

Impact case study (REF3)

Institution: University of Exeter		
Unit of Assessment: UoA 18 Law		
Title of case study: No fault now: Achieving historic reform of the divorce law in England & Wales		
Period when the underpinning research was undertaken: September 2015-February 2019		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Professor Liz Trinder	Role(s) (e.g. job title): Professor of Socio-legal studies	Period(s) employed by submitting HEI: Sept 2009 to date
Period when the claimed impact occurred: October 2016 to 25 th June 2020		
Is this case study continued from a case study submitted in 2014? No		
<p>1. Summary of the impact</p> <p>Numerous people and groups had campaigned for divorce reform since the late 1990s, but government had been resistant. Professor Trinder's <i>Finding Fault</i> study found that the fault-based divorce law in England & Wales was archaic, unfair, damaging to relationships and undermined the rule of law.</p> <p>The research led directly to a fundamental shift in government policy and a change in the law. The <i>Finding Fault</i> recommendations were adopted in their entirety by the government's Divorce, Dissolution and Separation Bill. The Divorce, Dissolution and Separation Act 2020 achieved Royal Assent in June 2020 and will be implemented in Autumn 2021. The Act entirely reforms the ground for divorce, eliminating fault and the ability to defend. This is a historic legal reform given that fault has been central to divorce law since the 1660s. It is also of great personal significance. A million families over the next decade will benefit from a clearer, fairer and less harmful divorce law due to Trinder's research.</p>		
<p>2. Underpinning research</p> <p>Divorce in England & Wales is (until Autumn 2021) available on the ground of irretrievable breakdown, but irretrievable breakdown has to be proved by one of five 'facts'. Three of those facts are fault-based: adultery, behaviour or desertion. Fault (or blame) can be avoided, but only after a long separation of two years (if the respondent consents), otherwise five years.</p> <p>There was an abortive attempt at law reform in the 1990s with the never-implemented Family Law Act 1996. There had been no research on the grounds for divorce since then. Trinder's <i>Finding Fault</i> study was designed therefore to explore whether problems identified in the 1980s and 1990s remained and whether professional concerns about current law and practice would be empirically validated.</p> <p>The <i>Finding Fault</i> study included four phases, with early phases establishing the need for reform and later phases informing policy design, once government had accepted the case for reform.</p> <p><i>Phase 1: The need to remove fault.</i> Interviews with the parties and lawyer focus groups revealed widespread gaming of the system. The behaviour fact was relied upon disproportionately to avoid the long wait required by a separation-based divorce. But to do so, parties regularly had to "cobble up some words which will... do the business" or were given free rein to attack the respondent [3.1]. Observations of judicial officers and case file analysis of undefended divorces showed how gaming of the system was enabled by de facto rubber-stamping of petitions by the courts. Whilst this meant that divorce was (almost) always available, interviews with the parties and a national opinion survey showed that the disproportionate reliance upon fault created or exacerbated conflict, was unfair for respondents subject to untested allegations that they were unable to defend and risked bringing the law into disrepute. In October 2017, <i>Finding Fault</i> [3.1] recommended</p>		

replacement of the current five fault and separation facts with a simple six-month notice period.

Phase 2: The need to remove the ability to defend divorce. A separate case file analysis of a national sample of defended divorces showed that most defences were not principled attempts to save the marriage, but rather objections to behaviour allegations or a convenient mechanism to exercise coercive control. ‘No Contest’ [3.2] was published in April 2018 to inform the rare defended case of *Owens*. It recommended that the ability to defend should be removed except for evidence of fraud or coercion, or lack of jurisdiction or capacity.

Phase 3: The need for government review of the law. In late spring 2018, Trinder worked with Baroness Butler-Sloss and a retired parliamentary counsel on a Private Member’s Bill arising directly from, and as a Nuffield Foundation-funded extension to, the main *Finding Fault* research. The Divorce (etc.) Law Review Bill [HL] 2017-19 required the Lord Chancellor to initiate a review of the law on divorce, including consideration of a *Finding Fault* style notification scheme. The Bill had its First Reading in July 2018. It achieved its purpose without having to progress further as a government consultation was launched in October 2018 (see section 4).

Phase 4: Refining the Ministry of Justice’s reform proposals The Lord Chancellor’s consultation paper [5.3], proposed to remove both fault and the ability to defend, following direct recommendations in [3.1] and [3.2]. *Taking Notice* [3.3] involved further analysis of the *Finding Fault* dataset in response to a query from the Ministry of Justice. Its key finding was that problems with service meant that any notification period should precede, not follow, decree nisi which was accepted by the government. *Reforming the Ground* [3.4] (with Jens Scherpe, Cambridge University) involved comparative analysis of eight similar jurisdictions. A key finding was the identification of an international move towards autonomy and away from fault and defence, in line with both [3.1] and [3.2] and the Ministry of Justice proposals in [5.3].

3. References to the research

(3.1) Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017) Submitted to REF2021

(3.2) Liz Trinder & Mark Sefton, *No Contest: Defended Divorce in England and Wales* (Nuffield Foundation 2018) Submitted to REF2021

(3.3) Liz Trinder & Mark Sefton, *Taking Notice?: Non-standard Divorce Cases and the Implications for Law Reform* (Nuffield Foundation 2019)
<https://www.nuffieldfoundation.org/about/publications/taking-notice-non-standard-divorce-cases-and-implications-ofr-law-reform>

(3.4) Jens M. Scherpe & Liz Trinder *Reforming the Ground for Divorce: Experiences from Other Jurisdictions* (Nuffield Foundation 2019)
[https://www.nuffieldfoundation.org/sites/default/files/files/Trinder%20-%20Reforming%20the%20Ground%20for%20Divorce%20\(Mar%202019\)\(1\).pdf](https://www.nuffieldfoundation.org/sites/default/files/files/Trinder%20-%20Reforming%20the%20Ground%20for%20Divorce%20(Mar%202019)(1).pdf)

(3.5) Liz Trinder, ‘Divorce reform in England & Wales: The Human Rights Perspective’ (2018) 6 *European Human Rights Law Review* 557. Available on request

(3.6) Liz Trinder, ‘Where Next after *Owens v Owens*?’ [2017] *Family Law* 474 Available on request

The Finding Fault study ran from October 2015 – April 2019 with a Nuffield Foundation grant of £342,545. Professor Trinder was principal investigator and employed full-time at Exeter University throughout. One Plus One (Braybrook, Coleman, Houlston), Bryson Purdon Social Research and Mark Sefton (independent researcher) were co-investigators for [3.1]

and [3.2]. Jens Scherpe (Cambridge University) was co-investigator for [3.4] between November 2018 and April 2019.

4. Details of the impact

What has changed?

Trinder's research provided irrefutable evidence that led directly to a fundamental shift in the government's position on the need to reform the ground for divorce/civil partnership. The result is the Divorce, Dissolution and Separation Act 2020. The Act will be implemented in Autumn 2021. It enacts every one of the *Finding Fault* recommendations:

- Irretrievable breakdown will be established simply by a statement to that effect by the applicant(s), with no reference to fault or separation periods
- A six-month waiting period between application and final decree
- Sole or joint applications
- Removal of the ability to defend the divorce/civil partnership

What changed the government's mind?

There were two prime pathways to impact:

1. Providing the evidence base for reform for use by stakeholders and government.

Whilst Trinder actively disseminated the research herself (e.g. Woman's Hour, The Times op-eds 5.1), key stakeholders made highly effective use of the research. Resolution, representing 6,500 family lawyers, stated "Your research was absolutely central of course to Resolution's campaign and messaging. We wouldn't have achieved the success without it... The *Finding Fault* study was absolutely key to the campaign's success" [5.2].

Trinder worked closely with MoJ from the beginning, including sending advance copies of all draft reports. Both [3.3] and [3.4] arose from specific evidence queries from MoJ. The Justice Minister wrote to Trinder in April 2019 "Your four reports have been invaluable in building a solid evidence base and my officials have told me how much they appreciate the contribution you and your colleagues have made to shaping the case for reform" [5.5]

Serendipitously as the research progressed, the rare defended divorce case of *Owens v Owens* attracted global media coverage and public disquiet. *No Contest* [3.2] was published to coincide with the Supreme Court hearing in May 2018. Lord Wilson described *No Contest* as a "detailed" and "admirable" analysis of how courts handle defended cases in *Owens* [2018] UKSC 41 [5.4].

2. Co-Creating a Private Member's Bill (PMB) to trigger the government's

consultation. Baroness Butler-Sloss sponsored the launch of [3.1]. She then offered to put forward a PMB specifically to implement the report's recommendations [5.6]. Butler-Sloss and Trinder worked with a retired Senior Parliamentary Counsel to draft the Bill and Trinder drafted the Explanatory Notes [5.7]. The Bill sought to place a duty on the Lord Chancellor to initiate a review of the divorce law, including consideration of a replacement notification scheme. The intention was that the Bill would encourage the government to initiate a review without the Bill having to be enacted. That plan was effective. The government's consultation paper [5.3] was released just three months later.

How pivotal was the *Finding Fault* study?

Finding Fault is an example of a direct and linear relationship between research findings and law reform. On 13 Feb 2017 Lord Keen, government spokesperson for Justice in the Lords, had stated that the government had no plans to change the existing law on divorce (PQ HL5103). That position was reversed within eighteen months, following publication of 3.1 and 3.2 and the Butler-Sloss Private Members Bill. The Government's Consultation paper [5.3] proposed adoption of the *Finding Fault* recommendations for removing fault and defence. It cited [3.1] and [3.2] repeatedly as "the most recent substantial evidence base"

[5.3 p17], indeed no other research was, or could, be cited. In April 2019 the MoJ Response to the consultation [5.8] confirmed the intention to reform the law, again with extensive reference to all four *Finding Fault* reports.

Scarce parliamentary time was found to introduce the **Divorce Bill** in June 2019. That, and a second Bill, were lost due to prorogation and then a General Election, before finally succeeding at the third attempt in June 2020.

The pivotal role of the *Finding Fault* research in securing the reform was recognised by practitioners and parliamentarians. Resolution's former chair commented "I am in little doubt that, without Finding Fault, we would still be waiting for no fault divorce – potentially for many more years to come" [5.2].

Even opponents of law reform recognised the centrality of the research to the government's case. In parliament, Lord Farmer, the leader of the small group of Conservative/DUP opponents of the Bill, was critical of what he saw as the "awful lot of weight ... being put on this research" by the government [5.9], and later referring to "the single piece of research on which this Bill seems to have been based. The Nuffield Foundation's *Finding Fault? Study.*" [5.10].

Replying to Lord Farmer on behalf of the government, Lord Keen stated "I am bound to say that the Government and many others find the evidence from this important research compelling. I agree that the research has been influential. Its messages—that the current law increases conflict, encourages dishonesty and undermines the aims of the family justice system—are consistent with a body of evidence going back about 40 years, not least the Law Commission report of 1990.... The *Finding Fault?* study shows that the problems with fault-based divorce persist today. We cannot ignore that message" [5.10].

What is the reach and significance of the changes? Who benefits?

The removal of fault and the ability to defend is a historic and radical legal reform. Fault has been central to English divorce law since the 1660s. The current divorce law is fifty years old.

The main beneficiaries will be the adults and children from more than 100,000 families in England & Wales who experience divorce or civil partnership dissolution each year. Over the next decade, the benefits for these one million families will include:

- **Preventing unnecessary conflict.** Quoting [3.1] and [3.2], the government's Impact Assessment [5.3] expects less conflict caused or exacerbated by the current legal process (and which is entirely contrary to wider public policy promoting parental cooperation).
- **Making the law clearer and easier to understand:** reducing the need for costly legal advice and ensuring those without lawyers do not have their divorce refused or delayed [3.1] due to the complexity of the law
- **Eliminating discrimination** by removing the adultery fact that is restricted to heterosexual 'conduct' within marriage only
- **Preventing the use of the divorce process to exercise coercive control**, e.g. by threatening or initiating a defence [3.2].
- **Removing the injustice** of respondents having to accept untested allegations against them [3.1]

The other main beneficiary is the **rule of law**. The straightforward administrative process introduced by the Divorce Act will eliminate the intellectual dishonesty of the current system or the "often painful, and sometimes destructive, legal ritual with no obvious benefits for the parties or the state" as identified in [3.1] and quoted verbatim by the Consultation paper [5.3].

5. Sources to corroborate the impact

[5.1] Op-ed pieces in The Times by Liz Trinder, a) 16th November 2017 “No-fault divorces would protect children and save millions” b) 3rd May 2018 “You shouldn’t have to ask the Supreme Court for a divorce” and c) 2nd August 2018 “Marriage shouldn’t be a prison”.

[5.2] Testimonial dated 17th September 2020 from Chair of Resolution during the Family Law Bill in 1995/6 and 2017-18. Resolution represents 6,500 family justice professionals, mainly family solicitors.

[5.3] Ministry of Justice Consultation paper (September 2018) *Reducing family conflict: reform of the legal requirements for divorce* and *Impact Assessment*. Includes 11 citations of **[3.1]** and **[3.2]** and multiple unreferenced paraphrases to make the case that the current law aggravates family conflict, does not establish why a marriage broken down, appears procedurally unfair, is open to manipulation and does not support children positively.

[5.4] Supreme Court judgment in *Owens* [2018] UKSC 41. Lord Wilson described the analysis in “*No Contest*” **[3.2]** as “detailed” and “admirable” (para 16 and 17).

[5.5] Unsolicited letter of thanks from Justice Minister Lucy Frazer MP dated 9th April 2019.

[5.6] Recording of Baroness Butler-Sloss’s interview on Radio 4 World at One on 17th May 2018 announcing that she will be bringing forward a Private Member’s Bill on divorce law reform as result of the Finding Fault research. She also noted that she had met with the Lord Chancellor and would meet shortly with two other Ministry of Justice ministers.

[5.7] Divorce (etc.) Law Review Bill [HL] 2017-19 and Explanatory Notes
<https://web.archive.org/web/20210114111222/https://services.parliament.uk/Bills/2017-19/divorceetclawreview.html>

[5.8] Ministry of Justice (April 2019) *Reducing family conflict: Government response to the consultation on reform of the legal requirements for divorce* (together with the accompanying Impact Statement (5.2a), Family Impact (5.2b) and Equality Statement (5.2c) that were published with the Response). The Government’s Response includes five references to **[3.1-3.4]**. There are 12 references to 3.1-3.4 in the Impact Assessment, 8 in the Family Impact Test and 2 in the Equalities statement.

[5.9] At Committee Stage, Lord Farmer refers to the “awful lot of weight ... being put on this research” by the government (Hansard HL Committee 3rd March 2020 c553 (at 18:00:00, page 29 of the pdf).

[5.10] At Report Stage, Lord Farmer complained about “the single piece of research on which this Bill seems to have been based. The Nuffield Foundation’s *Finding Fault? Study*” (Hansard HL Report 17th March 2020 c1403-4 at 17:00:00, page 15 of the pdf). In direct response to Lord Farmer, Lord Keen, Advocate General for Scotland and Government Spokesperson in the Lords for Ministry of Justice agreed that the government had relied on the Finding Faut research, but because it was “compelling”, “influential” and “We cannot ignore that message” (Hansard HL Report 17th March 2020 c1406-7 at 17:00:00, page 18-19 of the pdf). Lord Keen was the Justice spokesperson who had stated that the government had no plans to reform the divorce law eighteen months earlier, prior to the publication of the *Finding Fault* research.