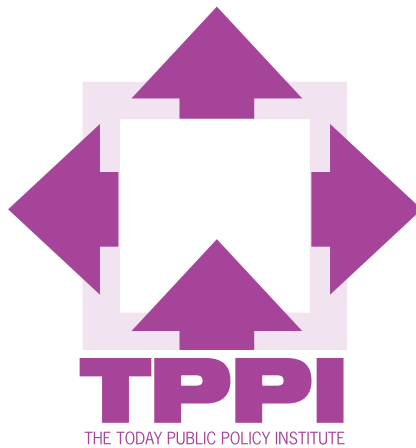


FOR WORSE, FOR BETTER: RE-MARRIAGE AFTER LEGAL SEPARATION



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**For Worse, For Better:
Re-marriage After Legal Separation**

May 2009

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INTRODUCTION

General

1. Malta is unique in the western world in making no legal provision for the civil dissolution of marriage. The law allows only for legal separations or annulments, albeit also recognising divorces granted to Maltese citizens in a foreign court.
2. In the ten years between the census of 1995 and 2005, the number of marriages in Malta which were annulled or where foreign divorces were recognised, together with those couples who were granted legal separations, rose by 160%, from just over 5,000 to over 13,000; see Table 1 below. The number of legal separations increased by 175%, from just over 4,000 in 1995 to over 11,000 in 2005. These marriages collapsed even though a divorce cannot be obtained in Malta.

Table 1

	1995	2005
Annulled/Divorced	978 } } 5,098	2,309 } } 13,354
Legally separated	4,120 }	11,045 }
Total Number of Married Couples	181,875	195,523

3. In the period between 1995 and 2005, the number of broken marriages in Malta through legal separation, divorce or annulment rose as a proportion of all marriages from around 3% to around 7%. In the three years since the last census there have been over 460 new ecclesiastical annulments and over 560 civil annulments, with over 570 cases pending in the ecclesiastical tribunal and over 270 in the civil court. Over the same period there have been about 3500 sworn separation applications submitted or mediations introduced, with over 1000 separation cases pending. It has been estimated that the number of failed marriages will exceed 35,000, or over 17% of all marriages, by 2015.
4. The figures for marriage break-downs over the ten-year period, the increasing number of co-habiting couples (up from 605 in 1995 to 2,538 in 2005), the choice of civil marriage in preference to marriage in church (up from 345 in 1995 to 779 in 2005 – accounting for about one third of all marriages celebrated in Malta each year, albeit most of these are between foreigners), and about one quarter of births registered outside marriage are testimony to the evolving state of Maltese society and the relative strength of marriage within it.

The State of Marriage in Malta

5. The thousands of people in Malta whose marriages have broken down are an impressive statistic. But each individual marriage break-down represents a human tragedy. Raw statistics alone cannot begin to tell the full

story. They certainly cannot begin to express the suffering of all those who are involved in the break-down of a marriage – spouses, children and the wider family and social circle. What the figures show, however, are the trends in society and the looming social pressure-points which an enlightened government can no longer ignore.

6. A disinterested lay observer of the Maltese scene would probably draw two broad conclusions. First, he would take comfort from the fact that the majority of Maltese marriages still appear to be solidly based. Secondly, however, he would also conclude that the high number of children born out of wedlock, the increasing pattern of co-habitation and the rising trends in marriage break-down, especially, but not only, legal separations, are a cause for concern. In line with developments elsewhere in Europe, and in advanced western cultures more generally, the institution of marriage is under strain and undergoing change.
7. The reasons for this in Malta are manifold. The rise in affluence, increasing financial demands and life-style pressures, an ethos of instant gratification and a culture of hedonism, a lower threshold of tolerance when marriages fail to come up to expectations and a more sophisticated, educated, questioning, less disciplined and more acquisitive society have served to loosen family bonds. Whereas up to two or three decades ago the perceived stigma of admitting to a broken marriage, for whatever valid reason, was enough to persuade people to stay together, today's married couples do not feel themselves bound by the same constraints. Legal separations, annulments, even divorce, are socially acceptable. The waning influence of the Catholic Church in Malta has also led to a concomitant loosening of its moral grip on Maltese society, as dwindling church attendance figures attest. Like it or not, Malta has become a more secular society.
8. While, therefore, the majority of marriages in Malta survive, and in most cases thrive, the solidity of the Maltese marriage structure, which was once a by-word, has been under-mined. One would earnestly wish that this were not so. But the fissures are there for all to see. Marriage break-downs are now an ever-present reality, and increasing steeply. This social phenomenon cannot be wished away. The starting-point of any discussion therefore must be an acknowledgement that marital break-down is now a fact of Maltese society.
9. It would be hypocritical to pretend there is no problem. Equally, it would be cynical and irresponsible to ignore it. And it would be uncharitable to suppose that matters can remain as they are. A civilized society has to deal with the consequences of broken marriages as prudently, fairly and justly as it can by providing the legal remedies for a well-ordered process for marriages which have clearly failed. It must also encourage and sustain the institution of marriage by giving the family unambiguous support.
10. The situation in Malta today, which allows for divorces obtained abroad, annulments by ecclesiastical tribunals and the civil courts and legal separations is anomalous and, arguably, discriminatory. While couples whose marriages have broken down and been annulled (on the grounds that they are decreed to have never existed), or who obtain a divorce abroad, are permitted to re-marry, those whose marriage break-down has led to a legal separation are not – no matter how long they have been separated.
11. In other words, legislation exists today which allows people who were bound in matrimony either to get divorced abroad or to have their marriage declared null and void, and in both circumstances to re-marry. Alternatively, they may separate, but will never be permitted to re-marry. The only missing element in the present law on legal separation, therefore – in contrast to divorce or annulment – is that these people are not allowed under any circumstances to re-marry. We have legal remedies equivalent to divorce in every respect except one – the right to re-marry.
12. Yet many who are separated wish to re-marry. Many form new, stable and happy relationships which are marriages in all but name. Many co-habit and have children. Is their position just? Is there a more humane and compassionate way for society to deal with the situation? Do the consequences – social, economic and legal benefit or harm society? Should we as a society, allow separated people to begin a new relationship based on marriage, if they wish to do so?

Aim

13. The aim of this report is to consider whether Malta should introduce legislation to allow people who are legally separated to re-marry after the civil dissolution of their marriage.

Parameters of the Study

14. The following parameters have been set to guide the outcome of this report:

- It should be objective, balanced, impartial and free from prejudice;
- It should seek solutions which are just, fair, equitable and workable both for the individual and, in-so-far as practicable, for the common good of today's society;
- Given the sensitivity of the issue, it should reflect all views in society. While the Catholic Church in Malta has a valid contribution to make, the Archbishop has stated that the Church would not seek to interfere – as opposed to participate fully – in this process;
- It is up to society to make the decision on divorce. The ultimate decision on the best way forward is a matter which should rest with the government and our law-makers in Parliament, who have the duty to act in the best interests of society as a whole.

Layout of the Report

15. This report examines the issues raised in six Parts:

- Part I: In Praise of Marriage;
- Part II: The Roles of Church and State in Relation to Marriage;
- Part III: The Existing Legal Remedies and the Options Open to Government;
- Part IV: Weighing the Consequences;
- Part V: Proposals for a Legislative Structure for Re-marriage after Legal Separation and Civil Dissolution;
- Part VI: Conclusions and Recommendations.

PART I

IN PRAISE OF MARRIAGE

16. It is a truism that the family is the bed-rock of society. In the words of the United Nations' Declaration of Human Rights "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State"
17. Marriage – the legal contract between a man and a woman for the purpose of living together and bringing up their children as a family in a lawful union – is the bulwark, the most important single building block, upon which successful societies are built. In an ideal world, the commitments of marriage should be for life.
18. By definition, therefore, the break-down of marriage is the abnegation of the stable and contented relationships we are seeking. However, it is not the availability of annulment, divorce or legal separation processes that cause marriages to break down. It is the fallibility of human beings, for whatever reason, that leads to some marriages breaking up. One can still give praise to the covenant of marriage while confronting realistically the fact that some marriages fail.
19. The State, represented by the government of the day, has a direct responsibility – the ultimate responsibility – for ensuring that the family is protected even when marriages fail; indeed, especially when marriages fail. It does this in two ways. First, it ensures, through its policies and structures, that marriages and the family are given the protection, tools and support for them to endure. Prevention of marital discord and break-down should be the over-riding objective of such policies.
20. Secondly, however, the State also has a responsibility to ensure that when marriages break down the legal processes for coping with the fall-out are just, efficient and as humane as possible. A more just society which recognises the need to safeguard the common good should be the State's objective here, recognising none-the-less that those whose marriages have broken down, and who in due course wish to re-marry, do so because they wish to return to the marriage fold and to participate once more in consolidating the stability of their new family in a new and legal marital relationship.
21. Society and the State have a vested interest in promoting stable marriages. The first, best answer must be to encourage good marriages built on solid foundations. If the rising tide of marriage break-downs in Malta is to be stemmed, or at least reduced, there are several steps which the State should take. The family requires committed support from government. In the context of Maltese society today, and in the face of the increasing rates of marriage break-ups, it is considered that a six-point programme of marriage support on the following lines is the minimum that the State should seek to implement:
 - While the National Commission for the Family is a useful standing advisory body to the government on the family, this is no longer enough. There is a need to establish a full-time Commissioner for the Family. This can be done in one of two ways: either by extending the terms of reference of the Commissioner for Children to include responsibilities for family policy, or by setting up a free-standing, full-time Commissioner for the Family. Whichever policy option is adopted, however, (and this report would on balance favour the latter), the necessary resources for such a Commissioner need to be provided. The Commission could not operate efficiently and effectively if proper human resources and financial support were not provided;
 - The State should ensure, through the fiscal means at its disposal, that the tax benefit and social security benefit systems provide positive incentives for couples to get married, and to stay married. Welfare dependency as a result of so-called 'father unknown' and other dysfunctional families should be discouraged by fiscal means;
 - Preparations for marriage and the responsibilities of family life should be inculcated from an early stage. It should begin in school as part of Personal Social Development (PSD) in the national

curriculum. Those who marry in church already attend an eight-week course of instruction by the Cana Movement. Although the courses are of a variable standard and could be improved, the State should extend these courses (through additional funding of the Cana Movement, Caritas or other relevant organisations) not only to those entering into a civil marriage (about one third of all marriages each year), but also on a continuing basis to young married couples after they have married and as their marriages evolve, not only to buttress the institute of marriage on a continuing basis, but also to help weather the inevitable storms when they arise;

- The provision of State mediation, counselling and reconciliation services should be greatly expanded to nip in the bud marriages which are getting into difficulties. Couples with marital problems should be actively encouraged to seek help as early as possible;
- The State should ensure that current efforts for more family-friendly work practices are further developed and extended imaginatively to ease the burden on working mothers and to strengthen their ability to devote time to children and family;
- The State should promote pro-marriage and pro-family media campaigns as a means of countering the often negative and trivial 'soap-opera' images of marriage portrayed in the popular media, especially on television.

22. These measures will cost money. But the cost to society of broken marriages is much higher without them, both socially and economically. If government is serious about reversing, or at least stemming, the current shocking increase in marriage break-downs, it must be prepared to take the steps which are necessary to salvage those marriages which are capable of being saved.

23. But it cannot stop there. It has also to cater for the reality of modern Maltese life that – despite best efforts to avert it – marriages will continue to break down. While in an ideal world marriage would be for life, it must be recognised that we live in an imperfect world and the ideal is not always possible. When marriages fail, the government must give legal recognition to this fact in such a way as to acknowledge the need to encourage the institution of marriage by allowing those who have been legally separated and whose marriages have irretrievably broken down to re-marry after the civil dissolution of their marriage. Re-marriage after legal separation would provide greater stability in our society by minimising the damage from earlier failure and avoiding the adverse social consequences from any subsequent relationships that may be formed. This would benefit the common good as the preferred frame-work for a stable relationship and a family to an extent which today's dislocation caused by co-habitation never could.

PART II

THE ROLES OF CHURCH AND STATE IN RELATION TO MARRIAGE

Church and State: *Deus Caritas Est*

24. Christians have debated the proper relation of Church and State for more than a millennium. From an early period, all denominations recognised that Church and State have different spheres of authority and that each should respect this division. The Catholic Church in Malta has historically and constitutionally held a special position. Although differences of emphasis over this issue once seemed a major point of division between Church and State in Malta in the 1930s and again in the 1960s, it is clear that today the Catholic Church in Malta recognises the fundamental difference between the roles of the Church and the State, and that healthy respect for that difference is essential for both.
25. In an elegant and well-written article in *Malta Today* in June 2008 setting out the Church's position on aspects of divorce, Archbishop Cremona quoted from Pope Benedict XVI's Encyclical, *Deus Caritas Est*, of 25 December 2005. He made it clear that while he considered the Catholic Church in Malta had a valid contribution to make to the debate on divorce, the Church would not seek to interfere – as opposed to participate – in this process since it is fundamental to ensuring that legislators and society are not placed under duress when considering this issue. A spirit of democratic dialogue, stemming from a willingness to be open-minded and open to persuasion should prevail. An unnecessarily intransigent interpretation of Catholic moral teaching, which led to the earlier Church/State clashes, is hopefully therefore unlikely today.
26. It is worth repeating the relevant extracts which the Archbishop quoted in his article. Pope Benedict states:

“The just ordering of society and the State is a central responsibility of politics The two spheres [of State and Church] are distinct, yet always inter-related. Justice is both the aim and the intrinsic criterion of all politics. Politics is more than a mere mechanism for defining the rules of public life: its origin and its goals are found in justice, which by its very nature has to do with ethics. The State must inevitably face the question of how justice can be achieved here and now. But this pre-supposes an even more radical question: what is justice? The problem is one of practical reason; but if reason is to be exercised properly, it must undergo constant purification, since it can never be completely free of the danger of a certain ethical blindness caused by the dazzling effect of power and special interests.

Here politics and faith meet. Faith by its specific nature is an encounter with the living God – an encounter opening up new horizons beyond the sphere of reason. But it is also a purifying force for reason itself. From God's standpoint, faith liberates reason from its blind spots and therefore helps it to be ever more fully itself. Faith enables reason to do its work more effectively and to see its proper object more clearly. This is where Catholic social doctrine has its place: it has no intention of giving the Church power over the State. Even less is it an attempt to impose on those who do not share the faith ways of thinking and modes of conduct proper to faith. Its aim is simply to help purify reason and to contribute, here and now, to the acknowledgement of what is just.

The Church cannot and must not take upon herself the political battle to bring about the most just society possible. She cannot and must not replace the State. Yet at the same time she cannot and must not remain on the sidelines in the fight for justice. She has to play her part through rational argument and she has to reawaken the spiritual energy without which justice, which always demands sacrifice, cannot prevail and prosper. A just society must be the achievement of politics, not of the Church. Yet the promotion of justice through efforts to bring about openness of mind and will to the demands of the common good is something which concerns the Church deeply.”

Different Faiths: One Law

27. In relation to marriage, the Church and State have different, though not mutually exclusive, sets of concerns. The State, through its legislators, must decide what decision is best for the whole of society, striking the proper balance between the human rights and the natural aspirations of individuals and the interests of the community and society as a whole. A State which legislates only in the interests of the majority is setting itself against the principles of social justice. Genuine social justice requires recognition by the State of the freedom and rights of all individuals and the right, which every individual has, to well-being under the law without any form of discrimination. Individuals must decide how to behave in accordance with their own religious or other beliefs. All major religions, including the Catholic Church, accept that in a democracy Parliament's decisions about what sort of behaviour should be lawful are not necessarily the same as what is considered morally right on a purely religious basis.
28. Our legislators have been elected to Parliament with a duty to cater for the needs of society as a whole while recognising that minorities also have the right to the State's support. Legislators cannot properly represent the heterogeneous society that Malta has become while being religiously sectarian. They have a duty to work objectively and disinterestedly for a better world and the politics they express should be secular. The position our legislators adopt on the issue of re-marriage after legal separation, therefore, should transcend private religious conviction and seek the best answer which will benefit the whole of Maltese society.
29. The kind of marriage which is recognised by the law does not depend for its validity on the rules of a particular religion. The courts of law decide a person's legal status. The distinction between religious ceremonies of marriage and their legal effect is highlighted by the purely secular form of marriage provided by the State. Although marriage in Malta is most often seen as an automatic consequence of a religious ceremony, it is the law of the State that sets its own terms for recognising the legality of such marriages, as set out in Chapter 255 of the Laws of Malta, the Marriage Act.

The Church's Interest in Marriage

30. Marriage, as a rite and as a relationship, is a vital part of the Catholic faith. The love and fidelity of spouses is seen by the Church as a spiritual, as well as a secular value. Marriage is a Sacrament, a sign of God's grace bestowed on human love. *Gaudium et Spes*, which was promulgated by Pope Paul VI on 7 December 1965, talked of the need to foster the nobility of marriage and the family.
31. The Church understandably regards its attitude to the morality of personal relationships as of great significance. It holds dearly to its belief in the indissolubility of marriage. Following the teachings of any religion, however, is a matter of personal conscience, not legal duty. The enforcement of that duty depends not on the law of the State but on personal conscience.
32. Clearly, in this context, the State should not interfere in the Church's affairs, for example by requiring that persons whose marriages had been dissolved by a court of law, but not by an ecclesiastical tribunal, be entitled to re-marry according to the rites of the Church. It does not follow that the civil dissolution of marriage, if introduced, would deny freedom of religious practice to those conscientiously opposed to it. Although a person's religious convictions may not permit divorce, his or her freedom of religious practice and beliefs are not violated by allowing re-marriage after legal separation and civil dissolution.
33. Legislating for divorce – as has already been done for separation after break-down of marriage - would not force any one to revoke his or her moral stand on marriage. It therefore follows that the pursuit of the ideal of a life-long marriage is not jeopardised by the introduction of laws for the civil dissolution of marriage. If the State continues to deny the right of civil dissolution of marriage after legal separation, it cannot do so simply on the basis of the religious beliefs of one part of society.

The State's Interest in Marriage

34. Neither compassion for the victims of marriage break-downs who have formed unofficial second unions in which they lack the recognition and protection of the law, nor the Church's teaching on marriage bear directly

on the State's duty. The moral, as well as the civic, imperative to be considered by the State is the doing of justice, which must be even-handed, and the enhancement of the common good of society. The essential questions raised are two-fold: those of fairness, liberty, protection of the weak and those who form a minority in society, as well as the wider social consequences for society as a whole. It is what humanity, reason, justice and the common good tell us we ought to do.

35. Persons married but separated are denied the right to re-marry. Legally, if they form a new relationship there is no husband, no wife, merely a co-habiting couple. The couple's offspring are not the children of married parents in the eyes of the State – and in Malta they currently have no legitimacy. The social exclusion of the couple's non-status and the psychological disability of having no means of confirming formally their commitment to one another are compounded by problems of inheritance and property rights and much else, since none of the legal entitlements enjoyed by those who are married can be invoked by persons in such a second union.
36. It is manifestly in the interests of the common good of society to rectify this inequity. The obvious way to do so is to regularize second unions by bringing them within the scope of marriage law. The availability of civil dissolution after legal separation would make this possible. This is the civic imperative to be considered by the State. In assessing such a law, the determining factor for the State should be the requirements of justice and the common good of society. A secular, democratic State, bound to pluralism and committed to the protection of the civil rights of each individual, must do justice by and on behalf of all its citizens, thereby strengthening the bonds of society as a whole. This is the moral imperative.
37. Marriage is a social institution. It is the preferred context for a wide range of social functions, especially for raising children. It is an enduring and exclusive partnership for the giving and receiving of love and the upbringing of children. Marriage is a vital pillar of society. As such, the State has the right and the duty to regulate it. Despite wide agreement on the importance of marriage and the family, there is disagreement about their nature and how best to regulate them. There is a particular disagreement over whether marriage should involve an irrevocable, exclusive and life-long commitment with no release from it under any circumstances. This difference is highlighted where a relationship has completely broken down and one or both spouses would like to re-marry and have this new position acknowledged by the State's laws and the stability that marriage provides.
38. The State must consider the interests in this situation of those of the individuals involved: the spouses, their children (if any) and the persons who would be second spouses. It must also, quite properly, examine the economic, social, psychological and other consequences of divorce. At the same time, the State must consider the impact of divorce on the institution of marriage, which is of concern to everyone. Would the stability of marriage generally be under-mined by accepting that the bond of marriage is dissoluble and that people who have legally separated may re-marry?
39. Divorce is often presented as based solely on the selfish happiness and emotional self-indulgence of those who wish to end a failed marriage. Such an argument ignores completely the traumatic anguish and pain of those whose marriages break down, often in spite of repeated attempts to save the marriage. It is an insult to the people concerned and an affront to charity and compassion. The plight of these people is a legitimate concern of the State. The individuals' right, in all consciousness, to choose their own domestic and family relationships, and to expect due respect and acknowledgement of those choices from the State, together with the wider benefits to society from the stability provided by re-marriage, are fundamental. The basic right to be free from unequal treatment is a civil right. The right to marry is also recognised as a civil liberty – a basic right and freedom that is guaranteed by the courts and the laws of Malta.
40. Respect for such rights does not run counter to the general interest of the State in supporting marriage. It reinforces it. The State's interest in marriage is as a social institution, a relationship that performs certain important social and economic functions. After marriage break-down, the legal relationship ceases to correspond with these functions. Often, it is the second informal and non-legal relationships that maintain a house-hold and rear and educate dependant children. It is for the greater common good to give such relationships the status and stability that comes from the possibility of re-marriage under the law rather than the inherently unstable relationships of co-habitation.
41. To fail to recognise such relationships, as is the case in Malta today, is actually to undermine the institution of

marriage and the family by denying them the equal respect and recognition which comes from being married. It is the duty of society and the State to weigh up the issues on the basis of the interests of the community as a whole, and not simply on the basis of private religious convictions about the meaning of marriage to our own lives. The rights of all citizens must be protected equally whatever their gender, race, religious beliefs or social standing. Such rights should not harm others, as opposed to merely offending their religious beliefs.

The State's Law-making Duties

42. To sum up on the different interests of Church and State – of religious convictions on the one hand, and the State's law-making duties on the other – the Church, as much as any other group in our society, has the right to hold and express its own views about social questions and, in particular, about the best form for the law of marriage. This report has set out that case as even-handedly as possible. But it has also explained what it believes is the proper role of the State in relation to marriage and civil dissolution after legal separation. If, in that context, the Church wishes to say – at it does – that dissolution would do more harm than good, then it is the Church's democratic right to do so.
43. This is the position which the Archbishop of Malta has adopted. Quite correctly, however, he does not claim that the doctrine of the Church should automatically have the force of law, only that its views should be heard. If the law happens to coincide with the Church's specific teachings it is because the law reflects some secular value, independent of religious belief. This should not be a doctrinal struggle, but an earnest endeavour by people of good-will to find a just and practical solution to an urgent problem. Legislators have a duty to ease the human suffering caused by marital break-down and have been given the capacity and the will to pursue this. It is hoped they have the humanity and conscience to do so responsibly.
44. State and Church have a vested interest in stable marriages. Legislators have many considerations in mind when they are drafting or enacting legislation. Legislators have to consider those who are not Catholics, those who do not accept the Catholic Church's teachings, and those who, in all consciousness, take a decision which differs from its teachings. State legislators have a duty to try to give citizens all freedom that is consistent with the rights of others, as well as arbitrating in the name of the common good of society between various interests. Good legislators should enact laws which will benefit the well-being of society as a whole.
45. Ultimately, legislators have to acknowledge that religious faith is a private matter and the principle of the separation of civil and religious authority is among the most important characterisations of a liberal democracy. Their primary concern and responsibility should be for the well-being of all the individuals within society and the good governance of all citizens in a way which is reasonable, just and beneficial for society as a whole, recognising that this often involves hard choices and imperfect answers.

PART III

THE EXISTING LEGAL REMEDIES AND THE OPTIONS OPEN TO GOVERNMENT

Legal Remedies to Marriage Break-down

46. It is clear from this separation of Church and State responsibilities that it is ultimately up to the State's elected representatives to regulate the way society copes with marital break-downs. The Archbishop accepts this delineation of responsibilities. Marriage break-downs in Malta are a reality. The collapse of a marriage is a cause of great pain for those directly concerned, but also has ripple effects across society as a whole. As a society we cannot ignore that this problem exists. The task of the laws enacted by government is to respond to this situation in the most just, practical and compassionate way possible. In selecting the best way forward, our legislators recognise that things are never black and white. They have often to search for the right shade of grey in order to benefit the greater good.
47. Marriage is a human institution. This report is concerned with marriage as a legal contract created by the exercise of a free and rational will by a man and a woman. However, even with the best of solemn intentions and will in the world, marriages may sometimes fail. So long as humans are fallible marriage break-downs will happen. The State has a duty to protect the family even when - perhaps especially when - marriages collapse.
48. In Malta, since the late 19th century, the law has responded to the problem of marriage break-down by setting in place the means whereby people can legally separate. In other words, legislation has existed for over one hundred years which allows people who were once bound in matrimony to separate because their marriage has broken down. The only missing element in the present legal remedy of separation – in contrast to divorce, which is only available to those who can go abroad to obtain it – is that these people are not allowed to marry again. Therefore, the case for civil dissolution in Malta is ultimately the case for allowing people whose marriages have broken down and are legally separated to re-marry since this would in the long run provide the greater stability in our society that comes from recognising people in a formal marital relationship, rather than an informal, extra-legal relationship. The fundamental question which we as citizens and the State must ask ourselves is: should we, as a society, prevent separated people from beginning a new relationship based on marriage, if they wish to do so?

Options Open to Government

49. In responding to this question, the government faces three options. The first is to leave things as they are, to maintain the *status quo*. The second is to focus simply on tidying up the current arrangements for co-habitation, while leaving other legal provisions for the break-down of marriage unchanged. The third course is to introduce legislation allowing for the civil dissolution of marriage after legal separation and the right to re-marry.

Maintaining the *Status Quo*

50. To leave matters as they are is no longer an option. The current situation is intolerable and seems only likely to grow worse. The legal provisions in place are insufficient, the growing number of marital break-downs is alarming and the effects on society are becoming unsustainable. Steps to buttress Maltese marriages on the lines proposed in paragraph 21 need to be taken urgently and determinedly by government. But even if these proposals were to be fully implemented they can only be seen as a stop-gap measure and we would be deluding ourselves if we thought otherwise. The reality is that marriage break-downs will continue to occur, with the resulting unsatisfactory strains on the family and society. It would be wishful thinking to suppose

that the trends of marriage break-down in Maltese society – as in societies all over the western world – can be reversed. They can at best only be slowed down or ameliorated, but never eliminated.

51. (This report defines co-habiting as between unmarried or separated men and women. It does not deal with any other kinds of co-habiting couples, such as siblings or homosexuals, who choose to live together.) Today, large numbers of separated couples co-habit in what are essentially illicit pseudo- or quasi- marriages and many have children. These relationships are extra-legal and, when children are born, are invariably disadvantageous to the female partner who has no security over maintenance rights or co-ownership in her partner's acquisitions. The reluctance of the State to recognise that a problem has existed – and to do something about it – has led to a fracturing in parts of our society which no responsible government can any longer ignore. The currently available remedy to a broken marriage of legal separation has proved inefficient and inadequate. The legal processes are confrontational, with judicial proceedings consisting of an interminable series of allegations, with no guidelines existing for the amount of maintenance payable or custody arrangements, and with couples becoming bogged down for years in judicial proceedings that harm children and families and create disillusionment with the courts and with the State.

Improving the Legal Standing of Co-habiting Couples

52. It would be tempting to suppose that introducing safeguards in the law on co-habiting couples would provide the solution. Safeguards would address such key matters as the position of children born of co-habiting couples (currently deemed illegitimate), property rights, their entitlement to child and security benefits and inheritance arrangements in the event of the death of one of the co-habiting partners.
53. The reasons for introducing legislation to this effect are well-intentioned, but misplaced. They arise from a wish to regulate and protect the position of the increasing number of couples who, having obtained a legal separation on the break-down of their marriage, have started a new long-term relationship with somebody else. But even the most carefully drawn-up safeguards on co-habitation can never equate with the status and stability of marriage. By definition, and in practice, co-habitation is more fragile than marriage since the couples can not enter into a legally binding contract. Research has shown that married couples are more than twice as likely to stay together as those who are united but merely living together. Marriages provide a far more stable environment for adults and children than co-habitation.
54. While the government may wish to draw up legislation which provides safeguards to co-habiting couples within clearly defined areas (property, finance status and care of the children etc) for those couples who would prefer this arrangement to a second marriage, it would be misleading to suppose that this would provide a long-term or sensible solution. On the contrary, to make a necessity of co-habitation would be incompatible with encouraging marriage to meet Maltese society's needs. This would be the kind of finger-in-the-dyke improvisation which simply satisfies those unwilling to accept the deep malaise of broken marriages in Malta and the need to encourage the stability and social order which marriage provides. On the other hand, re-marriage after legal separation would do so.
55. Encouraging and sustaining co-habitation – for this would be its effect – is not the right answer since it might encourage more couples to co-habit and enter into inherently less stable relationships to the detriment of the common good. While providing better legal regulation, in specific areas, of those who co-habit is desirable on grounds of good order, it presents only a partial solution to Malta's current social ills. A practical, viable solution to the State's responsibility for stable families should therefore be sought through other means.

The Need for the Government to Regulate the Position: Re-marriage after Legal Separation

56. The government has a responsibility to ensure that the social dislocation which has developed in Malta as a result of increased marriage break-down, the absence of divorce legislation and wide-spread co-habitation and one-parent families is avoided. A well-ordered legal process should ensure that, even when marital break-down occurs, it is regulated fairly in such a way as to reduce, not exacerbate, its wider impact on society. Allowing people to re-marry after legal separation if the opportunity arises, is part of the most just legal response to the very difficult problem of marital break-down in our society. Without the option of divorce people have simply sought their own solutions once they have separated with the social consequences which we witness in Malta today.

57. The question is: is the wider good of society best served by denying the chance of re-marriage to those whose marriages have broken down, or by encouraging co-habitation? It is co-habitation which is inimical to the institution of marriage, not the right to re-marry after legal separation. The right to re-marry, which arises from the dissolution of marriage, should be viewed as a just and necessary resort after all other options aimed at saving a marriage have been tried and exhausted. At the core of the argument is the conviction that the dissolution of a marriage which has already irrevocably broken down may be sanctioned to prevent greater harm to the common good which is caused by the dislocation and insecurity in society of co-habitation and the injustice of preventing those who are already legally separated from re-marrying if they wish to. The benefits to the wider public good arising from the stability offered to society of re-marriage far outweigh the disadvantages.
58. The well regulated civil dissolution of marriage after legal separation should be seen as another legal remedy (in addition to annulment or legal separation) rather than, as some would argue, the cause of marriage break-down itself. It is not the cause of marital break-down. It is a way of minimising the inevitably negative consequences to families of failed marriages who wish to re-build their lives. When compared to the current growing, chaotic position this would strengthen, not weaken, the family and the institution of marriage in Malta. To give legal recognition to caring second relationships, which are today marriages in everything but name, can only sustain the stability of society and, therefore, advance the cause of the institution of marriage.
59. On the balance of argument, therefore, it is considered that the civil dissolution of marriage after legal separation and the right to re-marry are a requirement of justice and will benefit the common good of society by introducing the greater status and stability that comes from marriage. Albeit a second marriage, it would none-the-less legitimise any children born of the marriage and provide a common set of rules and social standards of behaviour before the law. The introduction of divorce legislation would represent a just and compassionate attempt to respond to the plight of people who are trapped in 'indissoluble' marriages which have painfully fallen apart or are irreparably finished.

The Nature of Divorce and Annulment

60. We may not have divorce in Malta, but we have marital break-downs on a scale which is steadily increasing. What are the current remedies for marital break-down which are available in Malta? The current legal remedies for marital break-down are legal separation, annulment and the recognition of foreign divorces (effectively the ability open to a few, if they so choose, to obtain their divorce abroad).
61. There are two formal devices by which married spouses in Malta can separate. These are through a separation agreement, where spouses may contract mutually to live separate lives apart from each other, and through a judicial separation, where the courts have the power to order a separation of married spouses. Cruelty, adultery, violence and desertion are historically the main grounds for a judicial separation. The availability of these remedies acknowledges that marital break-down is a present, and growing, reality of Maltese life or else our legislators would not have enacted them.
62. Nullity refers to the legal procedure - which in Malta is conducted by the civil courts and the ecclesiastical tribunal - whereby an apparently valid marriage is declared invalid, and therefore not a marriage at all. The idea is that the marriage warrants being annulled because of some defect which existed at the time the marriage was entered into. The defect may relate to the capacity or consent of one of the parties, or to the formalities of the marriage ceremony itself. Annulment frees the parties to re-marry, on the basis that they were never really married in the first place.
63. In a substantive sense - as opposed to a formal legal sense - the lines between annulment and divorce can blur in the circumstances of a particular case. For example, you might have two people who have lived together for many years as a married couple, and in many cases have children. Their relationship may be, in flesh and blood terms, indistinguishable from other marriages. When they obtain a decree of annulment the law says that their marriage never existed. Divorce says their existing marriage is now ended.
64. The recognition of divorces obtained by Maltese abroad was inserted into the law in 1975. It was left in place when the Marriage Act was amended in 1995 to establish the ecclesiastical tribunal to deal with annulment procedures. It cannot be revoked since this would fall foul of international law. Arguably, it could be said

that for those Maltese fortunate (and wealthy) enough to be able to establish residence in another European Union country for the requisite period of time divorce is already a viable option and this is allowed under Maltese law. Since our accession to the EU in 2004 more than 115 Maltese citizens have availed themselves of this alternative. The fact remains, however, that for the vast majority of Maltese this is not a feasible option. Those living here cannot obtain a divorce in the Maltese courts.

65. A divorce decree formally ends, or dissolves, a valid marriage. The result is that the couple are no longer husband and wife. Each party becomes a single person again and, as such, is at liberty to marry another person if he or she wishes to do so. Thus, divorce after marriage break-down ends a marriage and allows the parties to re-marry, while legal separation after marriage break-down ends a marriage but does not permit re-marriage. This is an unsatisfactory situation with perverse results. Society currently pays a very heavy price for sustaining the concept of the indissolubility of marriage and the hope that separated couples may one day be reconciled. It is irrational to marginalise legally separated couples and prevent their further participation in a stable, orthodox and healthy family environment which re-marriage would provide.

PART IV

WEIGHING THE CONSEQUENCES

Should a Particular Religious View on Marriage Prevail?

66. It is sometimes argued that divorce undermines the Catholic view of marriage, which holds that the most basic features of the marriage relationship are unity and indissolubility. Of course – most emphatically - people are entitled to hold this religious view of marriage. But that is a matter of private conviction, as opposed to a basis for the enactment in Parliament of a law which applies to everyone.
67. What is of fundamental importance in a pluralist democracy (as opposed to a theocracy) is that the distinction is maintained between the right of individuals to have religiously-based convictions, and the right of others not to have those religiously-based convictions imposed upon them. This distinction, which is crucial to a mature liberal democracy, is the basis for the separation of Church and State – a position which, as we have seen, is fully accepted by the Church in Malta.

Does Divorce Transform Marriage into a Temporary Contract?

68. It is alleged that divorce transforms marriage into a temporary contractual arrangement. This is a grossly cynical and wrong-headed view of why couples enter into marriage and, more pertinently, how painful the process of broken marriage is. Marriage is indeed a contract. But to argue that because a contract can be dissolved inevitably leads to many - or any - not committing themselves in the first place to its success, is both unacceptable and wrong.
69. The law requires that couples enter into marriage freely and as equals. But the availability of divorce does not depend on viewing the marriage relationship as a contract. What the law does recognise is that the marriage relationship is an intimate and loving relationship of equals who bring to it certain rights and duties which express values of intimacy, closeness, caring, commitment and loyalty. When a marriage no longer expresses these values and becomes in effect a loveless marriage, then the basis on which two people can live together is undermined. Nobody in a successful marriage wants to divorce. Nobody enters into a marriage intending to divorce. The civil dissolution of marriage after legal separation simply enables the parties to an irretrievably broken and finished marriage to acknowledge legally that it is finished, and to be free to marry again if the chance arises.

Would Changing the Law Undermine Society?

70. One question arises of importance for all in society. This is whether changing the civil law may not seriously undermine the stability and well-being of society. Those who oppose the introduction of divorce in Malta fear that it would de-stabilise many existing marriages and bring about an overall weakening of the bonds holding society together.
71. Would divorce de-stabilise? When Malta looks to other western societies they see a wide-spread collapse of marriage when measured by the incidence of divorce. Divorce legislation may be an independent variable in increasing fragility in marriage in other countries as one report asserts, but a multiple array of cultural, social and economic factors lie behind this rise in other countries. Blaming it just on the divorce law is as misleading as saying the law is only catering to pre-existing demand.
72. When we look around us we also find this collapse and its unhappy consequences for families to be prevalent, if not rampant, in Malta as well. The only difference is that the collapse here has to be measured in broken marriages, as exemplified by the high number of annulments and legal separations, not in divorce applications. The absence of civil dissolution after legal separation has plainly spared Malta none of the pain and tensions and de-stabilisation of the modern age. All that it has done is made life more difficult than it need be for many people caught up in this tragedy.
73. The question therefore becomes whether an apprehension, a fear, that the situation might be made worse would justify the continuation of an actual and existing injustice. While no two countries are alike, the availability of divorce in Ireland since 1997 – like Malta, a staunchly Catholic country where the introduction of divorce was fiercely resisted – has not borne out the dire predictions of those who were against divorce. Divorce and family break-down flood-gates have not been opened and relatively few Irish people have actually applied for divorce. The Irish, together with the Italians, have one of the lowest rates of divorce in the western world. There is no reason to suppose that Malta would be any different.

Does Divorce Cause Marriage Break-downs?

74. To say that divorce causes marriage break-down, rather than remedies it, is like saying that a heart operation is a disease, not remedial surgery. If those who opposed re-marriage after legal separation really believed the assertion that it is the direct cause of marriage break-down they would, in logic, oppose legal separations as well. Yet they do not conclude that legal separations – which Malta has had for well over a century - ought to be prohibited and it would clearly be hypocritical to do so. Similarly, no country in the world which has introduced divorce argues that it should be removed from the statute books. Again, what is really being opposed is the right to re-marry after legal separation. People who seek civil dissolution are looking for a civilized remedy, under the law, for a finished marriage and the possibility to enjoy the stability offered by re-marriage if they so wish.
75. The argument that introducing divorce laws creates a 'divorce mentality' is disingenuous and null in a context where co-habitation is both possible and prevalent. Nobody can stop families breaking up if that is what happens. It is worth reiterating, for this is fundamental, that marriage break-down occurs before divorce. The objective of divorce laws is to empower people to re-build their lives after marriage break-down and legal separation within the proper regulation of the law.

What about the Effects of Divorce on Children?

76. There are conflicting opinions about the effects of divorce on children. It is crucial that the interests of the children of any marriage must be secured before and after divorce proceedings. Some of those who oppose civil dissolution, and the right of parents to re-marry, claim that it harms children. Others claim that children are better off with parents who have re-married after legal separation than constant marital conflict and discord in a failed marriage. The research picture suggests that the subject is extremely complex.

The Results of Research: The Need for Caution

77. Any assessment of the research findings on the topic of marital break-down and divorce carries with it a need to exercise caution when drawing conclusions from the results that emerge from the various research studies. Research in this area poses difficulties because it is not possible to generalize with any validity about marriage, or about problems within marriage and the solutions to those problems. Despite the extent of marital break-down in Malta, there is very little, if any, comprehensive research into the topic. In particular, there is very little work done on the factors which lead to the increasing break-down of Maltese marriages or on the actual experiences of Maltese parents and children.
78. In this situation, this report has been compelled to look at studies carried out in other countries. But this has the draw-back that these studies are not based on the customs, culture, traditions and socially specific factors which pertain in Malta. There is thus an immediate difficulty in using research carried out in other countries at other times in order to assess the human consequences of divorce, if it were to be introduced in Malta now.
79. Just as it is unwise to generalise about the effects of marital break-down and divorce across cultures, it is dangerous to generalise about the effects of marital break-down and divorce for individuals within a culture. There is also very little research into the comparative effects of marital break-down, legal separation, annulment and divorce. It is difficult to establish whether the psychological effects are due to the experiences associated with chronic discord in a marriage which is breaking up, or to those specific to break-down, since break-down, legal separation or divorce rarely occur without a substantial period of prior discord and conflict.

Effects of Marital Break-down

80. This report has had to bear these broad, but important, reservations in mind when examining existing research. In general, however, no research study denies that the process of marital break-down – whether resulting in legal separation or divorce – may damage children. The evidence is wide-spread to the effect that children are usually emotionally and psychologically affected by the conflict and bitterness which can accompany marital discord and break-down which precedes legal separation or divorce. What is less clear is the effect which divorce *per se* has on children. There is very little research which focuses specifically on the different and discrete effects of divorce, legal separation or, indeed, the root problem, which is marital break-down itself. Research of this nature would labour under the obvious difficulty that the conflict arising out of marital break-down is inextricably bound up with the divorce or legal separation that follows.
81. Conflicting results emerge from the various studies and research which have been carried out in other countries. This is not surprising given the complex and variable nature of the subject and the fact that each and every case is determined by the particular context and background of the break-down. The fundamental and over-riding point, however, is that it is marital discord, conflict and break-down which cause the primary emotional damage to children and it is wrong to state categorically that it is the experience of divorce which harms children. Divorce is a way of solving the problem – or at least easing it – as it may allow the child to escape from family turmoil and to adjust to the new family situation without the existence or threat of daily acrimony at home.
82. The central aim of divorce is to minimize the negative consequences of a difficult and deeply hurtful situation for children, resulting directly from the marriage break-down of their parents. It is the marriage break-down itself which causes damage to the children involved. Divorce is a way of responding to that problem by trying to ensure that parents and children can carry on with their lives after marital break-down, in an environment where there is less conflict, not more, and where the stability provided by a new marriage becomes possible. Bald statements that divorce *per se* harms children are irresponsible. A couple's divorce is not a reason to say that the parents have failed their children. It is a remedy to dissolve a finished marriage and an opportunity to structure the post-divorce parental relationship in a way that is deliberately designed to serve the best interests of the child.

The Financial Consequences of Legal Separation or Divorce

83. There are inevitable financial consequences following the break-down of any marriage, be it as a result of the existing legal separation arrangements or divorce. Since both legal separation and divorce involve the division of family assets this leads to economic consequences which the courts have to deal with. Spouses and children need not be worse off than they are under the current legislative regime of legal separation. It is fallacious to argue that any adverse financial consequences of marriage break-down occur only after a divorce is granted and that in the absence of divorce the financial position of a separated wife and children is more secure.
84. The crucial point is that regulating the financial affairs of a separating couple – whether in a legal separation or a divorce – must be tackled by the legislators in Parliament. Their duty is to arrive at the fairest solution for all parties involved and to ensure, in-so-far as possible, that none of the parties incurs unreasonable financial disadvantages. Civil dissolution after legal separation neither adds to nor subtracts from this duty. The financial consequences are common to both legal separation and divorce.
85. It is sometimes argued, on the basis of research carried out in other countries, that divorce impoverishes women and children. What most research illustrates to be a common feature throughout the western world is that wives are often awarded maintenance orders which are inadequate to meet their needs and that there is insufficient matrimonial property available to secure the financial position of both parties in the aftermath of the marriage break-down. Moreover, there is a wide-spread problem of default on the part of husbands in respect of their obligations as determined by the courts. In Malta this has led to a tendency for separated wives to have constant recourse to the courts either because they are unaware of their entitlement, or in the hope that they may be made the beneficiary of an otherwise unjust maintenance order – a situation compounded currently by lack of adequate guide-lines regulating the amount of maintenance payable.
86. The international research also shows that many wives fail to secure an adequate standard of living even after invoking the powers of the courts to make financial and property orders after divorce. This situation is no different from the one in Malta today in respect of legal separation. Low rates of maintenance, exacerbated in many cases by default, constitute the most striking features of any marital settlement. Dependence on social welfare payments among separated or divorced women is thus a necessary consequence of these problems. There is no prima facie case for thinking that civil dissolution of marriage after legal separation would pose an additional burden on tax-payers. The economic costs to the tax-payer which arise today in terms of social security, housing and other benefits are caused by separation itself.
87. These circumstances already exist and should be broadly little different upon the introduction of divorce. In Malta in 2008 about 2800 separated, annulled or divorced single parents supporting about 4750 children were entitled to a range of welfare benefits. It is not the decree of divorce which would give rise to these problems, but the break-down of the marriage and the legal separation of the spouses. To claim that the introduction of civil dissolution of marriage after legal separation would lead to any greater impoverishment of women and children would be to ignore the reality of marriage break-down in Malta at the present time and the need for the law to respond to this fact adequately and fairly.
88. The financial consequence of divorce – as is currently the case with legal separation – requires the careful drafting of legislation which responds fairly and equally to everyone's interests. This is a difficult task which must be tackled by Parliament regardless of whether divorce is introduced or not. The position of the wife and children will be a particular concern because, although on a formal level both spouses are equal and should be treated as such, on a practical level it is still women who are frequently in an inferior financial position after the break-down of a marriage. Legislation has to be put in place to deal with this situation to a greater and more efficient degree than exists in Malta today.

PART V

PROPOSALS FOR A LEGISLATIVE STRUCTURE FOR RE-MARRIAGE AFTER LEGAL SEPARATION

The Need for a Law Instituting the Civil Dissolution of Marriage after Legal Separation

89. The premise to all the arguments put forward in this report is that marital break-down is an increasing problem in Malta and one which affects the whole community. The adverse consequences of marital break-down – societal, emotional, psychological, financial – all exist and must be dealt with, whether we introduce a law for the civil dissolution of marriage or not. As it stands, the legislative response to marital break-down has been, in the majority of cases, to provide for legal separation. This has manifestly been shown to be inadequate and unjust in practice and not in the wider public interest. Our legislators have failed in their duty to respond to the needs of society. It is therefore considered that the civil dissolution of marriage after legal separation should also form a part of the legislative armoury because it allows couples whose marriages have irretrievably broken down to re-marry if they wish to. This would be far healthier for society than the current unsatisfactory arrangements.
90. The introduction of such legislation would force no one to avail themselves of the option of divorce. It does not prevent or undermine marriages which last and remain stable for life. Nor does it create a culture in which divorce becomes the norm. There are strong forces in Maltese society which militate against taking marriage lightly. Those forces should be considerably strengthened as has been proposed in paragraph 21 above. The existence of legal separations in our society for more than a century has not led to an outbreak of frivolous marriages, but it has provided people whose marriages have irretrievably broken down with a legal remedy to separate and to resolve, in a not entirely satisfactory way, the financial and other difficulties which inevitably arise.
91. But this legal remedy has been inadequate and, thus, inimical in its effects on society. The unintended consequences have been to encourage co-habitation and to cause untold pain to those who wish to re-marry and are prevented from doing so. Neither individual justice, nor the common good have been well served by it. The next necessary step in the legal response is to allow people not only to separate, but also to view themselves as single people through the dissolution of their failed marriage with the opportunity of engaging in another relationship leading to marriage and a family based on the solid institution of marriage. This would be more beneficial to Maltese society, not detrimental. The freedom to marry again after a legal separation is an intrinsic part of the rights and liberties which are characteristic of a well-ordered democratic and pluralist State. The introduction of the civil dissolution of marriage is now a needed and over-due reform which legislators who have the well-being of society at heart should hasten to enact.

The Legal and Social Framework to be Enacted by Parliament

92. It is vital, however, that a legal remedy, when it is introduced, be just, civilised, responsive to the interests of any children of the marriage and sensitive to the needs for the protection and security of the parties to the divorce. The legal and social framework which Parliament should devise must aim to be fair and well-ordered. It must be responsive to the needs of Maltese society and, very importantly, avoid the pitfalls of divorce legislation which have arisen in some other countries.
93. It is therefore proposed for the consideration of government and our legislators in Parliament that the legal framework for a new law should comprise the following main characteristics:
- Access to the divorce remedy should be restrictive, but fair. Easy availability of divorce in some countries, where the waiting period is a year or even less, causes problems. The Irish example, however, provides sensible guidance on this, where the court may only grant a dissolution of marriage if it is satisfied that “at the date of the institution of proceedings the spouses had lived apart from one another for a period of, or periods amounting to, *at least four years* [author’s emphasis]

during the previous five years” and “there is no reasonable prospect of a reconciliation between the spouses”. While it may be thought that a period of four years is too long, it is for consideration that anything less than three years would be too short.

- A ‘fault-based’ remedy should be eschewed since it tends to turn the separation into a confrontational, bitter and destructive process which is in no one’s interests. Great hostility and resentment may be generated by the recital of allegations of misbehaviour, often exaggerated and stretching back over many years, to the extent that no sensible discussion can take place between the parties or any agreement reached on any matter relating to their marriage or their children. In line with the Irish example, therefore, the ‘no-fault’ divorce remedy, whereby neither spouse is required to prove ‘fault’, or marital misconduct, on the part of the other, should be provided by statute. This should provide for divorce on grounds of the ‘irretrievable break-down’ of the marriage. In every case there should be a judicial process to ensure a break-down has really occurred and that no abuse of the system has taken place. While the ‘irretrievable break-down of marriage’ should provide the only proper basis for divorce, it may be prudent for legislators to retain the principle that matrimonial misbehaviour (‘fault’) may be taken into account by the courts on the ground that such behaviour was also evidence that a marriage had broken down irretrievably. Considerations of misbehaviour (‘fault’) may be especially relevant when the future welfare of the children is involved.
- The courts should be given sufficient powers to provide for the welfare of the dependent spouses and children (if any). This should apply especially to the question of custody arrangements for the children where it has been shown that joint custody arrangements are more beneficial when compared to sole custody. The welfare of the children must be given the court’s paramount consideration, especially where financial provisions and housing are concerned.
- The courts should be given sufficient powers to adjust property, income and maintenance rights equitably, including making proper contribution towards reasonable maintenance for any children of the family, taking account of the financial needs, obligations and responsibilities which each of the parties to the marriage has, or is likely to have, in the foreseeable future.

The Social Support Framework

94. This legal framework for the granting of the civil dissolution of a marriage should also be under-pinned by a social support infrastructure which not only eases the difficult process of divorce, but also, importantly, ensures that those entering into the process are fully aware of its consequences. It is a matter for the legislators’ consideration that, in line with the proposals already made in this report in paragraph 21 above, the legal framework should include prior efforts aimed at saving a marriage before steps to end it irretrievably are taken, as well as during the divorce process itself.

95. These steps should include the following:

- Introducing comprehensive family mediation as an intrinsic part of the divorce process. The parties to a finished marriage should have access to mediation to enable them to resolve issues arising in the divorce as reasonably and constructively as possible;
- Encouraging the couple to think through and face the consequences of divorce before it happens by requiring couples to attend a compulsory information session dealing with such matters as the consequences of divorce, the welfare of the children and the nature of the financial implications before starting the divorce process;
- Ensuring in-so-far as possible that arrangements for children and other matters are settled before the divorce is granted. Mediation which facilitates the ability of the divorcing parents to settle upon arrangements which place the children’s future at the centre, and creates a process for future communication and cooperation between the separated parents, will be essential.

96. It is considered that the over-riding purpose of framing the terms of Malta’s divorce legislation in this way

would lie in continuing to support the institution of marriage and encouraging the parties to a marriage which may have broken down to take all practical steps, whether by marriage counselling, comprehensive mediation or otherwise, to save the marriage itself. If, however, it is concluded by the court that a marriage has irretrievably broken down and should be brought to an end, this should happen with the minimum of distress to the couple and to the children affected; and without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end. Moreover, the court should ensure that any risk to one of the parties to the marriage, and to any children, of violence from the other party should so far as practicable be removed or reduced.

PART VI

CONCLUSIONS AND RECOMMENDATIONS

Summary of Arguments

97. Thousands of Maltese men and women have suffered, and are suffering, the pain of broken marriages. What is more, the problem is growing. Between 1995 and 2005 it more than doubled from 5,098 to 13,354 divorced, annulled or legally separated couples. In the three years since there have been over 1000 new or introduced annulments and about 3500 sworn separation applications have been submitted or mediations introduced. Almost 2000 annulment and separation cases are pending. It has been estimated that within the next six years the number of failed marriages will exceed 35,000, or over 17% of all marriages. These marriages have collapsed even though you cannot get a divorce in Malta.
98. The civil dissolution of marriage will give a chance to people who are in a stable and loving second relationship after being legally separated to obtain all the benefits and stability that come from a happy marriage. It is in nobody's interest to go on ignoring reality. There are thousands of marriages in Malta which have entirely collapsed and which are marriages in name only. On the other hand, there are many second relationships which are marriages in everything but name. To give legal recognition to this fact can only advance the institution of marriage and the stability of our society. It is clearly in the public interest that this should happen.
99. The break-down of marriage is always a source of sadness for those involved, especially to children. Some research findings confirm that some children may be deeply affected by the separation of their parents. The findings also show, however, that it is not divorce – the legal recognition of break-down – which causes the main problems for children. It is the under-lying marriage breakdown itself that does this. Often the parents will take steps to protect and reassure them and will agree on future arrangements for their care, but in some cases children exposed to bitterness and conflict can be caused damage.
100. But this damage is not caused by the civil dissolution of marriage. It is caused by the break-down of the marriage and the children becoming part of the conflict between the parents. The availability of divorce will not increase the risk of such damage, which already occurs when parents separate. Moreover, for the first time, children born to parents in a second relationship will have the chance to become members of a family based on marriage. Civil dissolution will give a second chance of happiness for those whose marriages have ended and benefit society as a whole by providing such families with the stability of marriage. The common good will thereby be enhanced.

Conclusions

101. It is concluded that:

- The arguments in favour of the introduction of legislation permitting re-marriage after legal separation and the civil dissolution of marriage far out-weigh the disadvantages;

- Persons married but legally separated are currently denied the right to re-marry. Legally, if they form a new relationship, there is no husband, no wife, merely a co-habiting couple. It is manifestly in the interests of the common good of society and a work of justice and fairness to seek to rectify this inequity;
- The only missing element in the present legal remedy of separation – in contrast to divorce, which is only available to those who can go abroad to obtain it – is that these people are not allowed to marry again. Therefore, the case for civil dissolution after legal separation in Malta is ultimately the case for allowing people whose marriages have broken down and are legally separated to re-marry;
- To leave matters as they are is no longer an option. The legal provisions in place are insufficient, the growing number of marital break-downs is alarming and the effects on society are becoming unsustainable;
- While providing better legal regulation of those who co-habit is desirable on grounds of good order, it presents only a partial and inadequate solution to Malta's current social ills. On the contrary, to safeguard cohabitation would be incompatible with encouraging marriage, which should always be the government's aim;
- Society today pays a very heavy price for sustaining the concept of the indissolubility of marriage and the hope that separated couples in a broken-down marriage may one day be reconciled;
- Civil dissolution enables the parties to an irretrievably broken and finished marriage to acknowledge legally that it is finished, and to be free to marry again if the chance arises;
- The well-regulated civil dissolution of marriage after legal separation is not the cause of marital break-down, but a way of minimising the consequences of marriages which have failed and to allow people who wish to do so to re-build their lives. To give legal recognition to caring second relationships, which are today marriages in everything but name, can only advance the cause of the institution of marriage, not weaken it;
- The absence of divorce has plainly spared Malta none of the pain and tensions and the destabilisation of modern society. All that it has done is made life more difficult than it need be for many people caught up in this situation;
- The way to remedy this is to regularise second unions by bringing them within the scope of marriage law. The availability of civil dissolution after legal separation would make this possible;
- The individuals' right, in all consciousness, to choose their own domestic and family relationships and to expect due respect and acknowledgement of those choices from the State, together with the wider benefits to society from the stability provided by re-marriage, are fundamental. Respect for such rights does not run counter to the general interests of the State in supporting marriage. It reinforces them;
- To fail to recognise second relationships is actually to undermine the institution of marriage and the family. It is the duty of the government to weigh up the issues on the basis of the interests of the community as a whole, and not simply on the basis of private religious convictions about the meaning of marriage to our own lives. Although a person's religious convictions may not permit divorce, his or her freedom of religious practice and beliefs are not violated by allowing the civil dissolution of marriage after legal separation;
- It is vital that a civil dissolution remedy, when it is introduced, be just, civilised, responsive to the interests of any children of the marriage and sensitive to the needs for the protection and security of the parties to divorce.

Recommendations

102. It is, therefore, recommended that the government should introduce legislation permitting re-marriage after legal separation and the civil dissolution of marriage.
103. Moreover, it is recommended that the legislative framework should comprise the main characteristics set out in paragraph 93 of the report, under-pinned by a social support infrastructure as proposed in paragraph 95.

BIBLIOGRAPHY AND REFERENCES

- Ahrons : 'Predictors of Paternal Involvement Post-Divorce : Mothers' and Fathers' Perceptions'.
- Andrew Cornes: 'Divorce and Re-marriage'.
- Anne-Marie Ambert : 'Divorce : Facts, Causes and Consequences'.
- Articles on Divorce by regular columnists in The Times, The Sunday Times, The Malta Independent on Sunday and Malta Today:
 - Evarist Bartolo, MP
 - Fr Joe Borg
 - Daphne Caruana Galizia
 - David Casa, MEP
 - Mark Anthony Falzon
 - Michael Falzon
 - Charles Flores
 - Professor Ranier Fsadni
 - 'Roamer' (aka John H. Micallef)
 - Michela Spiteri
 - Raphael Vassallo
- *Deus Caritas Est*, encyclical letter by Pope Benedict XVI on 25 December, 2005.
- *Dignitatis Humanae*, promulgated by Pope Paul VI on 7 December, 1965.
- Discern (Institute for Research on the Signs of the Times): 'Catholic Family Values, Civil Marriages and Marriage Breakdown' (Updated 2007).
- Editorials on Divorce during 2008 in The Times, The Sunday Times, The Malta Independent on Sunday and Malta Today.
- Edmund Flood: 'The Divorced Catholic'.
- Emery: 'Inter-personal Conflict and the Children of Discord and Divorce'.
- Emery: 'Marriage, Divorce and Children's Adjustment'.
- *Gaudium et Spes*, promulgated by Pope Paul VI on 7 December, 1965.
- Gonzales and Vittanen: IZA Discussion Paper 2023, March 2006, 'Divorce Legislations and their Effects in 18 European Countries'.
- Jenny Burley and Francis Regan : 'Divorce in Ireland : The Fear, the Floodgates and the Reality'.
- John Catoir: 'Catholics and Broken Marriage'.
- Johnson, Kline and Tschann: 'On-going Post-Divorce Conflicts : Effects on Children of Joint Custody and Frequent Access'.
- Julie Reeves: 'For Better, For Worse'.
- Kelly, Gigy and Hansman : 'Mediated and Adversarial Divorce: Initial Findings from a Longitudinal Study'.
- Kline, Tschann, Johnson and Wallerstein : 'Children's Adjustment in Joint and Sole Physical Custody Families'.
- Laws of Malta, Civil Code, Chapter 16.
- Laws of Malta, Chapter 255, Marriage Act.
- Leupnitz : 'Child Custody : A Study of Families after Divorce'.
- Mary Hayes and Catherine Williams : 'Family Law : Principles, Policy and Practice'.
- National Statistics Office : 1995 and 2005 Census.

- Occasional Articles on Divorce during 2008 in The Times, The Sunday Times, The Malta Independent on Sunday and Malta Today by:
 - HG Bishop Nikol Cauchi
 - HG The Archbishop of Malta, Monsignor Paul Cremona, OP
 - Fr Anton Gouder
 - Father Peter Serracino Inglott
 - Peter Apap Bologna
 - Professor John Baldacchino
 - Charlò Bonnici, MP
 - Simon Micallef Stafrace
 - Robert Musumeci
 - Dr Harry Vassallo
 - Professor Kenneth Wain
- Ralph Brown: 'Marriage Annulment in the Catholic Church'.
- Sabine Cabourdin: 'How the Changing Concept of the Family Affects the Child'.
- Selected Letters on Divorce from members of the public during 2008 to The Times, The Sunday Times, The Malta Independent on Sunday and Malta Today:

<ul style="list-style-type: none"> • Joseph L. Attard • Michael Axciak • J. Bonnet Balzan • Dr Emmy Bezzina • John Bisazza • Anne Busuttil • Poppy Busuttil • Anthony Cassar • Anthony Calleja • Jacqueline Calleja • Walter Camilleri • Joseph Farrugia • Maria D. Farrugia • William Flynn • Albert Gauci Cunningham • John Ghigo • Fr Anton Gouder • Herbert Messina Ferrante 	<ul style="list-style-type: none"> • Alfred and Miriam Mizzi • Fr Joseph Mizzi • Paul Mizzi • Frank Muscat • Grazio Muscat • Evarist Saliba • Georg Sapiano • L. Spiteri • Philip Spiteri • Adrian Vassallo, MP • Klaus Vella Bardon • Vincent Vella • Professor Kenneth Wain • Jim Wightman • Adrian Xuereb • Catherine Zammit • Charles A. Zammit • Lawrence D. Zammit
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- Steinman : 'The Experience of Children in Joint Custody Arrangements : Report of a Study'.
- Statistics for the Years 2006, 2007 and 2008 provided by the Ecclesiastical Tribunal and the Civil Courts and Civil Tribunals.
- The Centre for Social Justice: 'Fractured Families: A State of the Nation Report'.
- The Commission for the Family Report, 1997.
- The Economist in Figures, Marriage and Divorce, 2008.
- The Exeter Family Study.
- Tim Buckley: 'What Binds Marriage'.
- UN Declaration of Human Rights.
- Waldron, Ching and Fail : 'A Children's Divorce Clinic: Analysis of 200 Cases in Hawaii'.
- Wallerstein and Blakeslee : 'Second Chance'.
- World Health Organisation Survey: 'Health Behaviour of School Age Children' (HBSC).

