the least harm possible was done to relationships, and particularly focused on trying to reduce conflict that might impact on children. Whilst, some of the interviewees in this grouping had positive relationships with their spouse, this group also included those in situations where one party was held solely responsible for an unwanted separation. However, in this grouping, the focus was about moving forward and using fault responsibly, not on trying to exact punishment.

WK15's marriage had foundered on the discovery of her husband's affair, like WK20 described above. However, WK15's focus was on how to effect the divorce as quickly as possible while minimizing the harm to both parties and their children, not least as they were having to share the same house as the divorce went through. Whilst devastated, WK15 was focused on finding a positive future for all. The particulars had been discussed and kept mild. Despite this, she had found the divorce a very difficult process and just wanted it to be over as soon as possible:

We are still talking. There is not a problem, we are sorting out everything out ourselves, you know. We are not arguing over anything, everything is fine, but we both want the same outcome, obviously we want it as quick as possible and I think well they have to take time, you can't make it any quicker unfortunately.

The pragmatist petitioners also included some where there had been a background of abuse. In these instances, behaviour was being used instrumentally to secure a fast divorce but where the focus on doing the right thing for the children was coupled with a concern to reduce the risk of repercussions to the self. SP23, for example, had young children and there was a background of coercive control and financial dependency. In her case, she had agonised over ending the relationship as nobody else in her family had divorced. The particulars of behaviour were as un-antagonistic as she could make them "because I didn't think that anything else would do any help... and we have got two children". She had found the process very difficult and stressful. She was very keen therefore to have no-fault divorce on the basis that fault served no purpose other than causing antagonism:

You just grow apart or you just don't love each other anymore so it wasn't really any advantage in specifying anything because you're just poking an open wound. So, I think it would have been nicer not to have to put anything because in our situation it didn't really, it doesn't help anything. It was over

and that was that. If you could have just 'the marriage is over' and had that tick box I would have gone for that.

Autonomists

The other group subscribing to a responsibility norm took a principled approach to fault, here based on the avoidance of fault. This grouping shared the emphasis on harm-minimisation and preservation of relationships and were highly critical of fault for inappropriately blaming others, rather than taking personal or shared responsibility for the breakdown of the marriage. Their difference from the pragmatists was the principled avoidance of fault and (often difficult) decision to use the separation grounds, even where that meant sitting out a long waiting period, sometimes in the same house. Autonomists, as the name suggests, were also more likely to raise theoretical objections to fault, with a strong emphasis on autonomy and personal responsibility. In contrast to the literalists, the autonomists articulated a very strong belief that divorce was a private family decision where the state should not tread. It was particularly difficult therefore for these interviewees who wanted to take responsibility for their own lives to have to hand over control to the state to grant them their divorce.

Interviewee WK08 was a very clear and articulate advocate of autonomy. She and her husband had decided to sit out the two years' separation period in order to avoid using fault and blaming each other. The emphasis instead was on jointly taking personal responsibility for the breakdown of the marriage, rather than either one blaming the other and also trying to minimize the impact on the children:

I think actually finding fault is an awful thing, especially if you've got kids because you're saying publicly, in front of your children and your children's friends and everybody else, that that person is a bastard or a bitch or evil or unreasonable or da de da, and why would you do that to your children? Why do you have to make it, you're a bad person and I'm a good person? You know we both contributed to the marriage and to the disintegration of the marriage. Let's move on. Well we're trying to, and we're trying to be civilized about it.

Being 'civilized about it' came at a price. For the autonomists, the price was delay as they had to sit out the separation period. Crucially, it was also the loss of their autonomy as they remained unable to be free of the marriage and also had had to hand over the power to make their decisions over their lives to the state:

I'd like them to take me at my word and take my ex-husband, or soon to be probably ex-husband, at his word when we say, no chance of a reconciliation, please can you just put us through this and get us through this process as fast as possible because that's what we'd like. If we both turn around and say, this is what we'd like, can you not just do that?... Part of the reason we're still in the same house is because we want to do that. I absolutely understand it's a legally binding contract therefore it has to be legally dissolved. Absolutely understand that. But unlike other legally binding contracts, if both parties to that contract want it torn up, anything else can be

done really, really quickly but divorce no, because somehow it's got mixed up with church. And well I nearly said a very rude word there....

10.4 Experience of the divorce process and implications for law reform

Alongside their general views or norms about fault, we also asked interviewees in the journey study about their experience of the divorce process and their views on law reform in the light of that experience. On the whole, the experience of the process was not positive across the sample. All of the four groupings had found the divorce process fairly difficult, although the challenges differed (Table 10.4). As we explore in more depth below, the literalists continued to argue strongly in favour of fault, or rather a stricter version of fault than exists within the pragmatic framework of the family justice system. Not surprisingly, interviewees endorsing the responsibility morality, both pragmatists and autonomists, were very strongly in favour of the abolition of fault. However, the conflicted group who subscribed to an individual justice norm in theory also recognised that the collateral damage caused by fault was counter-productive and had shifted towards endorsing a no-fault approach.

Table 10.4: Experience of the process under the current law, by grouping

	Individual justice		Responsibility	
	Literalists	Conflicted	Pragmatists	Autonomists
Petitioner experience	Mixed. Can secure goals if persistent. Can be frustrated by pragmatic family justice system	Slow and difficult and recognise collateral damage	Slow, stressful, expensive, loss of control over life	Slow and frustrating. Penalised for doing the right thing by avoiding fault
Respondent experience	Apoplectic. Injustice that divorce rests on untested allegations	Angry. Unfair. Most anger directed at the petitioner	Still upsetting even knowing the (pragmatic) rules.	No examples
Spill over	Can spill over into children and financial disputes	Does typically spill over into children and financial disputes	Less likely to spill-over, but disputes could arise later	No examples of spill-over
Views on law reform and fault (petitioner and respondents)	Fault essential, with high threshold, testing of allegations and conduct influencing children and finances	Fault ultimately pointless and counter-productive. Support no-fault	Fault unhelpful, harmful and irrelevant. Support no-fault	Fault harmful and undermines autonomy and personal responsibility. Support no-fault

Literalists – frustrated by pragmatism

For literalists, the experience of the divorce process was one of frustration that, in effect, a family justice system oriented towards pragmatism and conflict-reduction refused to take fault seriously. For petitioner WK20, this included conduct not being taken into account in financial remedy proceedings.²⁸⁶ She argued that her husband's "serial adultery" should be taken into account and drew a comparison with serial murderers receiving harsher sentences. Alongside wishing conduct to be significant, she was also seeking some emotional validation and catharsis through the divorce process, but found it frustrating that her lawyer tried to rein in her literalist instincts. She had wanted, for example, the full story of her husband's adultery to be recorded, including the naming of co-respondents, but had had to concede on that point:

I applied for divorce on the grounds of adultery. And when the solicitor comes back to you and they ask you not to put a name on it... I actually- I want to put a name on it and I want all four of the women's names on it.... I actually wish that there was a list that said how many times – I'd put that on. If I could have done, I'd have written every single occasion. You know?

For literalist petitioners and respondents, the reality of fault in a pragmatist system is not justice, but what Davis and Murch referred to as "the prospect of 'justice'".²⁸⁷ As they observed, even writing in the 1980s, the prospect of justice turns out to be a chimera in what is essentially an administrative legal procedure.

Conflicted – the pyrrhic victory of fault

The conflicted group were also disappointed with the divorce process. This group were generally involved in subsequent disputes over children and/or finances. That appeared to have coloured their opinion. Some still thought that fault had a place in the law, but the dominant message emerging from petitioners in this group was that using fault had backfired on them, particularly in relation to sorting out money and children. SP46 considered that the use of fault had been unhelpful and had caused a lot of collateral damage in his case:

Helpful [to use fault?], no not really, in fact in some ways I think it probably inflamed things actually... A friend of mine, he sat there with his wife, he sorted everything out financially and their divorce has cost them five hundred quid. Me, personally, because of the way we are, I'm up to six and a half grand and I've not even started on the finance.

He also questioned the point of the court's scrutiny, noting that even if the court refused the decree the couple would not reconcile:

To be fair, if people want to separate what it's got to do with the law of the land why you want to separate. Even if a court said, right, well we don't think

²⁸⁶ Except in fairly extreme circumstances. See Section 1.2 above.

²⁸⁷ Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 98.

you've got grounds for divorce, well guess what, they're not going to live together so what does it really matter? In a court of law, why does it matter what you're getting divorced for?

In contrast with the sole literalist respondent who supported a strong adherence to fault, properly policed, those who appeared to be the respondents to conflicted petitioners were opposed to the use of fault, having been on the receiving end of strong particulars. SP31, for example, described his wife as “obviously bitter”. His view was that the particulars were unfair and untrue but he accepted the divorce petition to “get rid of her”. His opposition to fault was based on recognition that the court would not investigate whether the petitioner was lying and that fault just increased conflict, in his case, in the form of extended disputes over the children:

I think putting the fault down is a difficult thing for divorce. Because it just causes more who's to blame. I accepted it and went 'Fair enough. Just say I did it, then, and I'll move on'. Because at the end of the day, no one's- it's like my solicitor said: no one's going to read it and no one cares. It's on a bit of paper that you were at fault but you're divorced. You know- She said you know for yourself what happened, so what does it matter on a bit of paper? So, take it off a bit of paper”.

Pragmatists – the difficulty and upset of using fault even with harm-minimisation

For pragmatists, the dominant message was that the divorce had been a slow, difficult and upsetting process, even with the instrumental use of fault and harm-minimisation strategies.

Whilst some suggest that fault can be cathartic, it is important also to note that fault can also be painful for other ‘innocent’ petitioners who are having to relive difficult memories to produce the allegations to get their divorce, as WK02 reported:

It was the worst part of it just having, especially so many months down the line, having to sort of re-dig it all up again to actually put down on the petition and I think that's what kind of triggered things off. I think at that point I thought I was quite strong and I had got a bit of a grip on things but it does seem to be since then that perhaps that is not the case and I would probably be a bit silly to think that I could go through something like that without any sort of emotional support.

The pragmatist respondents recognized and supported the need under the current law to use fault, typically behaviour, to avoid a two-year wait. They recognized how the system worked and that fault could be used on an instrumental basis. In contrast with respondents in the conflicted groups, these respondents were involved in the process to some degree, whether in agreeing that behaviour would be the way forward and/or having some input into draft particulars. That said, even though pragmatist respondents recognized that it was a ritual performance and there were tensions and uncertainties and some impact on trust. WK11, for example, had been warned by his solicitor to ensure that the petition contained no strong allegations and insisted that his wife told him in advance what she was going to put in draft without committing anything to paper: “... because as soon as it's on paper, in paper form then it is something that you know, can be used in various ways that I think just need to

be cautious about". SP10 had agreed to be the respondent even though his wife had had an affair. Receiving the draft particulars was a difficult and uncomfortable experience and did cause some difficulty in the relationship even though he did accept them:

Well, I was surprised because she said I was controlling and all sorts of different things. It didn't change my behaviour towards her but, yes, it did distance me slightly.

Both respondents and petitioners in the pragmatic group were strongly in favour of no-fault. They also supported a clearer and simpler and cheaper system. As SP23 said, people going through a divorce were already having to deal with a wide range of decisions about their children and finances at a time of emotional difficulty and a complex and expensive legal process was really unhelpful, especially when trying to do the right thing:

But, yes just to make sure the process is as simple as possible really because you know often people with so many things going on as well in terms of relationships and children and you know life changes for everybody quite dramatically so in my personal situation it just needed to be over. If this is a process we have to go through to make it easier and cheaper, cheap as possible and [the reason] doesn't really make any difference to anybody.

Autonomists – the penalty of fault-avoidance

For the autonomists, the experience of having to sit out the two years' separation period was deeply frustrating, if not infuriating. There was a strong sense of anger within this group that they were not in control of their personal lives and that the state was intruding into their family lives. This sense of being judged was particularly keenly felt as this group considered themselves to be trying to behave according to a moral code that placed a high value on care and respect for others, hence the decision to avoid using fault:

I almost find myself a little bit violated that I've got a judge. A judge is going to look at my paperwork and scrutinise it. Right? I'm not asking for money; I'm not asking for anything. I've paid the fees. I'm asking somebody to grant me my future. Because until that, I have ties with a person that I don't live with or want to be with. It kind of makes you feel like an object rather than a person. And I understand there has to be law. I'm not an unreasonable person; I understand rules. And rules aren't there to be broken; rules are there to be adhered by. But, at the end of the day, I'm not a child. I know what I want in life and I know how simple it could be if somebody would just talk to me and the respondent, understand what's going on, and sign it... But right now, I don't feel anything apart from, come on, hurry up. Because that's because I don't feel like I've got any control at all. And I like to be in control. As far as I'm concerned, it's my life; I should be in control of this. Especially with things like this – personal things. (WK12)

The same feeling of a lack of control was reported by WK08 who was still co-residing with her husband:

I don't think it's under my control at all. The divorce is happening somewhere else. We get sent pieces of paper, we fill them in, send them back, it goes to a court, they either rubber stamp it or they send it back again. It's just, send more pieces of paper, send emails, we send them back. Eventually somebody will send me something that says I'm divorced, I'm assuming, and then I'll be divorced. It's happening elsewhere.

10.5 Conclusion

Drawing on qualitative interviews with the parties, we drew a contrast between two different moralities in relation to divorce: a traditional one based on ideas about individual justice for the petitioner and a responsibility morality. The first is rooted in the literal approach and the importance of a strict adherence to fault; the second emphasises personal and relational responsibility for the wellbeing of others, including children and the importance of harm-minimisation and the preservation of relationships.

We also traced how adherents of both moralities experienced the divorce process. In general, the experience of all groups was largely negative, but for different reasons. For the literalists embracing a justice morality then the pragmatic orientation of the justice could be deeply frustrating. For the conflicted, the experience of fault was problematic due to the upset and conflict generated by fault. For the two groups embracing a responsibility morality the experience was also difficult. For those using fault pragmatically the process was difficult for both petitioners and respondents, though to a lesser degree than for the conflicted group. For the autonomists who had chosen to avoid fault on grounds of principle, the enforced wait was difficult both practically and emotionally and also an affront to their personal dignity and autonomy. While the literalists sought a reinforcement and strengthening of the role of fault, for the others the removal of fault was attractive, including the conflicted group who had changed their position in light of their experience.

11. Divorce law and divorce law reform internationally

11.1 Introduction

Alongside the collection of empirical data on how the divorce law is operating in practice in England & Wales, an important part of the Finding Fault project was to see what lessons could be learned from divorce law and law reform in other comparable jurisdictions. In this section, we review the findings of international research on the relationship between divorce law and divorce rates (Section 11.2) and the findings of a comparative law workshop on divorce law and law reform in thirteen different jurisdictions.

11.2 The lack of relationship between divorce law and divorce rates

There is now a large and impressive body of research by economists, demographers and sociologists on the relationship between divorce law and divorce rates, particularly in relation to the impact of the introduction of no-fault divorce. Some early studies from the US and Europe did suggest that divorce law reform, especially no-fault and unilateral divorce, might raise divorce rates.²⁸⁸ However, there are now multiple studies, especially more recent studies, finding no effects or only temporary effects.²⁸⁹ Indeed, those earlier studies have been subject to serious methodological criticisms on three main counts:²⁹⁰

- Social change and law reform tend to occur together, making it difficult to disentangle cause and effect (what is known as an ‘endogeneity’ problem).
- Most comparative studies have been conducted by economists with limited understanding of the nuances of domestic laws. The result is a problem of classification where dissimilar systems are lumped together. One frequently-cited European study, for example, bases its analysis on the ‘United Kingdom’ [sic] as a unilateral no-fault divorce jurisdiction.²⁹¹ Few domestic commentators would accept that classification or think that the availability of unilateral divorce after five years separation has had a significant impact on driving up the divorce rate.
- The earlier studies typically explored the immediate impact of policy and legislative changes, rather than exploring whether changes in divorce rates were sustained (the ‘durability’ problem). A major analysis by Wolfers²⁹² looking over a 15-year period, however, indicated that any increases in divorce rates were short-term responses and that any increases were later cancelled out.

²⁸⁸ Elizabeth Peters, ‘Marriage and divorce: Informational constraints and private contracting’ (1986) 76 *American Economic Review* 437. Libertad Gonzalez and Tarja Viitanen, ‘The effect of divorce laws on divorce rates in Europe’ (2009) 53 *European Economic Review* 127.

²⁸⁹ For example, Justin Wolfers ‘Did unilateral divorce laws raise divorce rates? A reconciliation and new results’ (2006) 96 *American Economic Review*, 1802; Betsey Stevenson and Justin Wolfers, ‘Marriage and divorce: Changes and their driving forces’ (2007) 21 *Journal of Economic Perspectives* 2; Sietse Bracke and Klaas Mulier, ‘Making divorce easier: the role of no-fault and unilateral revisited’ (2017) 43 *European Journal of Law and Economics* 239.

²⁹⁰ See particularly, Sietse Bracke and Klaas Mulier, ‘Making divorce easier: the role of no-fault and unilateral revisited’ (2017) 43 *European Journal of Law and Economics* 239.

²⁹¹ Jane Binner and Anthony Dnes ‘Marriage, divorce, and legal change: New evidence from England and Wales’ (2001) 39 *Economic Inquiry* 298.

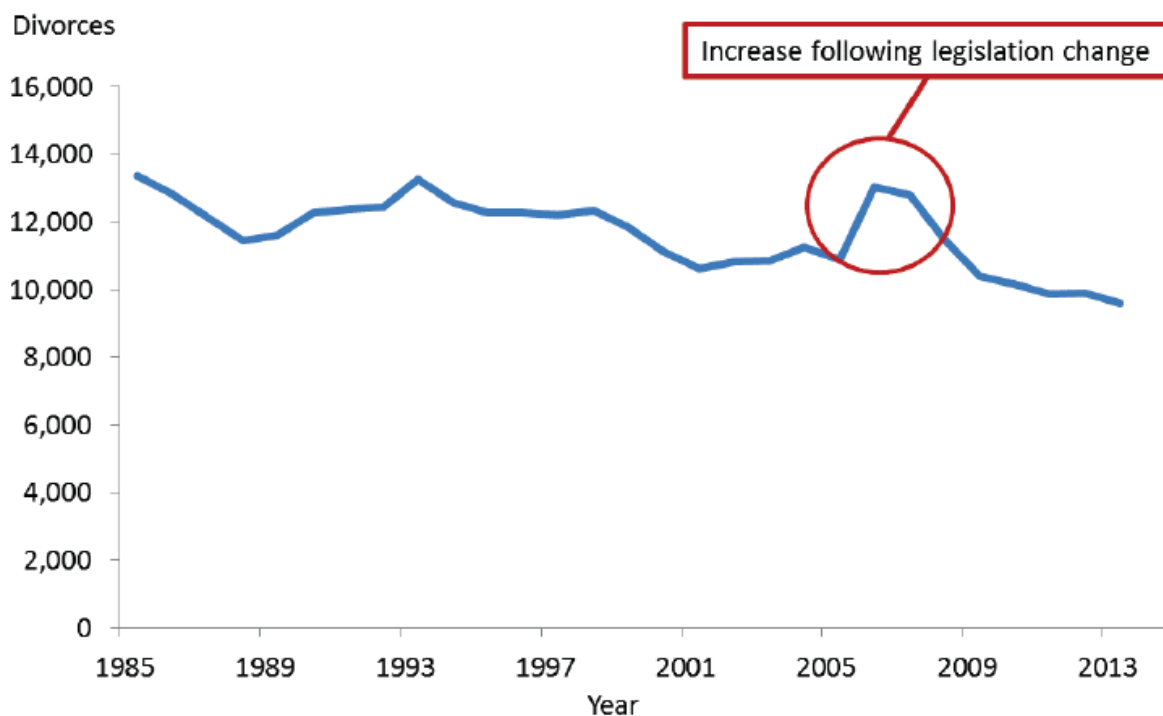
²⁹² Justin Wolfers ‘Did unilateral divorce laws raise divorce rates? A reconciliation and new results’ (2006) 96 *American Economic Review*, 1802.

Looking at the research as a whole, there is little consensus that no-fault or unilateral divorce has had any clear impact at all on the propensity to divorce, though it is common to find short-term blips in response to policy and legislative changes.

A classic example of a short-term blip occurred following the Family Law (Scotland) Act 2006. Until 2006 Scottish divorce law was almost identical to that of England & Wales, with the same formulation of a single ground for divorce – irretrievable breakdown of the marriage – evidenced by one of five Facts. The 2006 Act reduced the separation periods from two years to one where there was consent and from five to two years otherwise. The rarely-used ‘desertion’ Fact was removed entirely.

The result was a classic but short-lived mini-spike in the numbers of Scottish divorces immediately after the implementation of the 2006 reforms. Within two years, as Table 11.1 demonstrates, the numbers of divorces reverted to the previous level, and have continued on a slight downward trend. Given the similarity in the law between Scotland and England & Wales, a reduction in separation periods south of the border might be expected also to result in a spike, but one that would equally be short-lived. That said, the reliance upon fault has been always been far lower in Scotland compared to England & Wales. We discuss the reasons for that below and the implications for law reform in England & Wales in the next section.

Table 11.1: Number of divorces in Scotland before and after the 2006 reforms



Source: Scottish Government (2015) Civil Justice Statistics in Scotland 2013-14 at p33. Annotation is in the original.

11.3 Divorce law and divorce in practice internationally

As part of the *Finding Fault* study we held a comparative law workshop for international scholars in Amsterdam in July 2017.²⁹³ The workshop included nine papers relating to thirteen different jurisdictions, mainly from Europe but also extending to North America. The papers addressed the law in each jurisdiction, the role and use of fault (if any) and pressures for and experiences of law reform. The jurisdictions were selected to represent a range of different types of divorce law and experiences of reform. Inevitably, even with thirteen jurisdictions there are gaps, but we think there is a good range and excellent coverage of our nearest neighbours.

Divorce law and divorce rates

The key data – the grounds for divorce, use of fault and crude divorce rate²⁹⁴ – from each of the thirteen jurisdictions is presented in Table 11.2. The data on the crude divorce rate reflect the overall conclusion of the international comparative research reviewed in Section 11.2 above. No very clear pattern emerges from the jurisdictions included. Spain and France, for example, have very similar divorce rates to England & Wales but very different legal frameworks, including the availability of immediate consensual divorce. Similarly, Scotland and England & Wales have very similar divorce rates but widely different patterns of usage of fault and very different separation periods available.

The disproportionate use of fault in England & Wales

The main message to draw at this stage from the data presented is how much of an outlier England & Wales appears compared to the other twelve jurisdictions. In particular, the use of fault in England & Wales is completely out of the norm for an advanced democracy, with sixty per cent of all divorces relying on fault. That figure is ten times that of any other jurisdiction surveyed here, with France at 6.9% and Scotland 6% being the closest.

Some explanation for what appears to be a disproportionate reliance upon fault is also suggested by the table. With the exception of Ireland,²⁹⁵ the requirements in respect of separation periods in England & Wales are the longest of any jurisdiction, whether by consent or unilateral – and note that they are *separation* periods, not simply time requirements as in some other jurisdictions.

Why Scotland is different – the importance of procedure/wider legal context

The table does not tell the whole story, however. What also emerged at the workshop was the significance of the whole legal and procedural context for shaping the behaviour of parties.²⁹⁶ Whilst Table 11.2 captures the main substantive points of law, it cannot capture all the nuances, particularly procedural requirements. For example, it is important to note that jurisdictions that permit immediate consensual divorce – Denmark, France, Spain and Sweden – all require that arrangements for children and the financial consequences of divorce have been dealt with before the divorce can be granted.

²⁹³ An edited collection of the papers will be published in 2018.

²⁹⁴ The crude divorce rate is the number of divorces per 1,000 people regardless of age.

²⁹⁵ Ireland is itself likely to have a referendum shortly on reducing the separation period from four to two years.

²⁹⁶ See also Sietse Bracke and Klaas Mulier, 'Making divorce easier: the role of no-fault and unilateral revisited' (2017) 43 *European Journal of Law and Economics* 239.

The importance of procedure and the wider family law context is of particular significance in relation to understanding the differential reliance upon fault between Scotland and England & Wales. The differences between the two jurisdictions go beyond the difference in separation periods. Even before the 2006 Scottish reforms, when the required separation periods were two and five years as is still the case south of the border, only 19% of Scottish divorces were fault-based, a third of the proportion in England and Wales. There is no reason to believe that the difference is based on major differences in marital behaviour north and south of the border. It is more likely that procedural differences between the two jurisdictions make the difference. In Scotland, the reliance upon separation- rather than fault-based petitions followed the introduction of a comparatively easy and cheap 'simplified procedure' in 1982. The simplified procedure has only been available for those divorcing on the two separation grounds, not those using fault.

There are also fewer financial drivers to secure a fast divorce. There is no aliment (or maintenance) after divorce in Scotland (though periodical allowances may be ordered in certain circumstances), and it is possible to transfer property consensually at any point using the Minutes of Agreement procedure, rather than having a court order (such as a consent order, where the matter is agreed) alongside the decree absolute. Unless a Scot wishes to remarry quickly, there is no financial reason to press ahead with the divorce process itself and there are additional costs and hurdles with using fault compared to the simplified procedure for separation divorces.

What has happened in Scotland after the 2006 reforms is equally interesting. The reduction in the separation periods by one year for consensual consent divorces and by three years for other separations did produce some switching away from fault, but from an already low base compared to England & Wales. However, there has been lesser use made of the one year with consent Fact than might have been expected. In 2002, 56% of divorces relied on the two years separation with consent Fact and 24% on five years separation. Rather than the shorter by consent Fact becoming the most used, after the 2006 Scottish reforms, the majority of separation petitions have been based on the longer without consent Fact. In 2013/14 only 26% of separation divorces relied on the one year separation with consent Fact and 68% on the two years Fact. There has been no empirical research to explain the selection of Facts. What can be surmised is that the simplified procedure and shorter separation periods are likely to have directed more parties away from using fault-based Facts, but it may well be that the specific financial rules in Scotland do not require such a strong focus on achieving the divorce quickly. Given these important other differences, a simple reduction in the separation periods south of the border would therefore appear unlikely to greatly curtail the use of fault in England & Wales where speed as we have demonstrated above is a vital issue for the parties.

Law reform elsewhere

One other issue explored in the workshop was the process of reform in recent years. What was indicated was that the reforms implemented in Belgium, Spain and Italy appear to have been largely straightforward, consensual changes with broad political support. There have been no attempts to reverse the changes by subsequent governments in the case of Spain or Belgium.²⁹⁷

²⁹⁷ There has been no change of government in Italy since the 2015 reforms.

Table 11.2: Divorce law, use of fault and crude divorce rate (selected jurisdictions)

	Relevant legislation, year	Divorce by mutual consent	Divorce without mutual consent (time- or separation-based)	Divorce without mutual consent (fault-based)	Use of fault (% of all divorces)	Crude divorce rate ²⁹⁸
England & Wales	Matrimonial Causes Act 1973	2 years' separation	5 years' separation	Adultery, behaviour, desertion	60% (2015)	1.8
Scotland	Family Law (Scotland) Act 2006	1 year's separation	2 years' separation	Adultery, behaviour	6% (2013/4)	1.7 ²⁹⁹
France	French Civil Code, amended 2004	Immediate (once married for at least 6 months)	2 years' separation	Grave or repeated breach of duties and obligations of marriage	6.9%	1.9
New York State	Domestic Relations Law, amended 2010	6 months irretrievable breakdown ³⁰⁰	6 months irretrievable breakdown	Cruel and inhuman treatment, ³⁰¹ abandonment, 3 year imprisonment, adultery	5% ³⁰²	2.8 ³⁰³
Italy	Italian Civil Code, amended 2015	6 months from notification	1 year from notification	Sexual offence, insanity, prison (15 years)	1%	1.4
Norway	Marriage Act 1991	1 year separation	1 year separation	Attempted murder of petitioner or children, forced marriage	0.2%	1.9
Denmark	Marriage Act 1989	Immediate	2 years' separation	Adultery, bigamy, child abduction, domestic violence	No data	2.9

²⁹⁸ Eurostat data for 2015 unless stated. http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics#Further_Eurostat_information

²⁹⁹ Calculated from Civil Justice Statistics in Scotland 2014-15 <http://www.gov.scot/Publications/2016/03/6429/6>

³⁰⁰ The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath.

³⁰¹ "The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant".

³⁰² Calculated from Vital Statistics of New York State 2015, Table 50 Divorces by County of Decree and Legal Grounds, Department of Health https://www.health.ny.gov/statistics/vital_statistics/2015/table50.htm

³⁰³ Calculated from state population of 19,795,791 and 55,335 divorce in 2015, Estimated Population by Age, Sex and Region, 2015 https://www.health.ny.gov/statistics/vital_statistics/2015/table01.htm

	Relevant legislation, year	Divorce by mutual consent	Divorce without mutual consent (time- or separation-based)	Divorce without mutual consent (fault-based)	Use of fault (% of all divorces)	Crude divorce rate ²⁹⁸
Belgium	Belgian Civil Code, amended 2007	3 months' notification or 6 months' separation	1 year	In exceptional circumstances, cohabitation cannot reasonably be resumed	Rare	2.2
Spain	Spanish Civil Code, amended 2005	Immediate (once married for 3 months)	6 months	-	-	2.1
Sweden	1973	Immediate (6 months' waiting period if minor children)	6 months' waiting period	-	-	2.5
California	1970	6 months' waiting period	6 months' waiting period	-	-	No data
Finland	Marriage Act 1987	6 months' notification (or immediate if 2 years separation)	6 months' notification (or immediate if 2 years separation)	-	-	2.5
Ireland	Family Law (Divorce) Act 1996	4 years' separation	4 years' separation	-	-	0.6 (2013)

11.4 Conclusion

What emerges strongly from our comparative law review is how out of step both law and practice are in England & Wales, compared to similar jurisdictions. The heavy reliance on fault in England & Wales, amounting to 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 & 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 & Wales would have a significant or long-lasting effect on the propensity to divorce.

12. Options for law reform for England & Wales

12.1 Introduction

In this section, we consider the various options for law reform. We focus on four options: no change, tightening up the existing law, a modified mixed fault/no-fault system and a sole ground for divorce based on sole or joint notification. The four options are summarised in Table 12.1 and considered in more detail below.

Table 12.1: Overview of the options for law reform

	Options	Potential advantages	Disadvantages/limitations
No change	Retain current substantive law	Avoid need for legislation	Law unreformed for half a century, despite social changes
	Continue with digitisation of the process	Digitisation should reduce procedural complexity and some admin costs over the longer-term	Abundant evidence of hypocrisy, conflict and unfairness of current law and public outcry over <i>Owens</i> Expensive court-based system
Stricter interpretation of the existing law	Raise the threshold for behaviour	Bring greater honesty to the system	Inquiries have never been effective and would be unaffordable
	Robust inquiries in each case	Reduce unfairness for some respondents	Likely to encourage further manipulation and massaging of particulars Would be highly contentious and attract accusations of 'nanny state'
Modified mixed fault system modelled on Scotland	Reduce separation periods to 1 year with consent, 2 years otherwise	Existing separation periods too long	Use of fault unlikely to reduce significantly compared to Scotland
	Abolish desertion	Desertion is poorly understood and little used	Residual fault likely to be most conflictual, continuing unfairness for respondents
			System remains complex, confusing and costly
	Options	Potential advantages	Disadvantages/limitations

Notification divorce	Sole or joint notification of wish to divorce	Eliminate conflict triggered by fault	(Removes ability of the petitioner to choose the Fact)
	Directed to online relationship resources and dispute resolution	Equally fair to petitioner and respondent	Will require parliamentary time
	Sole or joint confirmation of intention to divorce after <i>minimum</i> period (e.g. 6 or 12 months)	Clear and simple to understand and administer and no opportunity for dishonesty	
		Support personal responsibility and autonomy	
		Significant cost savings for the family justice system	
		Well established internationally	

In evaluating these options, it is useful to bear in mind the arguments for and against the use of fault in divorce law, set out in Table 12.2.

Table 12.2: Arguments for and against fault

Pro-fault	ARGUMENT	Anti-fault
Fault upholds moral standards	MORALITY	Morality is about taking responsibility for relationship breakdown and minimising harm to others, rather than blaming one party
Parties should be able to choose their ground, including fault	CHOICE	In practice, only the petitioner has a choice of Fact.
Justice for wronged spouses	JUSTICE	Why a personal relationship broke down is inherently non-justiciable and the court simply endorses (arguably unfairly) the petitioner's account in undefended cases

Important for the sanctity and protection of marriage as an institution and individual marriages	SANCTITY OF MARRIAGE	<p>No relationship between divorce law and divorce rates internationally</p> <p>Fault provides a quicker exit (and one of the fastest unilateral divorces internationally)</p> <p>The institution of marriage may be better protected by allowing individual failed marriages to end cleanly.</p>
State has a legitimate interest in regulating family life	AUTONOMY AND PRIVACY	<p>It is for the parties to decide if their marriage is over, not the state</p> <p>Current law is an unjustified intrusion into private and family life</p>
Catharsis for wronged/innocent parties	EMOTIONAL ADJUSTMENT	<p>Court is not an appropriate or effective forum for self-directed therapy</p> <p>Fault can cause upset for petitioners and respondents</p>
Fault acts as lightning rod - parties fight about the divorce rather than over children and finances	CHILD WELFARE	<p>Hard to contain conflict once triggered by fault, even with harm-minimisation</p> <p>Fights spill over into children and finances rather than dissipating</p>
-	FINANCIAL	<p>Cost to the state of complex quasi-judicial system</p> <p>Cost of legal advice for the parties due to complex law</p>
-	RULE OF LAW	The law is widely abused and founded on 'intellectual dishonesty'
-	ACCESS TO JUSTICE	Those who can afford legal advice will be more likely to use the behaviour Fact to secure a fast divorce

12.2 Option 1: No change in the substantive law

The first option is based on leaving the substantive law unchanged and relies upon digitisation to address some of the difficulties caused by the complex or archaic language and procedure identified in this research. Once fully operational, the online system should make the process more accessible and understandable to a lay population. It should also reduce some of the delays associated with a paper-based system. Over time, the digitisation of the process should also reduce some of the administrative costs to the state of the current divorce procedure.

However, even with the improvements to the process that digitisation should bring, it is very difficult to see retention of the status quo as a sustainable option. Parliament has already decided, more than twenty years ago, that fundamental divorce law reform was needed. The problems that pre-dated the Family Law Act 1996 are, on the evidence of our research, at least as pressing now as when Parliament previously decided action was needed in the 1990s. Digitisation will not address the lack of understanding of a complex law and petitions will be no more honest or accurate, and no less conflictual, simply by virtue of being sent digitally, rather than through the post.

In some respects, digitisation may exacerbate the existing problems, highlighting the stark contrast between what will, if successful, be a customer-centred process and a moralising substantive law. It is also likely to pose problems in how to address the position of the respondent, currently able to vent their frustrations by writing on the existing paper acknowledgement form. The question for system designers will be whether to incorporate a digital 'rebuttal' box on the online form, knowing that the rebuttal will be ignored, or to prevent the respondent from adding their comments and perhaps causing greater frustration or more defences. As it is, without substantive law reform the full potential of digitisation, cannot be realised, particularly in terms of cost-savings for the government. The continuing need for human scrutiny of narrative particulars, notably in the fifty percent or so of cases in which petitions are based on behaviour, means that the process could not be fully digitised, even though in practice the refusal rate on substantive legal grounds is very low.³⁰⁴

12.3 Option 2: Stricter interpretation of the existing law

A more radical option is to make divorce harder, or more difficult, by stricter interpretation of the existing law and reversing the hollowing out of each of the five Facts identified earlier.³⁰⁵ This could encompass a raising of the behaviour threshold in undefended cases to prevent a decree being made on the basis of weak or 'flimsy' petitions. It would also require that particulars are properly investigated.

The aim of these measures would be to stop or reduce the intellectual dishonesty of the current system, especially where the behaviour Fact is used routinely as a fast route to divorce based on anodyne or flimsy particulars that are then nodded through by the court. More rigorous investigation of particulars would also begin to redress the current imbalance

³⁰⁴ Section 4.3 above.

³⁰⁵ Section 5 above.

of power between petitioner and respondent where the court's starting point in undefended case is that the petitioner's account will be accepted.

However, it is very difficult to see how such proposals could be workable or command public or professional support. The introduction of the Special Procedure in the 1970s was based on a recognition that the old oral hearings were an expensive and ineffective ritual. It is difficult to see how the state could afford to investigate in the 110,000 cases each year, or even 50,000 if restricted to behaviour. It is even more difficult to see how any inquiry could be effective. Even if rigorous inquiries were affordable and effective, it is difficult to see how they could be publicly acceptable in an era where questions of autonomy and proportionality in family law have assumed ever greater importance. A reinvigoration of fault here would also heighten the conflict with the no-fault emphasis adopted, for very good reason, by the rest of private family law.

Equally unworkable would be the re-introduction of a stricter or higher threshold in behaviour cases. Given the public and media outcry in relation to the decision in *Owens*, it is hard to imagine a situation where the public and family justice professionals would sanction the refusals of tens of thousands of behaviour petitions based on a higher threshold. Nor would an already over-stretched family justice system be able to cope with the additional workload.

The court's acceptance of the pragmatic use of behaviour today, just like cruelty and adultery in previous eras, is a reflection of the reality of personal life and the family justice system's capacity. When people have decided that their marriage is over they have, for the last hundred or so years, managed to find ways to secure a divorce through bending the law to meet their needs. Attempts to turn back the clock are highly unlikely to succeed. Indeed, they would run counter to the direction of travel in all other jurisdictions in the developed world which have moved away from fault³⁰⁶ or, as in the case of Ireland, introduced no-fault divorce from the beginning.

12.4 Option 3. Modified mixed fault/no-fault system

The advantages of reform

A more likely option than no change or tightening up of the existing law, is to introduce some incremental reform. The goal would be to try to limit the instrumental use of the fault grounds, and the associated problems with them, by shortening the separation periods. The obvious model is the Scottish system. Until 2006, Scottish divorce law was based on the same formulation as England & Wales of a single ground for divorce – irretrievable breakdown of the marriage – evidenced by one of the same five Facts. However, the Family Law (Scotland) Act 2006 reduced the separation periods from two years to one where there was consent and from five to two years otherwise. The rarely-used 'desertion' Fact was also removed.

Any proposal to remove the desertion Fact would be a small step in the right direction. Desertion is rarely used in England & Wales, with only 428 divorces granted based on

³⁰⁶ The only exceptions are Latvia and Lithuania who have reintroduced fault as part of a post-Soviet expression of national identity.

desertion in 2015.³⁰⁷ It is a complex Fact to understand and difficult to make out, particularly for unrepresented litigants. Removing desertion would reduce the complexity of the law, and the behaviour or separation Facts would generally³⁰⁸ be available as alternatives.

Any reduction in the separation periods would have the very strong support of many of the qualitative interviewees in our journey sample, particularly those who were trying to avoid using fault but found the long separation periods very difficult to manage. As WK16 put it, it was a choice between having to “give blame or you have to wait ages”. As we can see from the steady increase in reliance on the behaviour Fact since the 1970s, the everyday reality of wanting or needing to move on financially and emotionally means that many people will opt for the speed and certainty of behaviour over a two or five years’ separation period. For many people, there is no realistic choice between a 3-6 month wait for a divorce based on the behaviour Fact or a two-year wait with the same additional 3-6 month processing time, especially when coupled with the need for the consent and cooperation of the other party.³⁰⁹

Some people do decide to sit out the waiting period to avoid using fault, but it is a very difficult thing to do financially and emotionally for many. Interviewee WK14 and her husband had both decided that it would be too hurtful and “nasty” for one of them to blame the other for the divorce and they did not want their children to think that one parent was making allegations against the other.³¹⁰ She found the waiting period very difficult, not because she wanted to get remarried, but also because of the loss of independence:

I don't feel in control, I just still feel joined. And that feels a bit difficult somehow. I want independence It's not that I'm wanting to go and get married or he's wanting to go and get married or anything. I don't feel independent. I just feel that's holding us together still. That's only, once the house has gone, the only thing holding us together is our relationship with the kids which will always be there and I would always want that to be there.

For her, as for others, the waiting period was far too long as “people can make their own minds up within two years, without having to wait. And if they're not sure, they'll wait longer”.

The shorter separation periods would also have some support from our national opinion poll participants. Within the context of the current mixed-fault/no-fault law, just over a third (36%) of people thought that the two years period was too long, whilst just under half (48%) thought it was about right (Table 12.1). That is a shift from a similar question posed in the

³⁰⁷ Including at least one granted incorrectly – see Section 5.5 above.

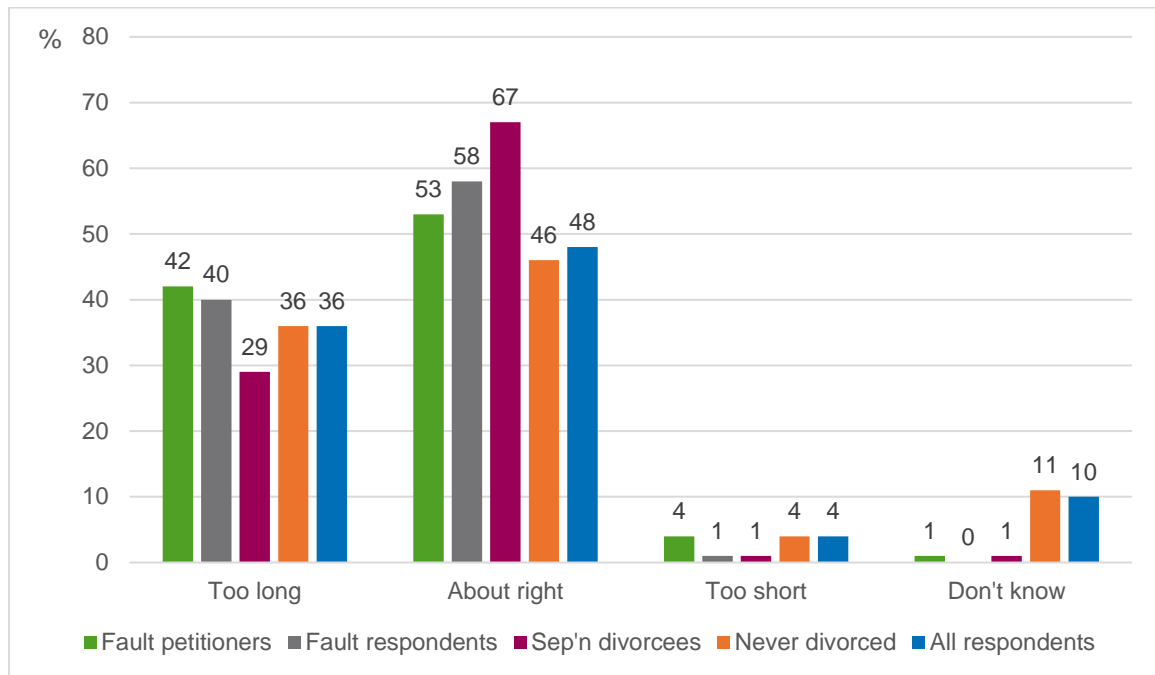
³⁰⁸ It has been held that the mere fact of separation cannot be treated as ‘behaviour’: *Stringfellow v Stringfellow* [1976] 1 WLR 645, though that was in the context of ensuring that deserted spouses could not evade the two-year requirement for desertion by simply pleading behaviour instead. That concern would evaporate once desertion were no longer available.

³⁰⁹ For the third of petitioners who seek financial orders, that processing time would extend on average to nearly nine months plus the two years waiting period. Waiting for approaching three years to finalise their financial positions is simply not a realistic option for most people when there is a fast alternative available, especially given the ability of the petitioner in practice to proceed unilaterally without relying on the consent of the other party.

³¹⁰ In this case, as in others, this was a moral decision not to resort to blame, not a shortage of potential material for a petition. WK14 reported that “there were times when he did kick off that were unreasonable” that could have been used for behaviour particulars.

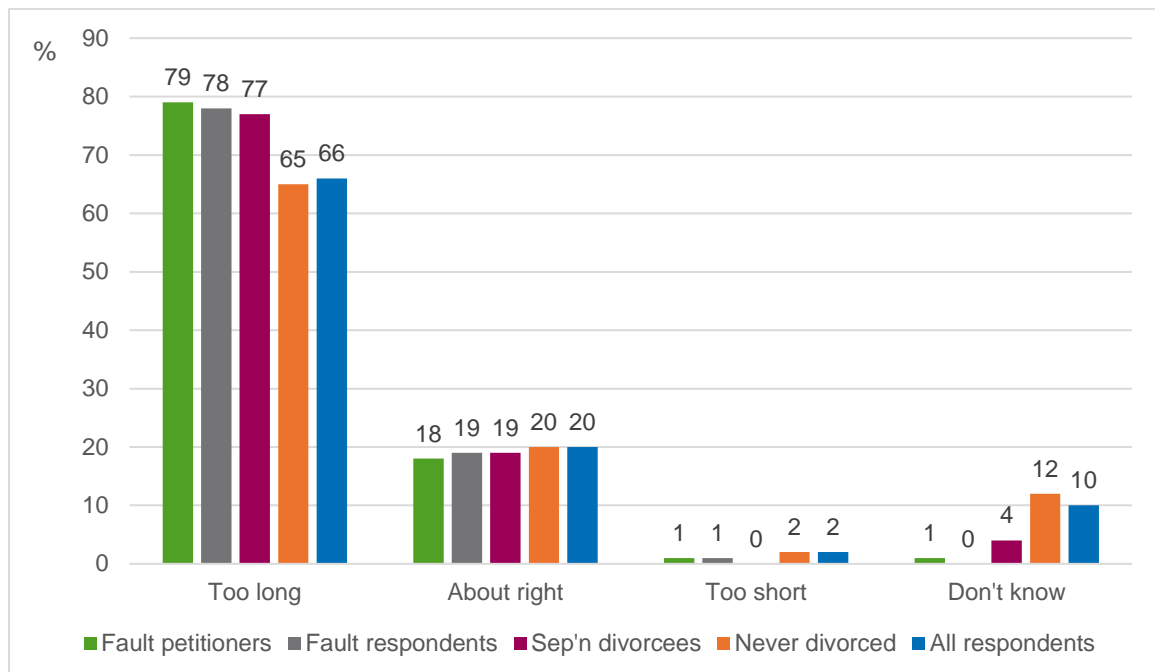
1994 Law Commission study where only 20% thought that the two years period was too long.

Table 12.1: Views on the two years' separation period within the current law



Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

Table 12.2: Views on the five years' separation period within the current law



Base: all survey participants

Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

Rather more people (66%) thought that the five years' separation period was too long, with only a fifth (20%) of people thinking that it was about right (Table 12.2). That is a reduction in the support for longer waiting periods from 1994 when 34% thought that was too long.

One point that is worth noting is that those who had experienced divorce were more likely to report feeling that the periods were too long, compared to the never divorced. That might suggest both that those using separation had felt their own wait was too long and that speed of divorce is an important factor for those citing fault: if so, shorter separation periods might contribute to some reduction in the use of fault.

Limitations of incremental reform

That said, while a reduction in the separation periods would find support, it is questionable how far it would reduce the reliance upon fault and all the associated problems documented earlier.³¹¹ In our main court file sample the median time taken to reach decree absolute for behaviour petitions was 6.9 months; 6.0 months in cases with no applications for financial orders. Those timescales seem likely to reduce with full digitisation. However, even with reduced separation periods, average court processing times of six months would mean a petitioner who relied on separation would still be waiting 18 months for the divorce, that is if the respondent consented or for 30 months if consent could not be relied upon or was withdrawn. Some petitioners would be willing to wait longer than six months to avoid using fault, but it is unclear how many would rely on separation instead, not least because they would need to be very sure that the respondent would consent, otherwise their wait time would on average go up from six (if using adultery or behaviour) to 30 months (if having to rely on two years separation regardless of consent).

The experience of Scotland is highly relevant. It might be assumed that a reduction in the separation periods to the same length as in Scotland³¹² might also dramatically reduce the use of fault to the same level: that is to 6% of divorces compared to 60% in England & Wales. As we discussed in Section 11.3, however, there are other very important differences between the two jurisdictions that would suggest that any reduction in the use of fault could easily be very limited. Unlike Scotland, in England & Wales the court process is not in itself more expensive or difficult for fault-based petitions compared to separation-based petitions. The other critical difference is that in Scotland, unlike in England & Wales, it is not necessary to get the decree nisi and absolute in place before finalising financial matters formally. Without those seemingly technical, but vital, other elements of the complex jigsaw surrounding divorce also present, it is likely that a large proportion of English and Welsh divorces will remain based on fault.

Unless the role of fault were very significantly reduced, and that would seem unlikely given the significant pull factor of a faster divorce using behaviour without the need for the respondent's cooperation, then the fundamental problems with the mixed fault/no-fault system, identified by the Law Commission and replicated in this study, would continue. Those problems include the manipulation of the behaviour Fact to secure a faster divorce. Fault would continue to be attractive too in the more conflictual divorces with the subsequent impact on financial and children matters. Nor would a reduction in the use of fault eliminate

³¹¹ Similar arguments can be made in relation to the addition of a 'sixth Fact' based on the presentation of a joint petition and waiting period of one year as proposed in the No Fault Divorce Bill presented by Richard Bacon MP in October 2015 <http://services.parliament.uk/bills/2015-16/nofaultdivorce.html>

³¹² That is, from two years' with consent to one year and otherwise from five years' to two. See Section 11.3 above.

the problem of fairness between petitioner and respondent or assist with public understanding of the law. Petitioners would get to 'choose' fault but that choice would be denied to respondents who would remain on the receiving end. The law would also remain as complex and confusing as before, but just with shorter separation periods.

12.5 Option 4: Notification-only system

Advantages of a notification system

The last option is divorce available solely on the application of one or both parties, confirmed by one or both parties after a minimum waiting or 'cooling off' period. This was indeed the original scheme put forward by the Law Commission in its 1990 report where it proposed a one-year period for consideration and reflection where one or both parties had filed a statement that the marriage had irretrievably broken down. More recently, as part of its *Manifesto for Family Law*, Resolution has proposed a scheme where one or both parties give notice that the marriage has broken down irretrievably and the divorce would proceed if one or both parties confirm that wish after a period of six months. As we saw in Section 11.3 earlier, this type of scheme is used in countries as diverse as Spain, Italy and Sweden.

There are multiple advantages with this type of divorce. It is clear and very simple to understand and to use for unrepresented parties. The registration and confirmation system means that it cannot be manipulated or abused, unlike the fault Facts or the retrospective 'recall' of separation dates. There would be significant costs savings for the government, as the process would no longer require manual scrutiny of narrative particulars. The elimination of fault would mean that the divorce procedure itself should not be a source of additional conflict. The notification procedure would also remove any advantage to the initiator or the procedural fairness against the respondent that is such a feature of the current system where the petitioner's allegations are taken at face value. The other advantage is that the procedure is put in the hands of the parties. The state would no longer intrude in this aspect of the private domain of family life.

Unlike the other options, there is also the possibility that notification would be more facilitative of reconciliation. In Section 9.4 above, we saw that the provisions within the current law did not support reconciliation and indeed the availability of fault appeared to lead to faster transitions from separation to the legal divorce. With a notification system through an online portal, the parties could be directed at the start towards online sources of advice and help in relation to marriage support and counselling and thinking about children and finances. Unlike separation Facts which generally require the parties to live apart, with notification the parties could continue to co-reside. In some cases that may be more likely to enable an opportunity for a rethink and reality check than enforced separation, particularly with access to online relationship tools following registration in a notification system.

There are two main disadvantages to a notification system. The first is that it limits choice. Currently there is a choice between five Facts, and between fault and no-fault. Some petitioners, with a literal orientation, do actively choose fault. They were, however, a small minority within our qualitative sample. More importantly, our qualitative findings suggest that for at least some of those petitioners the 'justice' and satisfaction achieved through reliance on fault is illusory,³¹³ as fault backfires on the petitioner or is unobtainable due to the

³¹³ The 'chimera' referred to by Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 98.

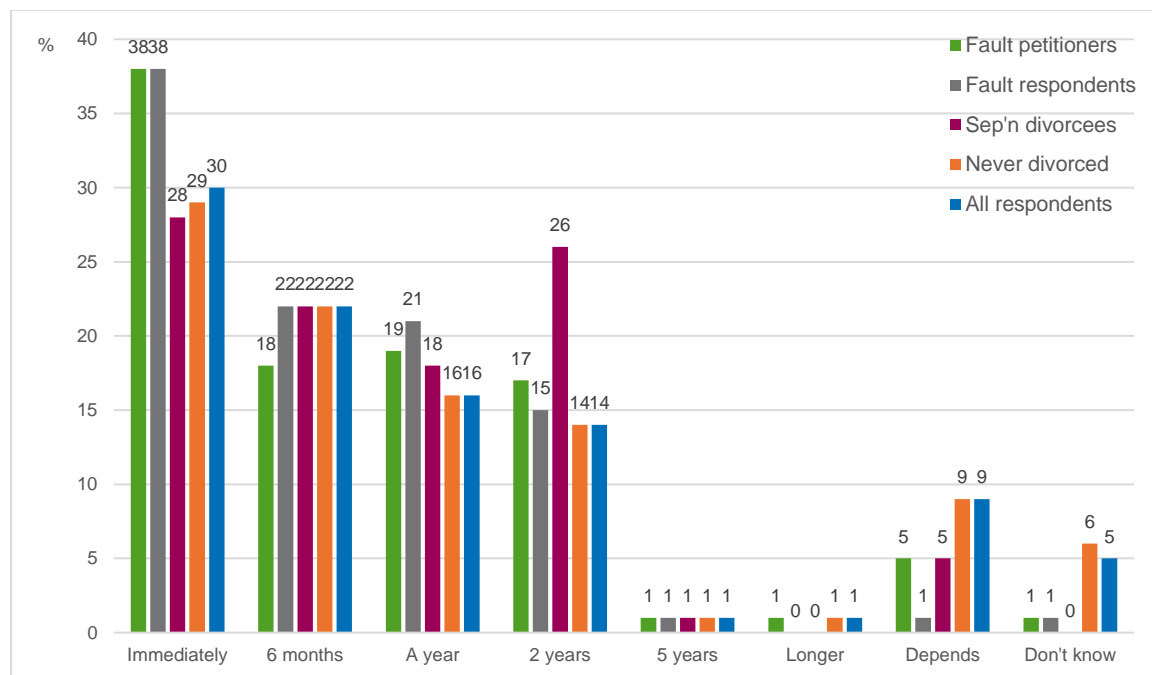
pragmatic orientation of the system. More importantly, whilst the system offers a choice of Fact to petitioners, it offers none to respondents (unless they are able and willing to defend the petition and/or issue their own). That is a very real problem and source of procedural unfairness in a system where allegations against the respondent are not tested by the court and can only very rarely be defended by the respondent. The removal of choice of Fact for the petitioner would therefore in many respects be a positive rather than a negative move.

The second disadvantage is that such reform would require primary legislation. It could not be achieved through procedural changes. That, however, is also true of what this study indicates would be the only other realistic option, that of modifying the mixed system.

What waiting or ‘cooling off’ period?

If a notification system were adopted, one of the critical questions would be what the waiting or ‘cooling off’ period should be and additionally, whether the period should be the same whether notification were sole or joint or whether there were minor children. We asked the participants in the national opinion survey what a suitable waiting period would be if fault were removed, both in cases where both parties wanted the divorce and where only one did so. Interestingly, nearly a third (30%) of participants thought that divorce should be available immediately if both wished to divorce, and two thirds (68%) thought that in those circumstances divorce should be available within a year or less (Table 12.3).

Table 12.3: Views on waiting period if fault removed: if both want the divorce

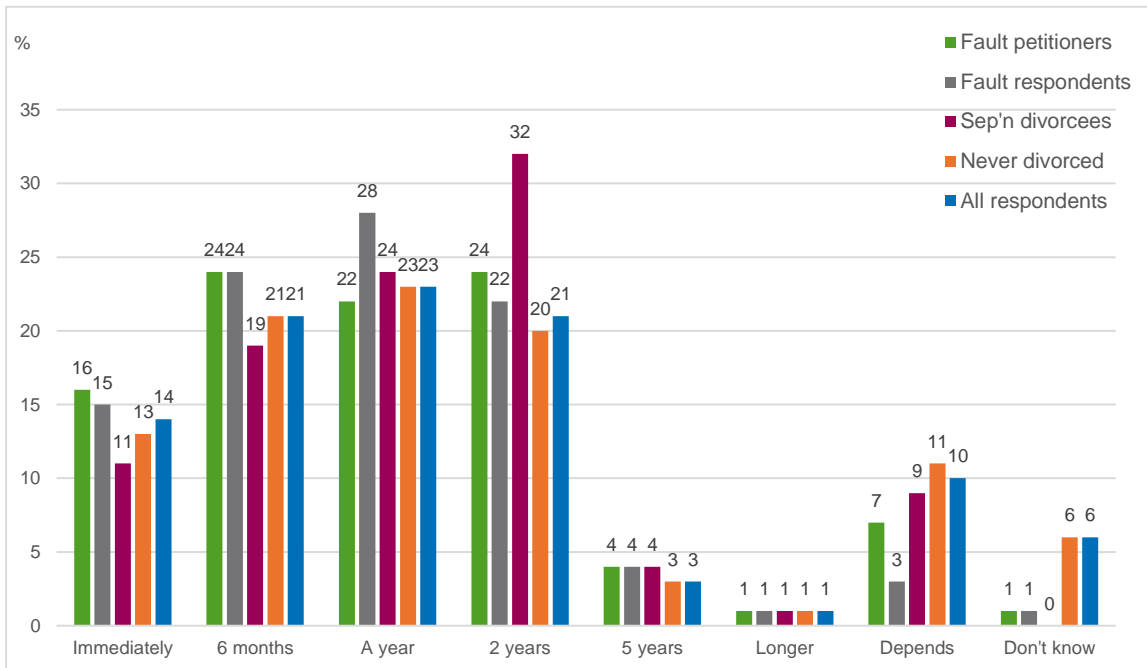


Base: all survey participants

Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

If only one party wanted the divorce then a third (34%) of the public would support a divorce being available within 6 months or less and 57% within a year (Table 12.4).

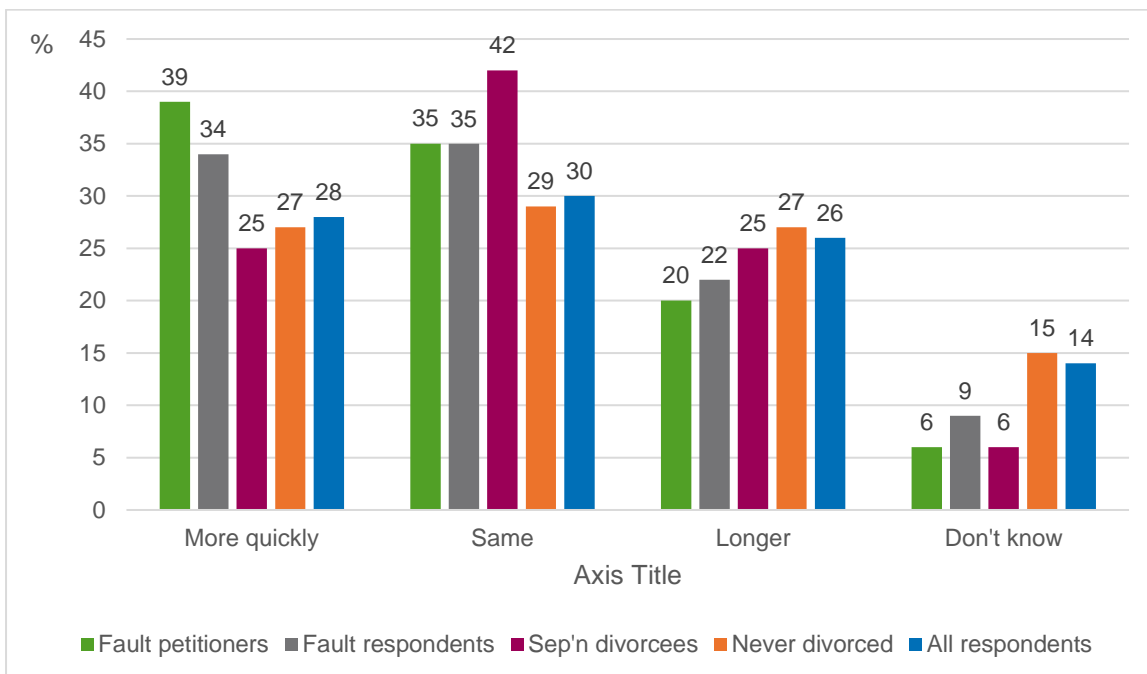
Table 12.4: Views on waiting period if fault removed: if only one party wants the divorce



Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845
 Base: all survey participants

There was very little consensus on whether the presence of minor children should influence the length of the waiting period.³¹⁴ The public were fairly evenly split between making the wait for a divorce shorter, longer or the same.

Table 12.5: Views on the speed of divorce if minor children are involved



Base: all survey participants
 Sample sizes: Fault petitioners 541; Fault respondents 280; Sep'n divorcees 336; Never divorced 1509; All respondents 2845

³¹⁴ Internationally, Sweden is one of the few countries where the presence of minor children is a factor in the length of separation or notification periods, requiring a six-month notification even if both spouses agree to the divorce – cf the lack of time-requirement where there are no minor children.

Alongside the opinion poll data, one of the very consistent themes amongst our qualitative interviewees in the journey study was that the current process was far too long and difficult, particularly at a time of enormous stress and uncertainty and when there were more pressing decisions to make about family finances and arrangements for children (see 10.3 above). At the same time, there was a very widespread view amongst qualitative interviewees that divorce should not be too easy and a concern that it should not be possible for (other) people to walk away from marriage on a whim.

Although all the qualitative interviewees except those with a literalist orientation were supportive of 'no-fault', that was not an endorsement of immediate unilateral divorce on demand. A consistent concern amongst the party interviewees, as well amongst lawyers and legal advisers, was that there should be some delay or 'cooling off' period to prevent decisions being taken too lightly or on a whim. There was no support amongst our qualitative interviews for unilateral divorce on demand, even though it might be said that that is effectively possible already under the fault system, given the difficulties of defending. Interviewee SP42, a classic pragmatist, reflected on some of those themes, supporting the removal of fault, but suggesting that some cooling off period was necessary:

I know there's lots of calls for no blame divorces but I think, actually do you know what, it's a serious thing getting divorced. You know perhaps you should have to sit down and think really hard about what's gone wrong... I can fill it in and say he committed adultery, send it off to the court and send it off to the court tomorrow. I don't have to wait, I don't have to go and see a counsellor. Yes, and it should be a serious decision, you should have to think about why you're getting divorced.

Conclusion

Divorce affects more than 100,000 families in England & Wales every year. That is a large number of adults and children undergoing a significant family transition. It is vital that, once one or both adults have decided that the marriage has ended, the subsequent legal process of formally dissolving the marriage does not make the situation more difficult. This study was prompted by longstanding concerns, recently given fresh impetus, that the existing divorce law is not meeting that goal.

The study aimed to explore how the law on divorce found in the Matrimonial Causes Act 1973 works in practice today and whether problems recognised by legislators in the 1990s are still present or have been resolved. The study was based on a mixed methods approach, drawing on qualitative interviews, focus groups, observation and case file analysis, coupled with a national opinion poll and comparative legal analysis.

What emerged? It was striking that, despite a gap of nearly thirty years, the issues and problems identified by Davis and Murch³¹⁵ and the Law Commission³¹⁶ in the 1980s are still evident today. These include the processes whereby the parties fit or stretch their circumstances into the legal Facts available to gain a quick divorce; the court in undefended cases only being able to 'pretend' to inquire into the petitions produced; fault creating conflict, with possible negative consequences for children; the law being confusing and difficult to understand. Moreover, like earlier studies, this study also found no evidence that the existing law protects marriage or facilitates reconciliation. In short, all of the issues and problems that were evident in the 1980s, and that persuaded Parliament to legislate to remove fault with the (now-abandoned) Family Law Act 1996, are just as apparent thirty years later.

Whether those problems are better or worse than in the 1980s is difficult to judge. Some differences have emerged in the intervening years. The general impression is that the process is perhaps more routinised and ritualised now than in the 1980s. Two major differences are the much greater emphasis on harm-minimisation strategies, particularly the sharing of draft particulars, and secondly, the hollowing out of the five Facts, especially the lowering of the threshold for behaviour. This may have reduced the potential for conflict somewhat in some cases, but that is counter-balanced by the increase in the number of behaviour petitions over the decades, which seem to be inherently likely to inflame conflict in other cases. And those pragmatic developments come at a price, notably both widen the gap further between the law in the books and the law in practice, especially in relation to the behaviour Fact.

In some respects, those same problems can be seen as worse than in the 1980s given different public expectations, understanding and values. As a society, we have higher expectations of the service provided by public agencies than in the 1980s, which our study suggested are not currently being met.³¹⁷ Above all, the study highlights the increasing gulf between a divorce law based on fault, blame and the 'bad' respondent, and a modern family

³¹⁵ Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988).

³¹⁶ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990).

³¹⁷ Section 6.3 above.

justice system that is trying to facilitate a 'good' divorce for the parties and their children based on problem-solving, collaborative parenting and transparency.

The result is a curious and rather hypocritical position where we have what is tantamount to divorce available 'on demand', whether on a consensual or unilateral basis, via the behaviour Fact. That reality is masked by an often painful, and sometimes destructive, legal ritual with no obvious benefits for the parties or the state. How archaic and odd that is becomes even clearer when compared with similar jurisdictions where fault has been abolished or reduced to a rump. None of the jurisdictions surveyed for our comparative analysis came close to the instrumental reliance upon fault as in England & Wales. And in none are nearly half of divorces granted immediately based on the production of a few sentences of unverified allegations without the consent (though without the formal opposition) of the respondent. Nor is there any reason to believe that removing fault would undermine marriage in England & Wales: it has not done so in other jurisdictions.

There is strong support for divorce law reform amongst the senior judiciary and the legal profession.³¹⁸ We now also have three or four decades of empirical research showing that the existing mixed fault/no-fault law is problematic. The general public are more in favour of the retention of fault, as reported in the public opinion surveys conducted for the Law Commission in the 1980s and for the Finding Fault study.³¹⁹ We suspect, however, that that support is based on a misunderstanding that fault is required to allocate blame (rather than providing evidence of breakdown) and that the court is scrupulously verifying allegations. The public may be less sanguine about fault if they were aware that it is perfectly within the law for a 'guilty' adulterous husband to petition on his non-adulterous wife's 'behaviour', or that those allegations of behaviour will be taken at face value by the court, even where the wife, who cannot afford to make a formal defence of the petition, denies the allegations.

Our view is that the case for fundamental legal reform is strong. The existing compromise solution of a mixed fault/no fault law is problematic. Given the harm that the use of fault can generate, it is difficult to see what the point of fault is today. That is particularly so given there is no need in law for the fault alleged to have anything to do with why the relationship broke down – even if many petitioners and respondents understandably think that is the case. The result is that the process becomes an empty ritual, a point reinforced both by claims of lawyers that they could draft an adequate behaviour petition for the happiest of marriages and by the statistically very limited chance of a petition foundering on substantive legal grounds. At present, it is not marital behaviour, guilt or morality that determines the outcome of petitions (or the speed with which a divorce may be obtained) but rather whether the parties have the legal and literacy skills to navigate the paperwork.

The findings from this study point to the benefits of fundamental reform of the law and the removal of fault so that divorce is based solely on the notification, and later confirmation, by one or both spouses that the marriage has broken down. That process can, and should, be a purely administrative process with no requirement for judicial scrutiny. The decision to divorce should be taken by the parties themselves. In the twenty-first century, the state

³¹⁸ In a recent survey, 90% of Resolution members stated that they support no-fault divorce and divorce law reform is part of the Resolution *Manifesto for Family Law*. <http://www.resolution.org.uk/endtheblamegame/>

³¹⁹ Law Commission, *The Ground for Divorce* (Law Com No 192, 1990), Appendix D and above Section 10.2.

cannot, and should not, seek to decide whether someone's marriage has broken down. That should be a private family matter, properly determined by the parties, not the state. The court's role in supporting families to make decisions about children or finances, where necessary, would not be affected by this change and would continue as now.

This is a timely opportunity for law reform given the work that is being undertaken to digitise the divorce process. The benefits of that project for the parties and for MoJ/HMCTS will not be realised without substantive law reform. It would be particularly welcome if the savings achieved by the adoption of an administrative procedure could be re-directed elsewhere within the family justice system where they could be used more productively to support children and their parents and, additionally, to relationship support services.