

AUSTRALIAN FAMILY ASSOCIATION

APPEARANCE BEFORE COMMITTEE HEARING OF 16 SEPTEMBER, 2020

SUPPLEMENTARY MATERIAL AS REQUESTED

Three propositions for reform:

(a) **Revisiting the 1 year period of separation as proof of an irretrievable breakdown of the marriage:**

- i. The period was selected arbitrarily. Some European countries require a 3 year waiting period (which can be shortened by mutual agreement). **Requiring a greater period of separation, say 2 years, will force couples to give greater consideration to staying together and resolving their conflicts. Alternatively, the grounds for filing for divorce may be period of separation for 1 year, but the court may be precluded from granting the application for a further year. The period may be abridged to 1 year if a court finds there are special circumstances which require it.** Special circumstances may be left to the courts' discretion but would be such as a party to the marriage having been convicted, during the marriage, of a violent or sexual [offence] against the [applicant] or a minor child or where a court has made a protection order against a party based on a final determination that the party had committed or threatened physical violence against the other party or a minor child of that party.
- ii. **The evidence suggests that [longer waiting periods are associated with lower divorce rates](#).** This complements the other evidence that nearly half of divorcing couples are from [low conflict relationships, which could survive with help](#). [Recent research shows that about 40% of American couples who are already in the divorce process say that one or both of them would be interested in pursuing reconciliation](#). There is therefore good evidence to consider extending the period before parties may obtain a divorce.

(b) **Mandatory reconciliation counselling (at least where there are minor children):**

- i. Australia has already legislated for mandatory mediation to resolve issues such as parenting orders before an application may be filed. These provisions could be refined to require **counselling specifically directed at the possibility of reconciliation**. Matters that could be addressed:
  1. Questions to help individual spouses reflect on their potential interest in reconciliation;

2. The potential benefits of avoiding divorce for children and adults
  3. Resources to assist with reconciliation
  4. Information on when the risk of domestic violence should rule out working on reconciliation at this time.
- ii. Aligned to such counselling may **be a requirement for a formal notice before setting divorce proceedings in train**. This could take the form of **a formal notice by one party to another that their marriage faces serious difficulties and suggesting that they undertake counselling together. Such a procedure may overcome the common situation that one party first knows that there are issues in the marriage when the other announces they are leaving.**
- (c) **Providing the right for a court to award damages for a breach of the marriage contract:**
- i. Marriage is a contract. The law gives a right to claim damages for breaches of contract in the civil and commercial arenas. **Why should marriage be the only contract which may be breached with impunity?** The law, by means of ascribing consequences to actions, signals to us what we as a community hold important. It is clear that the no-fault revolution, in allowing the marriage contract to be breached without any legal consequences undermines the value we place on marriage to the detriment of Australian society. It is time to change and give new value to marriage;
  - ii. The courts could be given the power, on application, to award damages to a party who has breached the marriage contract namely of a union between two people for life to the exclusion of all others;
  - iii. Clearly this will involve the courts having to make awards of damages for intangible losses. However, courts routinely do so in awarding damages for non-economic loss in personal injury claims and damages for loss of reputation in defamation claims. This may be by means of an actual award of damages or by weighting any division of property to account for the fault;
  - iv. There are difficulties with this of course if parties to a marriage do not have the means to pay such damages. But it is something to be considered.

### **Conclusion**

2. The no-fault divorce revolution the FLA gave our society has resulted in massive financial and human costs.

3. The cost of fragile families that has ensued is significant. As [Professor Patrick Parkinson](#) has said:

“Fragile families lead to broken hearts. They also threaten the wellbeing of the community as a whole. Turning this around will require a herculean effort, but we cannot afford not to make the attempt.”

4. The present Inquiry is the opportunity to start.