

# Revolutions in Family Law and Their Effect on Family Disputes

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## Abstract

Herring once set out that family law has undergone a profound revolution over the last few years which has shaped the way in which family law disputes are handled. Whilst there is some truth in this statement, the extent to which the aforementioned reforms have impacted the law in this area is up for debate. This paper questions how such reforms have provided the courts with alternative methods of dealing with family law cases and particularly focuses on the areas of access to justice and familial breakdown. It is concluded that, despite the amendments, the legal system remains flawed in handling family matters. This paper explores the adverse effects of such changes with a particular focus on cuts to legal aid and litigants in person. Further, the research discusses the proposal of a non-fault divorce system and how, despite the goal being to reconstruct the previous divorce law into one which existed on a 'no fault' basis, fault continues to be a central position within the process of a divorce.

**Keywords:** Divorce; Legal Aid; Law Reform; LASPO; Family Disputes; Access to Justice

## 1. Introduction

Herring sets out that family law has undergone a profound revolution over the last few years which has shaped the way in which family law disputes are dealt with.<sup>1</sup> Whilst he may be correct in acknowledging changes in the law, the extent to which these reforms have made an impact is up for discussion. This paper seeks to inform how changes in the law in areas relating to familial breakdown and access to family justice have brought about alternate ways in how the courts manage family law issues. In doing so, the

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<sup>1</sup> Jonathan Herring, *Family Law* (9th ed, Pearson 2019).

history of the law will be analysed to reach the conclusion of whether such reforms have helped or hindered the legal system. This research will argue how, although there have been significant reforms over the years, the law is still flawed with regards to how family matters are dealt with and how adverse effects, for example, of cuts to legal aid and the fact that many litigants go unrepresented in family courts, can be detrimental to those most vulnerable in society.

## **2. Access to Justice Without Legal Aid and Representation**

### *2.1 The Family Justice Law Review*

In 2011, the publication of the Family Justice Law Review<sup>2</sup> sparked many controversies within the legal realm of family law with it being said that the ‘current system was not a system at all due to its inability to protect vulnerable children and instead designed to undermine their future’.<sup>3</sup> This thorough examination of the family justice system determined two significant issues in the law as it stood which led to adverse effects on those most vulnerable. Primarily, a major issue was that of delays in proceedings. It was recorded that the average case took 55 weeks to complete, with many extending this already lengthy-time period. Consequently, the chance for children to find a permanent home was dramatically reduced, often resulting in the child suffering emotional distress and damage to their development. Furthermore, as a result of increasing costs and cuts to public funding, ‘there has been an escalation in the number of self-represented litigants’<sup>4</sup> in family courts which, understandably, also contributes to delays in the proceedings. Another issue highlighted by the review was that the adversarial nature of court proceedings created situations in which families were

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<sup>2</sup> David Norgrove, ‘Family Justice Review: Final Report’ (2011) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217343/family-justice-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf)> accessed 29 June 2022.

<sup>3</sup> Simon Hughes, ‘Family Justice: Generational Shift’ *The Law Society Gazette* (7 April 2014) <<https://www.lawgazette.co.uk/law/family-justice-generational-shift/5040733.article>> accessed 29 June 2022.

<sup>4</sup> Lesley Pendlebury Cox, ‘Litigants in Person Cases: It Doesn’t Have to Be Like This’ *Family Law Week* (2012) <<https://www.familylawweek.co.uk/site.aspx?i=ed97034>> accessed 29 June 2022.

arguing over deeply sensitive and emotional issues which should not have been dealt with in the courtroom environment and manner.

After publication of the document, the Government acknowledged the need for a serious change within the law and proposed a series of procedural reforms in the hopes of eradicating the issues which had been raised by the Review. These included the welfare of the child remaining the paramount consideration in proceedings determining child's upbringing, children deserving a family court where their needs come first, and that judicial independence must be upheld as the system is made more coherent and managed more effectively.<sup>5</sup>

Another significant change brought about by this Review was the creation of a single-family court under section 17 of the Crime and Courts Act 2017.<sup>6</sup> Although this meant that family matters were no longer being distributed across the Magistrates and High Courts and were dealt with in a court designed solely for family issue purposes, which would theoretically make for a more coordinated service, there was still setbacks for litigants in family cases as the creation of a single-family court was matched by a dramatic decline in the number of courts. The Government attempted to justify these cuts by stating that 'over 95% of citizens will be able to reach the required court within an hour by car.'<sup>7</sup> However, this still causes major inconvenience for those without a car or those who have childcare responsibilities as often they may find lengthy journeys to court an impediment to accessing justice.

## *2.2 The Legal Aid, Sentencing and Punishment of Offenders Act*

The introduction of the Legal Aid, Sentencing and Punishment of Offenders Act<sup>8</sup> (LASPO) also impacted accessibility to justice in family law in a severely negative way.

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<sup>5</sup> Ministry of Justice and Department for Education, 'The Government Response to the Family Justice Review: A System with Children and Families at its Heart' (February 2012) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/177097/CM-8273.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/177097/CM-8273.pdf)> accessed 29 June 2022.

<sup>6</sup> The Crime and Courts Act 2013, s 17(3).

<sup>7</sup> Shailesh Vara, 'Proposal on the Provision of Court and Tribunal Estate in England and Wales' (July 2015) Statement UIN HCWS121.

<sup>8</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The Act substantially restricted who was eligible for legal aid in family law proceedings and completely withdrew the possibility of applying for legal aid in private law matters unless an applicant fell within the exceptions provided in the law. These exceptions were as follows:

- 1) applications for protective orders in relation to domestic violence, such as occupation orders, non-molestation orders or injunctions; and
- 2) cases where the applicant falls into one of the exceptional categories: victim of domestic abuse, forced marriage injunction involved, allegations of child abuse, a child who is a party to the proceedings, or exceptional circumstances.<sup>9</sup>

Schedule 1 of the Act provides a definition of what constitutes domestic violence, stating that it is 'any incident, or pattern of incidents, of controlling, coercive, or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other'.<sup>10</sup> A significant feature of this definition is that it encompasses a broad variety of abusive behaviour, including emotional abuse and controlling or coercive behaviour, which had previously been limited to physical threats in former legislation.<sup>11</sup>

However, this broad definition was significantly limited as a result of the restrictions placed on how somebody could prove they had been at risk of, or a victim of, domestic violence. The Civil Legal Aid (Procedure) Regulations Act in 2012 listed the criteria that would be required to prove domestic violence which included things such as 'a relevant unspent conviction for a domestic violence offence, evidence of relevant criminal proceedings for a domestic violence offence which have not concluded and a letter from a health care professional or social services department confirming they are satisfied the victim has been or is at risk of domestic violence'.<sup>12</sup> As this is a closed list, any person who fails to provide one of the listed documents cannot be eligible for exemption. This has caused many issues as it was found that only 18% of women who

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid, Schedule 1, para 12(1).

<sup>11</sup> Herring (n 1).

<sup>12</sup> The Civil Legal Aid (Procedure) Regulations Act 2012, s 33(2).

had experienced partner abuse had reported it to the police<sup>13</sup> and so, under this Act, they would be ineligible for legal aid.

Furthermore, under the original form of the Act, the paperwork would only apply if the incident had occurred in the past 24 months, which highlighted a failure to appreciate the long-term impact that domestic violence can inflict.

The 2016 case of *R (Rights of Women) v The Lord Chancellor and Secretary of State for Justice*<sup>14</sup> challenged the lawfulness of regulations imposed on what evidence could be used to prove victim status for domestic abuse and questioned the necessity of the 24-month time-period which prevented many individuals from accessing justice. The Court of Appeal concluded that the purpose of LASPO was to make legal aid services available to certain categories of cases, including victims of domestic violence proceedings and, whilst the Act contemplated regulations being made for the purpose of making determinations as to entitlement under LASPO, these regulations could not be used as such to frustrate the initial purpose of the Act.<sup>15</sup> Evidentially, these requirements would, in many cases, deprive many people of the intended benefit of entitlement and so, as a result of this case, new regulations were introduced which removed the time limit altogether.<sup>16</sup>

Irrespective of the reforms, the overall process of obtaining medical records is not a simple one as doctors are now under an obligation to sign a form which confirms that the injuries or condition of the presenting person were caused by domestic violence.<sup>17</sup> This induces pressure on medical professionals who may find it difficult to sign this form

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<sup>13</sup> Her Majesty's Inspectorate of Constabulary, 'Increasingly Everyone's Business: A Progress Report on the Police Response to Domestic Abuse' (December 2015) 28  
<<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/increasingly-everyones-business-domestic-abuse-progress-report.pdf>> accessed 29 June 2022.

<sup>14</sup> *R (Rights of Women) v The Lord Chancellor and Secretary of State for Justice* (2016) EWCA Civ 91.

<sup>15</sup> *Ibid.*

<sup>16</sup> Civil Legal Aid (Procedure) (Amendment) Regulations 2016 (SI 2016/516).

<sup>17</sup> Legal Aid Agency, 'The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 - Evidence Requirements for Private Family Law Matters' (15 May 2020)  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/885447/Evidence\\_Requirements\\_for\\_Private\\_Family\\_Law\\_Matters\\_guidance\\_version\\_10.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885447/Evidence_Requirements_for_Private_Family_Law_Matters_guidance_version_10.pdf)> accessed 29 June 2022.

as they may feel as though they are not in the position to be able to confirm that the injuries were a direct result of domestic violence.

When considering the effects of LASPO on accessibility to family justice, one of the primary objections was that injustice was often the result of legal aid cutbacks. In the case of *Re T (Children)*,<sup>18</sup> grandparents who were accused of being involved in the abuse of their grandchildren borrowed £55,000 to fund their defence as their modest income made them ineligible for legal aid. The Court found the accusations to be entirely without foundation and the grandparents were acquitted. Despite the fact they were not culpable of the offence, they were still left with a substantial sum of money to pay to cover their legal costs, which was estimated to take around fifteen years to pay off. The Supreme Court held that it would not be possible to order the Local Authority to pay the fee which raised the issue of whether this goes against Article 6 of the European Convention on Human Rights which guarantees the right to a fair trial.<sup>19</sup>

The European Court of Human Rights made it clear that the right to a fair trial did not mean that litigants are automatically entitled to legal aid. However, in some cases, access to legal aid may be essential to ensure equality of arms in creating a fair trial. Furthermore, the case of *P, C and S v United Kingdom* emphasised that fairness was crucial in deciding if there had been a breach of Article 6. It was stated that

there is the importance of ensuring the appearance of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his/her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.<sup>20</sup>

Thus, it indicated that if the Court is satisfied that a person can appropriately represent their own interests or that pro bono representation is sufficient, then there is no breach of Article 6 rights. Furthermore, international law requires that 'remedies are available

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<sup>18</sup> *Re T (Children)* (2012) UKSC 36.

<sup>19</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 6.

<sup>20</sup> *P, C and S v United Kingdom* (2002) 2 FLR 631.

not only in law but are accessible and effective in practice'.<sup>21</sup> However, when parties are going unrepresented in Court, this may create issues regarding the accessibility of justice. The European Court of Human Rights has stated that it will consider the particular facts and circumstances of each case and take into account several factors including the importance of what is at stake for the applicant, the complexity of the case, and the capacity of the applicant to effectively exercise their right of access to court.

Following on from this, the idea that parties are entitled to a fair trial may be breached in circumstances where litigants are having to self-represent as a consequence of legal aid cuts. Parties who appear without legal representation are sufficiently deprived of the access to justice they are entitled to as, often, individuals struggle to understand court proceedings and make sense of their legal entitlements. Not only does this create a disadvantage for these individuals within the justice system, but it also threatens to place additional financial stress on an already strained justice system.

When analysing the cuts made under LASPO and their effects on access to justice, one of the arguments is that children's welfare can often be neglected as a consequence of reduced legal aid funding, especially in cases where a child is not a party to a proceeding, but their best interests are at stake. Under the United Nations Convention on the Rights of the Child, the 'best interests of the children should be the primary consideration in all decisions affecting them'.<sup>22</sup> Yet, although the UK has ratified this Convention, the influence of LASPO has meant that sometimes this article has not been upheld.

A decrease in legal aid funding has meant that many individuals are having to self-represent their case in Court. As many individuals lack sufficient education regarding the legal process, many 'cannot understand the evidence requirements in a case, effectively navigate the procedures and processes required nor cannot represent themselves effectively in a hearing by presenting their argument and advocating their

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<sup>21</sup> United Nations Human Rights Committee, 'General Comment No.31, Concerning Article 2(3) of the International Covenant on Civil and Political Rights' para 14 - 15.

<sup>22</sup> The United Nations Convention on the Rights of the Child (1989) Treaty no. 27531. United Nations Treaty Series, 1577, art 3(1).

position'.<sup>23</sup> Inevitably, judges are more likely to lack the information required to ensure that the outcome of the case protects the child's best interests. Due to this, concern when legal help and representation are absent, a parent is unable to effectively represent themselves, rendering the process unfair and risking the welfare of children.

It was believed that the Government aimed to implement the reforms in the hope that it would save them an annual sum of £450 million. However, this was questioned as it was found that the Government had underestimated the number of people who, even under its proposals, would be entitled to claim legal aid. Furthermore, the savings from cutbacks in legal aid calculated by the Government had to be balanced with the increased costs that resulted from litigants representing themselves in court such as, additional judicial time due to delays and the overall cost of running the courts. Hence, it appeared that Baroness Hale was correct in saying that the introduction of LASPO may be a 'false economy'<sup>24</sup> as it led to greater expenditure on a wider scale due to the fact that many individuals who were victims to the cuts in the legal realm were then left with no alternative than to claim from other government-funded bodies, in turn increasing the overall costs. Graham Cookson also commented on the 'knock-on costs' that would come as a result of funding restrictions. For instance, if separated parents do not receive the financial orders they are entitled to, there will more than likely be increased claims on benefits or social housing.<sup>25</sup>

### **3 Divorce Law**

#### *3.1 The Matrimonial Causes Act*

When it comes to familial breakdown, the law relating to divorce has undergone some significant changes over the past few decades. The Matrimonial Causes Act<sup>26</sup> was the

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<sup>23</sup> Amnesty International UK, 'Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice' (11 October 2016) 36-37 <<https://www.amnesty.org/en/documents/eur45/4936/2016/en/>> accessed 29 June 2022.

<sup>24</sup> Owen Bowcott, 'Senior Judge Warns Over "Shaming" Impact of Legal Aid' *The Guardian* (13 October 2017) <<https://www.theguardian.com/law/2017/oct/13/senior-judge-warns-over-shaming-impact-of-legal-aid-cuts>> accessed 29 June 2022.

<sup>25</sup> Graham Cookson, 'Analysing the Economic Justification for the Reforms to Social Welfare and Family Law Legal Aid' (2013) 35 (1) *Journal of Social Welfare and Family Law* 21.

<sup>26</sup> The Matrimonial Causes Act 1857.

first divorce law of general application which introduced the concept of being able to obtain a divorce via the courts. Section 1(1) of this Act stated that the sole ground for obtaining a divorce is that marriage has ‘broken down irretrievably.’<sup>27</sup> In order to qualify as having an ‘irretrievable’ marriage, couples were required to prove that at least one of the five facts listed in section 1(2) had occurred.<sup>28</sup> This list contained fault-based situations, such as adultery and behaviour of one party which meant that the other party could not reasonably be expected to live with him/her.<sup>29</sup>

The previous system of divorce was greatly criticised due to the fact it was solely based on the concept of blame. The fault-based system of divorce was condemned for failing to promote or encourage an ongoing relationship between the parties. If one party is blamed for the failure of the marriage, this often results in tension and creates conflict between the parties which may not have existed if a non-fault system was readily available.<sup>30</sup> Especially in situations where children are involved, it is important that parties can be amicable and can communicate in a civil manner going forward.<sup>31</sup>

### 3.2 *The Family Law Act*

The Family Law Act<sup>32</sup> introduced the idea of a non-fault divorce system. The Act represented a compelling advancement in the history of divorce laws, and it constituted the first Government sponsored reform of the law since 1857.<sup>33</sup> Its contents included the provision of two fundamental changes to be undergone in divorce law, primarily the removal of the matrimonial ‘fault’ grounds for divorce alongside the encouragement of mediation as an alternative to court proceedings. The provisions of this Act set out that the divorce process could be initiated by either or both of the parties at least three

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<sup>27</sup> Ibid, s 1(1).

<sup>28</sup> Ibid, s 1(2).

<sup>29</sup> Ibid.

<sup>30</sup> Liz Trinder and others, ‘Finding Fault? Divorce Law and Practice in England and Wales’ (Nuffield Foundation 2017) <[https://www.nuffieldfoundation.org/sites/default/files/files/Finding\\_Fault\\_full\\_report\\_v\\_FINAL.pdf](https://www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_full_report_v_FINAL.pdf)> accessed 29 June 2022.

<sup>31</sup> Susan Heenan and Anna Heenan, *Family Law* (Oxford University Press 2012) 44.

<sup>32</sup> Family Law Act 1996.

<sup>33</sup> Shelley Day Sclater and Christine Piper, ‘The Family Law Act 1996 in Context’ in Shelley Day Sclater and Christine Piper (eds), *Undercurrents of Divorce* (Ashgate 1999) 5.

months after they had attended an 'information meeting' in which they had to file a statement to the effect that their marriage had broken down. This was followed by a nine-month reflection and consideration period, which was to be extended to 15 months if there were children under 16 in the family or if the other party requested an extension. This gave parties the opportunity to consider the practical consequences of a divorce and reflect on whether or not the breakdown was irreparable.<sup>34</sup> At the end of this period, either party was able to apply for a divorce order on the grounds that their marriage was now irretrievable.<sup>35</sup> Many academics described this as a 'revolutionary mechanism for obtaining a divorce'<sup>36</sup> and praised it for reducing hostility associated with divorce litigation.<sup>37</sup>

### *3.3 Family and Children Act*

Under the Family and Children Act 2013, it became compulsory that, prior to attending court, parties had to attend an initial mediation information assessment meeting (MIAM), excluding cases whereby safety was an issue.<sup>38</sup> Mediation is used as a preventative measure to avoid court proceedings. It is designed to settle disputes in a more conciliatory way and prevent the need for lawyers to become involved. This makes for a less hostile procedure, which is particularly helpful in family cases where sensitive matters are being discussed and, often, children are involved. Where children are involved, the 'welfare of the child is paramount',<sup>39</sup> and so, a system which pushes for parties cooperating civilly is more likely to ensure this rather than one which places blame on one of the parties. Furthermore, although parties will still suffer financial loss through mediation, it is a significantly lower amount than what court proceedings would

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<sup>34</sup> The Law Commission, 'Family Law and the Grounds for Divorce Law' (Com No 192, HMSO, 1990) para 3.35.

<sup>35</sup> Amnesty International UK (n 23).

<sup>36</sup> John Eekelaar, Marvis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing 2000) 1.

<sup>37</sup> Ezra Hasson, 'Wedded to "Fault": The Legal Regulation of Divorce and Relationship Breakdown' (2006) 26 (2) *Legal Studies* 267.

<sup>38</sup> The Family and Children Act 2013.

<sup>39</sup> Children Act 1989.

cost, especially given that legal aid no longer applies to most private law cases under LASPO.<sup>40</sup>

In many cases, it is solely the lack of communication between the two parties which makes disputes appear unfixable. Hence, when put into a situation in which the parties are given an opportunity to rebuild that communication in a relaxed, non-adversarial setting, they can resolve their issues in a civilised manner without the need for court hearings and lawyers. Contrary to this, due to the relaxed nature of mediation, parties are under no obligation to attend and can withdraw from mediation proceedings at any time.<sup>41</sup> Hence, there is no guarantee that negotiations will not fall through, in which case the parties would have wasted their time and money and would still have the added costs of the necessary court proceedings. Another prevalent issue that must be considered with mediation is that, in circumstances whereby the parties have unequal bargaining power, mediation may result in an unjust result.<sup>42</sup> For example, in a domestic violence situation, the perpetrator of the violence often holds negotiating powers over the victim who, in most cases, is overborne by the perpetrator and will simply agree to their wishes out of fear.

### 3.4 *Owens v Owens*

The case of *Owens v Owens*<sup>43</sup> recognised that the current divorce process was flawed. The facts concerned Mr and Mrs Owens, who had been married in 1978 and had two children. In 2015, Mrs Owens left the family home and applied for a divorce based on the grounds of unreasonable behaviour. She claimed that her husband prioritised work over their marriage; his treatment towards her lacked love and affection and he made disparaging comments and arguments which left Mrs Owens feeling unhappy, upset and under-appreciated. As Mr Owens contested his wife's petition, the Court had to consider the statutory wording in deciding what constitutes unreasonable behaviour. It

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<sup>40</sup> LASPO (n 8).

<sup>41</sup> James Munby, 'Family Mediation in England and Wales: A Guide for Judges, Magistrates and Legal Advisors' 3 <<https://www.judiciary.uk/wp-content/uploads/2014/06/mediation-guide-for-judges-may2014.pdf>> accessed 12 April 2022.

<sup>42</sup> Judith L Maute, 'Mediator Accountability: Responding to Fairness Concerns' (1990) 2 J Disp. Resol.

<sup>43</sup> *Owens v Owens* (2018) UKSC 41.

was held that, although their marriage had broken down, the behaviour of Mr Owens was not enough to meet the necessary legal threshold. The Court of Appeal also upheld this judgement on the decision that the test under the Matrimonial Causes Act<sup>44</sup> was not met, with Lady Hale stating how 'it is not for us to change the law laid down by Parliament - our role is only to interpret and apply the law that Parliament has given us'.<sup>45</sup> It was clear that there was discomfort in this judgement and Lord Wilson even put forward the suggestion for Parliament to consider whether the law governing entitlement to divorce was satisfactory.

Since the *Owens* case, there has been an increased demand in calls for law reform. Cretney argued that the current law often resulted in worse outcomes for divorcing couples and their families.<sup>46</sup> The practical implications of this case emphasised an urgent need for reform in divorce law in England and Wales, with it being undeniable that the current law caused an unnecessary emotional and financial strain on Mr and Mrs Owens in their divorce process. Effectively, the current law makes it so that unhappy spouses are compelled to remain married despite one of them feeling that they are unable to live with the other. Although cases like *Owens* in which divorce proceedings are contested are rare, the law requires urgent reform to establish a guarantee that those in a similar position to Mrs Owens are not locked into potentially years of unhappiness as a result of legislation. Furthermore, this poses the question of whether current divorce legislation is allowing domestic violence to go unnoticed and unpunished. In circumstances, such as that of Mrs Owens, where the wife had to remain in the marriage for a further five years before they could be granted a divorce, the courts are inconsiderate to the fact that this could be severely detrimental to those who may be victim to domestic violence within their marriage. With the addition of tighter restrictions under LASPO to prove that one is suffering in an abusive relationship, victims may end up being trapped in an extremely dangerous and damaging situation at the hands of the law.

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<sup>44</sup> Matrimonial Causes Act (n 26), s 1(2)(b).

<sup>45</sup> *Owens* (n 43) para 46.

<sup>46</sup> Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press 2003).

### 3.5 *The Divorce, Dissolution and Separation Act*

When it comes to the future of divorce laws in England and Wales, the Divorce, Dissolution and Separation Act 2021 transforms the old legislation into that of a non-fault system. Despite hopes that no-fault divorce would have become the norm when the 1996 Act was introduced, 'fault has continued to occupy a central position within the process'.<sup>47</sup> The new non-fault system means that couples are spared from having to blame one another for the breakdown of their marriage, in turn, making the divorce procedure more amicable and accessible. The removal of the courts being able to contest a decision to divorce allows couples to collaboratively agree on practical arrangements for when reconciliation is not possible and their separation inevitable.

On the other hand, a non-fault system has been criticised for failing to differentiate between amicable and acrimonious divorces,<sup>48</sup> as well as for the fact that the period of reflection cannot be said to be both an opportunity for looking back on the marriage and a tool for sorting out future arrangements.<sup>49</sup> In order for ancillary relief to be determined prior to the divorce order being made, bargaining power will often be distorted to a greater extent than was possible under the old law.

Irrespective of the controversy surrounding a non-fault divorce system, ultimately, it has meant that couples are more likely to end their marriage in a non-confrontational, non-hostile manner. Consequently, there will be less stress inflicted upon the family overall as couples will not be pitted against each other in a lengthy battle for divorce. Reasons like this contribute to the widely accepting attitude towards a non-fault divorce system as the current law requires couples to shape their lives around the framework of the law, when in reality, the law should be shaped to reflect people's lives.<sup>50</sup>

## 4. Conclusion

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<sup>47</sup> Hasson (n 37).

<sup>48</sup> Legal Aid Agency (n 17).

<sup>49</sup> The Matrimonial Causes Act (n 26).

<sup>50</sup> Graeme Fraser, 'The Search for Equality in Divorce Reform' *New Law Journal* (11 March 2020) <<https://www.newlawjournal.co.uk/content/the-search-for-equality-in-divorce-reform>> accessed 29 June 2022.

In reflection, it seems as though Herring's statement was correct in that family law has undergone a profound revolution. Yet, it does not seem that such changes have altered the legal system for the better as, often, reforms have contributed to wider issues within the law. Under the introduction of LASPO, families across the United Kingdom have suffered the harsh effects of being unable to afford legal representation and court costs which, consequently, results in injustice. In terms of future possibilities for reforms in law, it could be suggested that more legal aid be made available. As it stands, family courts are inundated with unrepresented litigants which in turn, increases both the cost of court proceedings and adds to the delays in court times. Also, due to the false economy created by LASPO, if more legal aid were to be made available, other sectors such as social housing and the benefits system would not see as significant of an increase in their services and would not be under unnecessary financial strain.

When assessing whether the law reforms have changed the way family law disputes are dealt with, we must also ask the question of how effective the process of mediation is. Under law reform, mediation is encouraged as opposed to immediately issuing court proceedings, which for many was first viewed as a positive advancement.<sup>51</sup> Ultimately, mediation aimed to reduce the intensity of the divorce process and make it so that couples were able to resolve their issues in a non-adversarial setting. It has been argued that

in some instances, the dynamics and emotions of family separation make the current system of adversarial litigation inappropriate. It's predicted on a win/lose outcome that can drag on interminably. In, for example, child custody and divorce cases, the process can increase tensions between the parties, tensions that do not go away after the court process is completed.<sup>52</sup>

Thus, mediation may be a more sensitive approach to dealing with topics involved with family law. Although, this is sometimes impossible as the success of mediation is

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<sup>51</sup> The Children and Families Act 2014, s 10(1).

<sup>52</sup> John Gillen, 'Review of Civil and Family Justice: The Review Group's Draft Report on Family Justice' (August 2016) 31 <<https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Preliminary%20Family%20Justice%20Report%20published%204%20Aug%2016.pdf>> accessed 29 June 2022.

entirely dependent on how civil divorcing parties are, or willing to be, with one another. If successful, mediation has been shown as a way of saving individuals a lot of time and money. Yet, it can also cost the family more time and money if the process fails and individuals have to incur further costs by issuing court proceedings. Hence, whether mediation works well is unclear due to the subjective nature of each case and whether parties are willing to communicate.

Furthermore, in cases involving children, unlike the courts where the best interests of the child are paramount, mediators are under no obligation to discuss how children may be affected in a certain situation as there is no legal duty to protect the best interests of the child. As a result, it may be argued that the mediation process diminishes child welfare and there needs to be some consideration of how the process can be modified to ensure protection of children's needs in family law cases.

The Divorce, Dissolution and Separation Act also contributed to reform in the family law sector. This Act converts divorce legislation into a non-fault system, after its enactment failed in the previous Family and Children Act.<sup>53</sup> Under a non-fault divorce system, some of the stigma surrounding divorce is eliminated as it prevents one of the parties from having to carry the burden of being the one who was at fault for the divorce. Although this can be portrayed as a positive improvement, there are some instances in which its effectiveness has to be questioned. For example, in situations where domestic abuse is the cause of marital breakdown, it can be considered unfair that the abusive individual gets to walk away from the situation without being held accountable for their actions.

In short, it appears that there is still plenty of room for development in family law and, when analysing the law reforms that have already occurred, it seems that there has been a varied response to such changes. Despite the positive impact such reforms have had on the law and have, in some cases, made it easier for individuals experiencing legal issues to settle them, there are still crucial issues that need to be addressed within the law. Subsequently, courts should aim to implement laws which simultaneously protect the human rights of individuals and uphold children's welfare.

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<sup>53</sup> Amnesty International UK (n 23).

Possibly, a legal checklist should be created to ensure that when settling legal issues, all crucial areas are covered. Having said that, despite the flaws that currently exist in law, there is hope that the law will continue to be reformed accordingly to resolve these issues.

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