

‘Divorce is a topic which arouses concern and controversy. No divorce legislation, punitive or liberal, will please everyone, perhaps because it is so difficult to disregard personal values and beliefs about marriage, its function and its meaning in our society’

Walker (1991)

Outline the key changes proposed in the Family Law Act 1996 and evaluate why this controversial divorce reform proposal failed.

The Family Law Act 1996 and the Failure of Divorce Reform

Divorce law in England and Wales has long been a subject of intense debate, reflecting deeply held societal, moral, and religious values about the institution of marriage. As Walker observed, no divorce legislation can please everyone because it inevitably engages with conflicting beliefs.¹ The Family Law Act 1996 (FLA 1996) represented one of the most ambitious attempts to reform divorce law in England and Wales.² It sought to move away from the fault-based framework of the Matrimonial Causes Act 1973³ and encourage more constructive, less adversarial approaches. However, despite its innovative proposals, the reforms were never implemented and ultimately repealed. This essay will outline the key changes proposed in the FLA 1996 and critically evaluate the reasons why this controversial reform failed.

Key Proposals of the Family Law Act 1996

The FLA 1996 was introduced in response to a Law Commission Report in 1990, which recommended that irretrievable breakdown should remain the sole ground for divorce, stating that the current rules on divorce ‘provoked unnecessary hostility and bitterness.’⁴ One of the key aims of the FLA 1996, therefore, was to modernise the law on divorce and minimise conflict between the parties.⁵ One of the ways in which the Act sought to achieve this aim was the introduction of no-fault divorce. Under the Matrimonial Causes Act 1973, parties were required to demonstrate one of five facts (adultery, unreasonable behaviour, desertion, two years of separation with consent, or five years of separation without consent).⁶ The FLA 1996 replaced these five facts with the ground of ‘irretrievable breakdown of the marriage’.⁷

¹ Janet Walker *The Politics of Divorce Reform* (Routledge, 1991).

² Family Law Act 1996

³ Matrimonial Causes Act 1973

⁴ Law Commission, *Family Law: The Ground for Divorce* (LAW COM. No.192, 1990), 7.

⁵ Children and Families Bill HC Bill (2013) [131], para 140.

⁶ *ibid*, s.1.

⁷ (n 2), s.3(1).

A second major reform was the introduction of mandatory information meetings and a reflection and consideration period.⁸ Before filing for divorce, couples would have been required to attend meetings to receive information about mediation, counselling, and reconciliation services. Following this, they would enter a statutory waiting period of at least nine months, extended to fifteen months where children were involved, before a divorce could be finalised. The Law Commission proposals explained that this period was primarily designed to give parties to opportunity to consider the consequences of separation or divorce before it happens.⁹

The Act also placed emphasis on mediation and alternative dispute resolution- for example, S. 14 (1) (a) and (b) empower courts to adjourn proceedings in order to allow parties to pursue mitigation or to resolve the dispute amicably.¹⁰

In addition to the changes made to divorce, the Act included broader reforms to the area of family law more generally. For example, in Part IV, the Act introduced Occupation Orders and Non-Molestation orders, both aimed at protecting parties against domestic violence.¹¹ In contrast to rules on divorce, these broader reforms remain in force today.

Reasons for the Failure of the Reform

However, despite the ambition of the reforms, Part II of the Act was never fully implemented. Lord McNally, then Justice Minister, explained that the government had decided that the provisions were ‘unworkable’.¹² He explained that the findings from pilot schemes designed to test the effectiveness of the information meetings demonstrated that the meetings came too late to save marriages and, often, had the effect of causing ‘parties who were uncertain about their marriages to be more inclined towards divorce’.¹³

Further, Lord McNally noted difficulties with the length and complexity of the process. The reflection period imposed by the FLA was nine months long, which critics found to be unnecessarily long and even paternalistic, in that it forced couples to remain married against their wishes.

Finally, there was a lack of political consensus regarding the reforms to the divorce law. Some stakeholders, particularly more religious or traditional groups, criticised the reforms as making divorce too simple and thereby undermining the sanctity of marriage. In contrast, other groups believed the reforms, including the long reflection periods, were overly restrictive and paternalistic. This reinforces the argument made by Walker that divorce law is inherently

⁸ (n 2), s.7-8.

⁹ (n 4), 32.

¹⁰ (n 2) s.14.

¹¹ (n 2), Part IV.

¹² House of Commons Library, ‘No-Fault Divorce’ (2019) Briefing Paper No 01409, 14.

¹³ Ibid, 14.

contentious as it reflects deeply-held beliefs about the meaning of marriage and, therefore, any reforms to the law on divorce are very unlikely to please everyone.

As a result of all of these limitations, the reforms were never fully implemented. The Labour government concluded that the reforms were ‘unworkable’ in 2001. The relevant sections of the FLA 1996 were later repealed in 2014.

Evaluation and Legacy

Although Walker argues that divorce laws will never please everyone, the reforms implemented by the FLA 1996 failed partly because they failed to please *anyone*. As explained above, the reforms were too liberal for those holding traditional views on marriage and not liberal enough for others. It could be argued, therefore, that despite the ambition of the FLA reforms, the Act should have been more ambitious and clearer on its overall aims rather than trying to please all parties.

In spite of this, the legacy of these reforms should not be dismissed. The emphasis on mediation and the attempts to reduce conflict between divorcing parties paved the way for the Divorce, Dissolution and Separation Act 2020.¹⁴ The Act introduced no-fault divorce without the mandatory reflection periods and mediated required under the FLA 1996 and, therefore, achieved the aims of the original reforms without the drawbacks which resulted in the failure of those reforms.

Conclusion

To conclude, the Family Law Act 1996 was an ambitious attempt at reforming divorce law by introducing no-fault divorce alongside promoting mediation, reflection and consideration. The fact that the reforms were never fully implemented, due to the failure of pilot schemes and lack of political and social consensus, supports Walker’s view that divorce law is inherently controversial. However, the Act paved the way for recognition of the need for a simpler and less adversarial approach to the law on divorce, which has since been implemented in the 2020 Act.

¹⁴ Divorce, Dissolution and Separation Act 2020.

Legislation

Divorce, Dissolution and Separation Act 2020.

Family Law Act 1996.

Matrimonial Causes Act 1973.

Secondary Literature

Children and Families Bill HC Bill (2013) [131].

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Law Commission, *Family Law: The Ground for Divorce* (LAW COM. No.192, 1990).

Walker, J., *The Politics of Divorce Reform* (Routledge, 1991).