

# Divorce, Dissolution and Separation Bill 2017-2019

## Submission of Written Evidence

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### Summary

1. This submission relates to the Divorce, Dissolution and Separation Bill, with particular focus on the separate but connected issue of financial provision that would be affected by reform. Although the move to no fault divorce is welcome, this change underlines the need to reform the outdated law on financial provision. The Bill's approach that leaves this for another day and makes only minor amendments to the law safeguarding financial matters (found in sections 5 and 10 of the Matrimonial Causes Act 1973) is insufficient and runs the risk of causing hardship.
2. Like divorce, the law on financial provision has not been comprehensively reformed for almost fifty years. The financial consequences of divorce need to be investigated fully in light of this Bill, with a focus on addressing economic inequality between spouses on divorce. This submission argues that historically, lack of pension sharing has contributed to this inequality. As a result, a minor amendment is suggested in relation to section 10 of the Matrimonial Causes Act 1973 to address the risk of pension provision on divorce being overlooked. In paragraphs 8-11, the significance of the Bill's proposed removal of section 5 is discussed, which was added to the Divorce Reform Act 1969 as a financial safety net for spouses otherwise left in a position of grave hardship. If this provision is removed, greater emphasis is placed on section 10 as a form of protection for those left financially vulnerable in the event of reform (discussed in paragraphs 12-18). It is also argued that section 10 must be scrutinised closely, as it may need to be relied upon more given the Bill's new timeline for divorce. The suggested amendment is therefore necessary until comprehensive and urgent reform of financial provision on divorce is carried out.

### Background to the Author of the Submission

3. I am a Senior Lecturer in Law at Cardiff University and author of several publications on divorce, financial provision and nuptial agreements. These include the book *Prenuptial Agreements and the Presumption of Free Choice*<sup>1</sup> which was shortlisted for three major book prizes and was cited and applied by the High Court of Australia in *Thorne v Kennedy*.<sup>2</sup> This work was also cited by the Law Commission of England and

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<sup>1</sup> S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Bloomsbury/Hart 2015).

<sup>2</sup> [2017] HCA 49. See also S Thompson, 'Thorne v Kennedy: Why Australia's decision on prenups is important for English law' (2018) 48 *Family Law* 415-419.

Wales in its report on marital property agreements.<sup>3</sup> My current work includes a monograph forthcoming with Bloomsbury (Hart Publishing) which presents historical analysis of divorce and financial provision law. This includes scrutiny of the historical context of sections 5 and 10 of the Matrimonial Causes Act 1973, which are both affected by the Divorce, Dissolution and Separation Bill.

### **Support for the Divorce, Dissolution and Separation Bill**

4. It is important to state from the outset that the Divorce, Dissolution and Separation Bill is both welcome and necessary because it seeks to remove fault from the divorce process. It is commendable that so many members of the House of Commons recognise the need to alleviate acrimony where possible through reform of divorce procedure,<sup>4</sup> and it is hoped that members will similarly appreciate the need to reform the financial consequences of divorce, as indicated in the Bill's Second Reading debate by Paul Maynard.<sup>5</sup>
5. As is often the case in family law matters, this reform straddles several important areas of law, and so consideration of the broader context and impact of the Divorce, Dissolution and Separation Bill is crucial at this stage. The remainder of this submission considers some of the wider ramifications of the Bill, including a suggested amendment while arguing for further reform beyond the Bill.

### **Sections 5 and 10 of the Matrimonial Causes Act 1973**

6. The most powerful opposition to the Divorce Reform Act 1969 was that it could have disastrous economic implications for deserted wives. The destitution of middle aged women who had separated from their husbands in the 1960s was clear in my analysis of c. 2000 archival letters written by women that fit this demographic.<sup>6</sup> At that time, sections 5 and 10 of the consolidating Matrimonial Causes Act 1973 were introduced as a safety net for those that would otherwise be left destitute by reform. Section 5 provides that the divorce decree can be refused in five-year separation cases on grounds of 'grave financial or other hardship...and that it would in all the circumstances be wrong to dissolve the marriage'. Section 10 facilitates postponement of the decree absolute (the legal end of the marriage) so that financial provision can be arranged.
7. These provisions are now removed or amended pursuant to the Divorce, Dissolution and Separation Bill and it is important to consider the implications of this. For although

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<sup>3</sup> Law Commission, *Matrimonial Property, Needs and Agreements* (2014) Report no. 343.

<sup>4</sup> As demonstrated by key research findings: EJ Trinder, D Braybrook, C Bryson, L Coleman, C Houlston, M Sefton, *Finding Fault? Divorce Law and Practice in England and Wales*. (2017) Nuffield Foundation.

<sup>5</sup> Hansard, HC Deb vol 662, col 601, 25 June 2019.

<sup>6</sup> This opposition was led by Edith Summerskill and my forthcoming research highlights the importance of this opposition: S Thompson, 'Behind Casanova's Charter: Edith Summerskill, Deserted Wives and the Divorce Reform Act 1969' (forthcoming).

the respective financial positions of husband and wife have changed since the 1960s, research shows that there is still a gulf in financial outcomes for spouses on divorce which is divided on gender lines.<sup>7</sup>

### **Removal of Section 5, Matrimonial Causes Act 1973**

8. The Divorce, Dissolution and Separation Bill seeks to remove section 5 of the Matrimonial Causes Act 1973. This provision has only been invoked in a small number of cases,<sup>8</sup> which may reflect both the relatively small number of divorces relying on the fact of five years of separation without the respondent's consent, and the concern that this provision could prevent dead marriages being dissolved. Even though it has not been a popular provision, its removal must be carefully considered.
9. The existing case law related to this provision indicates that section 5 has been especially important when one spouse will potentially lose pension entitlements they would otherwise have if they remained married.<sup>9</sup> In doing so, section 5 highlights the significance of pensions in the context of divorce. While the law on relationship breakdown and pension entitlement has evolved considerably since the Divorce Act 1969 (when this provision first emerged), lack of pension sharing is still one of the greatest causes of financial inequality on divorce today.<sup>10</sup>
10. When the Law Commission considered no fault divorce in 1988 it concluded that section 5 would need to be removed from the Matrimonial Causes Act 1973 or extended to everyone subject to a divorce petition.<sup>11</sup> Extending section 5 would mean that the divorce decree could be refused in any case where it could be established that the respondent would experience grave financial hardship and that it would in all of the circumstances be wrong to dissolve the marriage. If this provision were extended, it would likely be invoked in exceptional circumstances only, for as the Law Commission once said, it is 'offensive to decency and derogatory to respect for family ties to preserve the legal shell of a dead marriage for purely monetary consideration'.<sup>12</sup>
11. The Divorce, Dissolution and Separation Bill has removed rather than extended section 5, which puts considerable emphasis on section 10 as a safety net for those left

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<sup>7</sup> H Fisher and H Low, 'Recovery from Divorce: Comparing High and Low-Income Couples' (2016) 30 *International J. of Law, Policy and the Family* 338.

<sup>8</sup> See, for example *Reiterbund v Reiterbund* [1974] 1 WLR 788 and *K v K* (Financial Provision) [1996] 3 FCR 158. Both cases involved the wife's loss of pension rights on a scale that could not be compensated by state welfare.

<sup>9</sup> The existence of section 5 has also been used to pressurise the petitioner to provide a reasonable financial settlement: see *Archer v Archer* [1999] 1 FLR 327.

<sup>10</sup> H Woodward, "Everyday" financial remedy orders: do they achieve fair pension provision on divorce?' [2015] *Child and Family Law Quarterly* 151.

<sup>11</sup> Law Commission, *Facing the Future – A Discussion Paper on the Ground for Divorce* (1988) para. 41.

<sup>12</sup> Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (1966) para. 40.

financially vulnerable in the event of reform. This reform means that the court would no longer have the power to refuse a decree pursuant to section 5, but would in certain circumstances still have the power to delay the decree absolute under section 10. As is explained below, the removal of section 5 means that it is vital that section 10 is reformed to ensure protection of the financially vulnerable spouse as much as possible.

### **Suggested Amendment to Section 10, Matrimonial Causes Act 1973**

12. Section 10 of the Matrimonial Causes Act 1973 provides special protection for the respondent in separation cases and can prolong the divorce so that financial provision can be made. The issue of financial provision is a separate but connected issue to divorce and it is possible to divorce without financial matters being finalised.<sup>13</sup> But if financial matters are not resolved at the time of divorce, this can lead to significant financial hardship. The six-month (minimum) timeframe enshrined in the new no fault procedure of the Divorce, Dissolution and Separation Bill could place considerable pressure on resolving (often complex) financial issues. It is likely that many cases will not be satisfactorily resolved in this time frame, particularly given the complexity involved in the valuation of assets such as pensions.<sup>14</sup>
13. In short, the Bill changes the context of section 10, and its importance as a safeguard for financially vulnerable spouses is significantly increased. It is therefore important to scrutinise the operation of section 10 further to ascertain whether it will be effective in ensuring delay of decrees so that spouses receive the financial provision they are entitled to, reflecting their contributions to the marriage and right to compensation for sacrifices made as a result of caregiving.
14. Part 1 of the Schedule appended to the Divorce, Dissolution and Separation Bill seeks to amend section 10 of the Matrimonial Causes Act 1973. Currently, section 10 applies only to divorce petitions based on no fault facts but under the new reform, this would be extended to all divorce petitions, which is a logical amendment.
15. The current wording of the Bill (and existing legislation) facilitates delay to ensure financial provision is ‘reasonable and fair or the best that can be made in the circumstances’. This wording can be interpreted expansively,<sup>15</sup> though it does not draw enough attention to an often complex yet overlooked cause of financial inequality on divorce – lack of pension sharing.

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<sup>13</sup> It is standard practice for financial remedies to be resolved before the divorce is finalised pursuant to the decree absolute but in some cases, financial redistribution has taken place decades after the divorce (see for example, *Wyatt v Vince* [2015] UKSC 14.

<sup>14</sup> H Woodward, “‘Everyday’ financial remedy orders: do they achieve fair pension provision on divorce?” [2015] Child and Family Law Quarterly 151.

<sup>15</sup> See for example *Garcia v Garcia* [1992] 1 FLR 256 where the divorce was delayed because the husband owed the wife a substantial amount of child maintenance.

16. Loss of pension entitlement as a result of divorce was historically a major (if not main) fear of those opposing the Divorce Reform Act for fear the deserted wife would be left destitute.<sup>16</sup> However, the issue of pension sharing was not comprehensively dealt with until 1999.<sup>17</sup>
17. There is an opportunity to draw particular attention to the impact of divorce on a spouse's pension in the Divorce, Dissolution and Separation Bill by amending section 10 further. This opportunity should not be overlooked, as it is likely in practice that parties will need to rely on section 10 to delay the decree and ensure proper pension valuation. Determining a fair valuation of a complex pension arrangement might get in the way of divorce, but if spouses are not aware of this, there could be insufficient time for such valuation before the decree absolute, which could lead to economic inequality on divorce being exacerbated further. While pension provision is enshrined in financial provision law,<sup>18</sup> it is not explicitly referred to in the wording of section 10. As a result, it is suggested that section 10(3)(b) is amended to read as follows:

that the financial provision made by the applicant for the respondent is reasonable and fair or the best that can be made in the circumstances **having particular regard to the impact of the decree on spouses' pension entitlement.**

18. This amendment (or wording like this) would draw more attention to the matter of pension provision; an issue which has led to financial inequality on divorce historically and now. This is because when one spouse makes career sacrifices affecting their pension, such sacrifices are often not compensated by pension adjustment on divorce. Before pension sharing was reformed in 1999, section 10 was used to protect spouses at risk of losing pension rights on divorce but since 1999 its utility has waned. But if divorce law is updated, section 10 could be too. If amended, the effectiveness of section 10 as a safeguard against financial inequality could be improved. A fair valuation and assessment of pensions on divorce would be clearly prioritised over the decree absolute, which could provide the non-moneyed spouse with leverage to secure a fairer settlement, instead of divorcing without financial issues being resolved.

### **Need for Reform of Financial Provision on Divorce**

19. Removing fault from the divorce process is an important and radical development in family law, since the concept of the matrimonial offence has overshadowed secular divorce ever since it was first introduced in 1857.<sup>19</sup> By removing fault so that relationship breakdown can be made better and fairer for those involved, discussion of

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<sup>16</sup> This evidence is based on a detailed archival study of thousands of documents reported in my forthcoming research: S Thompson, 'Behind Casanova's Charter: Edith Summerskill, Deserted Wives and the Divorce Reform Act 1969' (forthcoming).

<sup>17</sup> Pursuant to the Welfare Reform and Pensions Act 1999.

<sup>18</sup> Pursuant to Section 25 of the Matrimonial Causes Act 1973.

<sup>19</sup> Pursuant to the Matrimonial Causes Act 1857.

the Bill has also logically reinvigorated calls for reform<sup>20</sup> of the financial consequences of relationship breakdown.<sup>21</sup>

20. Members of the House of Lords, such as Baronesses Deech and Shackleton have noted that reform of divorce procedure will be of little consequence if financial matters are left unresolved, and Baroness Deech has put forward the Divorce (Financial Provision) Bill in several parliamentary sessions as an antidote to this problem.<sup>22</sup> But her proposed solution is not the answer as it could leave the lesser income producing spouse in a position of considerable financial hardship. Baroness Deech argues that the Divorce (Financial Provision) Bill promotes equality because it is built on the assumption that women are now financially independent on divorce. However, by removing flexibility from financial provision law in the areas where flexibility is most important, it is more likely that her Bill would reinforce *inequalities* that result from caring responsibilities.
21. The issue of financial provision is complex and during the Second Reading debate of the Divorce, Dissolution and Separation Bill, it was made clear that it was a matter for separate and future reform. As the Bill seeks to change the timeframe in which spouses can get divorced, reform of the process in which their financial matters are resolved is long overdue. As a result, the financial consequences of divorce in light of this Bill must be investigated fully and imminently.

### **Concluding Remarks**

22. Divorce law is outdated and in need of reform, and so the Divorce, Dissolution and Separation Bill is both welcome and necessary. However, divorce procedure is inextricably linked to its financial consequences, which like divorce, have not been comprehensively reformed for nearly fifty years either. In this submission, I have recommended that the financial consequences of divorce need to be investigated fully, particularly in light of this Bill.
23. I also recommend amendment of section 10 of the Matrimonial Causes Act, which was originally introduced as a financial safeguard<sup>23</sup> in divorces based on no fault facts. One of the greatest risks of the Divorce, Dissolution and Separation Bill's six-month (minimum) time frame is that financial matters can be side-lined and left unresolved, which can lead to hardship. Section 10 facilitates delay of the legal end of the marriage

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<sup>20</sup> It is interesting to note that the introduction of the Divorce Reform Act 1969 was delayed by two years to ensure reform of financial provision law, indicating that divorce and its financial consequences are separate but inextricably linked issues.

<sup>21</sup> For spouses, but also unmarried cohabitants, as the latter relationship type has little financial protection on separation.

<sup>22</sup> The most recent version of this Bill is the Divorce (Financial Provision) Bill 2017-2019 but it was first introduced in 2014.

<sup>23</sup> It should be noted that this safeguard is not a substitute for the court's wide discretionary powers to make financial provision pursuant to section 23 of the Matrimonial Causes Act 1973.

so that financial matters can be addressed. In this submission I have recommended an amendment that incorporates explicit reference to pensions.

24. This is important because although currently section 10 is not often used, it may need to be relied upon more given the Bill's new timeline for divorce. Historically, section 10 was used to protect spouses at risk of losing their entitlement to pension rights on divorce,<sup>24</sup> which was a major source of hardship for deserted wives when the Divorce Reform Act 1969 was introduced. However, since pension sharing was reformed in 1999, section 10 is no longer viewed as useful. But if the Divorce, Dissolution and Separation Bill is introduced, it may be relevant once again. There is a risk that under the Bill's time frame, financial issues could be rushed, which would be problematic given valuation of pensions can be complex and time consuming. If section 10 is amended as suggested, it would be clear that a fair valuation and assessment of pensions on divorce is to be prioritised over the decree absolute. This would provide the non-moneyed spouse with leverage to secure a fairer settlement, instead of divorcing without financial issues being resolved.
25. The Divorce, Dissolution and Separation Bill promotes responsible exit from marriage by removing legislative provisions that have been shown to intensify hostility and bitterness.<sup>25</sup> In this submission, I suggest that there are further adjustments which could be made in keeping with the spirit in which this Bill has been created, facilitating responsible divorce whereby economic inequalities are not side-stepped or exacerbated either.

#### LIST OF AUTHOR'S RELEVANT PUBLICATIONS

Thompson, S., (forthcoming). Behind Casanova's Charter: Edith Summerskill, Deserted Wives and the Divorce Reform Act 1969.

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<sup>24</sup> *Jackson v Jackson* [1993] 2 FLR 848; *Griffiths v Dawson & Co* [1993] 2 FLR 315.

<sup>25</sup> EJ Trinder, D Braybrook, C Bryson, L Coleman, C Houlston, M Sefton, *Finding Fault? Divorce Law and Practice in England and Wales*. (2017) Nuffield Foundation, London, Nuffield Foundation.

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