

Civil and Religious Divorce

FAMILY LAW COUNCIL

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Attorney-General

Parliament House

CANBERRA A.C.T. 2600

Dear Attorney-General

Following your discussion on 28 April 1997 with the then Chairperson concerning some of the problems which have arisen with regard to civil and religious divorce, Council discussed these issues at its meetings on 8 - 9 May and 17 - 18 July 1997 and 19-20 February and 21-22 May 1998.

The background to the problems is set out at Attachment A, which also includes an overview of relevant Australian law, as well as developments in other jurisdictions. Briefly, a problem has been identified where a Muslim or Jewish woman may obtain a civil divorce, but her husband refuses to agree to or grant a religious divorce. This has obvious implications for the woman's ability to remarry in her religious faith. It also has immigration and social security implications in some cases, and these are set out briefly in Attachment A. However, Council is not in a position to advise you on these issues.

An opinion was obtained from the Acting Solicitor-General on the constitutional validity of possible amendments to the Family Law Act -

to amend the Act to insert in Part VI a "no impediment" clause which would defer the hearing of the civil dissolution application pending the granting by the relevant parties of a religious divorce; or

- to amend the Act so that, after a decree nisi for civil dissolution has been made, there be a deferment of the decree becoming absolute under section 55 of the Act until the Court is satisfied that the grant of the religious divorce has occurred.

A copy of that opinion is at Attachment B.

Summary of opinion

The Acting Solicitor-General advised that the proposed amendments would be within the scope of section 51(xxi) -(xxii) of the Constitution but they would most probably contravene section 116 of the Constitution.

The Acting Solicitor-General's opinion and interpretation of section 116 is based on the following matters:

- If a Commonwealth Act confers powers on a body (including a court) to make orders contrary to section 116 that will normally mean that the empowering Act contravenes the express prohibition in section 116 and is invalid to that extent.
- The relevant clause in section 116 for the purposes of this exercise relates to 'religious observance'. There is no direct authority on this clause but the Acting Solicitor-General believes it would be interpreted as extending to any requirement that a person participate in activities with a religious content.
- A law which required a person to take steps to dissolve a marriage according to the doctrines of a particular religion would arguably breach the observance clause of section 116 by requiring the person to take part in religious rites.
- Such a law would also arguably breach the 'free exercise' clause of section 116 by requiring the person to take steps which were in some way offensive to his or her faith.
- These arguments for invalidity would not be overcome by the counter argument that the proposed amendments would require religious processes to be undergone only as a condition of invoking the jurisdiction of the Family Court.
- Recent developments in the High Court suggest that the Court would be protective of individual religious freedom.
- The recent High Court decision in *Kruger v Commonwealth* held that a law which restricts political communication will nevertheless be valid if the restriction is an incidental effect of the law's pursuit of some non-infringing purpose. It would be difficult to argue that the proposed amendments to the Family Law Act, which manifestly impose a requirement of religious observance and possibly a prohibition on the free exercise of religion, would bring about this result as a side effect of the pursuit of some non-infringing purpose.
- There would be better prospects of success for a provision which did not focus on religious processes. A general discretionary power conferred on the Court to make orders for dissolution conditional on each party taking the necessary steps to free the other party from the marriage relationship would probably be valid. While it is arguable that the Court already has such an inherent power, sections 48(2) and 55-55A make this doubtful.
- There may be considerable challenge in drafting a general provision which avoided contravening section 116 while still making it clear that an order requiring religious divorce proceedings to be undertaken was intended to be allowed.

Advice

In considering the effects of denial of a religious divorce on a party who has been divorced in the civil courts, Council is aware of the anomalous situation arising when a person enjoys the

Constitutional protection of the freedom of religious expression but seeks the assistance of Government to circumvent certain undesirable consequences of the observance of their religion. The problem we considered affects those who wish to uphold their religious beliefs and obtain a religious divorce before remarrying according to their religion. A person who obtains a civil divorce in Australia has no impediment, arising from the divorce, to civil remarriage in Australia. Furthermore, section 116 of the Constitution provides a guarantee of freedom from, as well as freedom of, religion. Hence it protects the right not to hold religious views or take part in religious rites.

In light of the Acting Solicitor-General's opinion, Council believes that any amendments to the Family Law Act along the lines of the ALRC recommendations in its 1992 report on Multiculturalism and the Law would be invalid (see Attachment A at page 6).

A more general provision which does not focus on religious processes, but extends the Court's discretion, may be constitutionally valid, but there is some uncertainty on this issue. However a broad discretionary power could leave it open to the Court to impose a range of conditions not sought to be covered by any amendments arising out of this issue, thereby introducing certain consequences which may be undesirable from a policy perspective.

Given the constitutional uncertainty of the proposed amendment, the possible undesirable consequences from a policy perspective, and the Acting Solicitor-General's view that there would be considerable difficulty in drafting the amendment, it is Council's view that the Family Law Act should not be amended to deal with this particular problem. In light of this view, the current judicial approach taken by the Family Court, as outlined on page 6 of Attachment A, would continue to be available on a case by case basis.

Whether other legislation should be amended to deal with the immigration and social security issues raised in the background paper is a matter for the responsible Ministers.

RECOMMENDATION

Council takes the view that the problems outlined above arise from the observance of religious practices and not from any shortcomings in the Family Law Act. It therefore recommends that the Family Law Act should not be amended in these circumstances.

At its meeting in Alice Springs on 21-22 May 1998 the Council agreed that the matters raised in this letter should be conveyed to you. I have signed this letter on behalf of the Council and by agreement with the immediate past Chairperson whose term of office expired on 30 June 1998.

Yours sincerely,

(R W Hughes)
Director of Research
on behalf of the Chairperson

ATTACHMENT A

BACKGROUND

The two main issues for consideration are:

- (A) the effects of denial of a religious divorce to parties who have been divorced in the civil courts; and**
- (B) the abuse of the overlap between civil and religious divorce requirements for fraudulent or malicious purposes.**

At the 7th National Family Law Conference in Canberra in October 1996 Dr Ahmed Hammoud of the Australian Islamic Community presented a paper about the position of women from strongly religious, patriarchal communities, where the women have been granted a civil divorce but the ex-husband refuses to agree to a religious divorce. This leaves them in a form of marital limbo, where they are civilly divorced but still religiously married, which occurs where civil law in effect recognises a religious marriage in full but does not provide for religious divorce.

The courts have tried to deal with this problem in indirect ways with varying degrees of success. Weaknesses of the current approach are that it may not resolve the entire problem, and that it can be interpreted as acquiescence by the courts in a form of 'quasi-blackmail' by the recalcitrant spouse.

The dichotomy between civil and religious divorce apparently has consequences for Australian policy in other jurisdictions, notably with regard to immigration and social security fraud (see below). There is obviously a conflict between non-interference by the state in religious matters, and a situation where Australian law can be used by one party to a divorce to disadvantage the other, to obtain an improper financial advantage, or to facilitate the misuse of other Australian legislative requirements.

A. Effects of denial of a religious divorce

Muslim and Jewish communities

In some communities, notably the Muslim and Jewish communities, one partner to a divorce has been able to use religious requirements to effectively undermine the legitimacy of civil divorce for personal gain. This occurs when the couple obtains a civil divorce but the (usually) ex-husband refuses to agree to a religious divorce, for which the husband's voluntary agreement is considered essential. Under Jewish law, a civil divorce is not recognised without a gett or religious divorce. The effect is that, though both the above religions permit divorce within their religious communities, these women remain agunot (or agunah), to all intents and purposes married or 'chained' to the ex-husband, and unable to remarry in that religion.

With the Jewish and Muslim arrangements for divorce, the main difficulty centres on the requirement in the majority of cases for the religious divorce to be voluntarily given. However, the religious authorities have the capacity to authorise a religious divorce in some circumstances, and on occasion to institute sanctions against a recalcitrant party.

Abuse of the requirement for voluntary agreement to a religious divorce may be by:

(i) *control mechanisms*, eg for revenge on a partner who has initiated a civil divorce, or to gain control of matters at issue between the parties, such as contact and residence of children, or property. An Islamic husband may use this as an opportunity to overcome the stronger rights which Islamic law gives the mother for custody of young children. Furthermore, the father may use his capacity to marry off minor children, ensuring that both generations, the wife and the children, are never free to enter a religious marriage again;

(ii) *direct financial gain*, by placing a price on agreement to the religious divorce; eg. the husband may seek financial recompense, or insist on receiving all the wife's property. The woman may be forced to relinquish her dowry or her right to have it returned at the breakdown of the marriage.

The practical consequences for women

The requirement for mutual consent in religious divorce arrangements has two main strands, each requiring a different response. In the first instance, a recalcitrant partner deliberately denies his partner the religious freedom to remarry. In the second instance, the husband is not available for various reasons to give consent, and the problem is particularly devastating. Cases in the latter category include women who have been deserted by their husbands, those whose husbands are insane, kidnapped, missing in action, or otherwise missing and those where the husband is presumed dead without verification. The woman in any of these situations can neither religiously divorce her husband nor remarry.

If a woman wishes to remain within her religion, she may be penalised more severely than the male partner if she does not obtain a religious divorce. Women who form another relationship after obtaining a civil divorce but without obtaining a religious divorce are regarded as having committed adultery, a serious crime in Jewish and Islamic law. For Jewish women who remarry in civil ceremonies, the children of their second marriage are regarded by Jewish law as bastards, and shunned. Any child from the union of a Jewish woman and someone other than her religious husband becomes illegitimate. A pre-gett relationship cannot be legitimised later because an adulterous relationship cannot become a legal marital relationship under Jewish law.

By comparison, children fathered by Jewish men who remarry in civil ceremonies are considered legitimate as long as their mother is Jewish. Only if the husband's second wife was a divorced woman who had not obtained the gett, would he be in an adulterous relationship and their children illegitimate.

Women may also temporarily or permanently refuse the gett, and 'blackmail' their husbands in the same way for a greater share of the marital property. The refusal of the gett restricts the husband's capacity to remarry religiously under the rabbinical law that most Jews follow but is not likely to have the effect that the man's refusal would upon the woman. Moreover where the wife has abandoned the husband, he is permitted to religiously remarry without issuing a gett. This would effectively prevent the wife from ever remarrying religiously.

A problem may also arise with regard to child marriage. In the Islamic faith the father of a young girl may marry her to a friend or acquaintance without the knowledge of the girl or her mother, sometimes in return for financial consideration. It is possible in extreme cases that

the child may not find out about it for years, and when she does she may not even be able to find out the name of her supposed marriage partner to initiate a religious divorce.

B. Abuse of civil and religious divorce overlap

Immigration and social security issues

One question which this study has raised is the extent to which civil divorce arrangements can be used to circumvent Government policy in migration and social security matters. Particular concerns relate to:

- (i) alleged attempts to evade migration requirements through civil divorce, serial marriage and spouse sponsorship; and
- (ii) the ability to obtain additional social security benefits, such as the sole parent benefit, while maintaining a traditional marriage or multiple marriages.

The essence of fiance/e and spousal migration arrangements in Australia is the requirement that the parties be engaged in 'a genuine and continuing marital relationship' (Migration Regulations 126 and 135). A man or woman who is divorced under Australian civil law, however, is free to remarry and to sponsor his or her new marriage partner into Australia, while still 'married' in religious convention to the earlier partner or partners. This apparently has been known to facilitate an entirely legal (by Australian law) system of serial marriage and divorce, and chain migration.

Abuse of the social security system may occur as part of serial spouse sponsorship, or when all parties are legally residing in Australia. The civilly divorced wives can claim sole parent benefit and other benefits while living as the religious wives of the man concerned, thus increasing the overall pension income of the family. In some instances the man may wish to retain his hold over the previous wife for her income-earning capacity or to work in areas such as prostitution and other fringe activities.

Attempts to use civil divorce to defraud the social security system derive from differences between the amount of pension available to a married couple by comparison with two single persons, or persons drawing sole parent benefit. Especially if the husband is from a polygamous culture, he may be able to maintain a household or households of women over whom his religious marriage gives him control, each of whom due to a civil divorce is able to draw sole parent's benefit. One representative of the Islamic community claimed that 80 per cent of Islamic households are separated but living under the same roof, to be eligible for sole parent and other benefits. Because the men usually take over control of children after they enter their teens, the father may often be in control of the child's benefits as well as the mother's.

As the Council is not equipped to investigate the extent of immigration or social security fraud resulting from serial sponsorship of new partners or abuse of the divorce provisions of the Family Law Act, it merely draws these possible problems to your attention.

RELEVANT AUSTRALIAN LAW

Section 116 of the Australian Constitution specifically prevents the Commonwealth from legislating in respect of religion. This section states that:

- The Commonwealth shall not make any law for establishing any religion or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office of public trust under the Commonwealth.

While the Commonwealth has tended to avoid any action which could be regarded as interventionist with regard to religion, the question arises what, if any, type of intervention would be within Constitutional boundaries, and whether the capacity for intervention could be used or interpreted as discriminatory against one culture or religion rather than another. In a relatively recent decision, the High Court noted that:

- To attract invalidity under s 116, a law must have the purpose of achieving an object which s. 116 forbids.

Barwick CJ in *Attorney-General (Vict); ex rel. Black v the Commonwealth* (1981) 146 CLR 559 also suggested that in the interpretation and application of section 116, the establishment of religion must be found to be the object of the making of the law and the law must have that objective and probably as its single purpose. To this end, he distinguishes between a 'religion', to which section 116 would apply, and a sect or department of the one religion, to which it probably would not. It probably would not be correct, for example, to regard the different Christian churches as separate and distinct religions for the purposes of section 116 (at page 580).

An opinion by the Acting Chief General Counsel on the constitutional issues raised by this advice are set out at Attachment B. That opinion appears to concur with views of Strum ("*Getting a Gett in Australian Courts*" (1997) 12:1 *Australian Family Lawyer* 21) that section 116 would not prohibit the exercise of jurisdiction by Family Court judges adjudicating on the conduct of parties to a Jewish divorce.

Marriage

The definition of marriage in the Marriage Act 1961 (section 46 (1)) is that

- Marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

However, section 6 of the Family Law Act recognises overseas polygamous marriages for family law purposes, even though polygamy is prohibited under Australian marriage law. Section 6 states that:

- For the purposes of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.

Polygamous marriages which are entered into within Australia are void. Recognition of foreign marriages is provided for at sections 45, 46 and 56 .

Divorce

Section 48 of the Family Law Act states that:

1. An application under this Act for a decree of dissolution of a marriage shall be based on the ground that the marriage has broken down irretrievably.
2. ..a decree of dissolution of the marriage shall be made if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage.
3. A decree of dissolution shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed'

Sub-section 104(9) recognises the significance of the capacity to remarry in Australian family law. This states, with regard to recognition of overseas decrees, that

- Where a dissolution or annulment of a marriage is to be recognised as valid in accordance with this section, the capacity of a party to that marriage to re-marry in accordance with the law of Australia is not affected by the fact that the validity of the dissolution or annulment is not recognised under the law of some other jurisdiction.

This provision makes it quite clear that a civil divorce takes no cognisance of requirements of other jurisdictions. The question arises whether the Family Law Act can make the same provision in relation to religious divorce, thereby ensuring the complete freedom of both parties to religiously remarry.

A case has been made by some interested parties that the courts could legitimately refuse a civil divorce application where the religious divorce has been refused, on the grounds that maintenance of the marriage in a religious sense suggests the requirements of section 48 have not been met, that the relationship does not appear on its face to have 'broken down irretrievably' where a strong religious tie is retained and that the assumption could be made that there is a 'reasonable likelihood' of cohabitation being resumed. In fact, cohabitation may not have ceased where the 'divorced' wife remains as part of the husband's household. On this view, the existing legal framework is adequate to resolve at least one part of the problem, where the applicant refuses the religious divorce. The applicant cannot be considered serious if he or she applies for a civil divorce while refusing his or her partner a religious divorce and the matter perhaps could be left to the discretion of the court.

The question here is whether the refusal of a civil divorce, on the grounds of the existence of impediments for one party to the freedom it should provide, would ameliorate or exacerbate the existing problem. Where for example a wife seeks a divorce due to violence at home, and the husband resists it, she could have little to gain by the refusal of a civil divorce.

Section 104 sets out the requirements for recognition and non-recognition of a foreign divorce.

Australian case law

One of the early authorities on Muslim marriage law in Australia was the case of *Haque v Haque* (1962) 108 CLR 230. However this case appears to have little relevance today.

In the case of *Steinmetz* (1981) FLC 91-079, the Family Court of Australia used its power in relation to property settlement to 'encourage' the husband to give the wife a religious divorce. It took the view that the husband's refusal of a gett for the wife was vindictive, and that the husband was preventing the wife from remarrying and getting the benefit of support from a new husband. The Court therefore authorised the payment of a certain sum as maintenance, which would be reduced if the husband granted the wife a religious divorce.

This 'solution', however, has limited application. It would not be available where the couple had few resources, and presumably would not bother the male partner if he had sufficient resources to pay the higher sum comfortably. However, Strum states that "the limitation of this approach is that it does not secure the appearance by the parties to appear before the Beth Din nor their compliance with its directives". Whether this is an appropriate order to be made under the *Family Law Act*, and whether it would be supported by the marriage power is open to question.

In *Shulsinger* (1997) FLC 90-207 the Full Family Court stated that "it would be contrary to all notions of justice to allow the husband to seek and obtain a civil divorce while refusing to relieve his wife of their Jewish marriage and to say that the court could do nothing".

In the *Marriage of G* (unreported, 23.2.83, Melb.), Emery follows the approach supported by Strum that the appropriate order is one which "requires the party to submit to the Beth Din and to abide by its determination". An opposing view which Strum believes was incorrect, was taken in the *Marriage of J* (1980) FLC 91-911.

ALRC Report

In 1992 some of these problems were examined by the Australian Law Reform Commission (ALRC) in the course of its work on *Multiculturalism and the law* (Report No. 57, 1992). The majority recommended (para 5.42) that:

- ...the Family Law Act 1975 (Cth) should be amended to provide that, on application, in specified circumstances, a decree nisi does not become absolute until the court is satisfied on one of three grounds. In any other proceedings, except a proceeding relating to a child, in the specified circumstances, the court should have the power to adjourn the proceedings. The circumstances are
 - the applicant has removed, or has undertaken to remove, any impediments to the other party's remarriage that it is solely within the applicant's power to remove and
 - the applicant has asked the other party to remove a specified impediment to the applicant's remarriage that it is solely within the other party's power to remove and
 - the other party has not complied with the request.

Before the court may order that the decree nisi should become absolute, or continue to hear the proceedings before the end of the adjournment, the court must be satisfied of one of the following

- the impediment has been removed or

- the other party has genuine grounds of a religious or conscientious nature for not removing the impediment or
- there are circumstances because of which the decree nisi should become absolute, or the court should continue the hearing of the adjourned proceedings, even if the court is not satisfied of one of the matters above.

In its response, which was tabled with the Justice Statement in May 1995, the Government did not support this recommendation. The grounds it gave at the time were that:

- The Family Law Act 1975 provides for the administration of civil law including marriage and its dissolution. The Act makes no provision for regulation of religious law. To accede to the recommendation and import religious law for dissolution would significantly change the nature of divorce and create unintended consequences for the civil law in relation to divorce. It is an Australian legal tradition that civil and religious laws are, and should, remain separate.

Note: The ALRC recommendations appear to be based on the New York Domestic Relations Law, s253, which is described below.

DEVELOPMENTS IN OTHER JURISDICTIONS

The suggestion that couples who wish to divorce in Australia, and who have been married 'by their native marriage practices', should produce documented evidence that they have dissolved their marriage 'according to their native laws' before seeking an Australian divorce (Hammoud 1996:343) is consistent with developments overseas.

USA

In the United States, New York's *Domestic Relations Law*, s253 prevents the issue of a final judgment or annulment unless both parties to a religious marriage have filed statements to the effect that they have taken, or will take, all steps to remove any barriers to the other partner's remarriage or have waived the requirement. This law does not mention specific religions but instead states that a barrier to remarriage will be taken into account by the civil courts when equitable distribution of property is determined. To some extent, however, the coercive element in this arrangement is contrary to the purist view of the *gett*, which is that it should be voluntarily given. Moreover it could merely handicap an applicant where the respondent wishes to delay or prevent the divorce.

Another suggestion was a 'prenuptial agreement' to include matters for the religious court to decide, but this appears to have little relevance in Australia because of the way in which the *Family Law Act 1975*, the Child Support Scheme, and related legislation operates. However, Strum points out that a prenuptial agreement might be critical where the parties seek to specifically enforce the terms of the document in contract law.

Canada

Canadian law, by comparison, allows the court to reopen financial and custody settlements if one party is preventing the other's remarriage. The Canadian *Divorce Act 1985* gives the court the power to dismiss or strike out any applications, pleadings or affidavits from a spouse who has chosen not to remove any religious barriers to the remarriage of the other spouse. This enables the court to exert pressure on a respondent who withholds a religious divorce, through the possibility that the respondent's inability to bring material before the

court will result in a disposition with regard to property and children which disregards the respondent's interests. Insofar as the court can control actions by a respondent, this also could ensure that applicants who have been victims of violence are not additionally disadvantaged by refusal of religious divorce by a recalcitrant or vengeful partner.

In 1992, a majority of the ALRC favoured the Canadian approach, but expressed concerns over the extent of the discretion given to the Canadian courts. The ALRC felt that cases involving children should be decided on the basis of the best interests of the children, and that the court's capacity to take account of relevant matters in this regard should not be prejudiced (1992:110).

On the other hand, the best interests of the child could be adversely affected in any case by the prolongation of uncertainty and agnosc status for one parent, and by the possibility of one parent being unjustly deprived of property or other rights in return for the freedom to remarry. It could be argued that the best interests of any children require, in the first instance, the ability of the courts to prevent as far as possible any injustices or misuse of the system arising from religious divorce requirements.

United Kingdom

The new UK *Family Law Act 1996* has brought several changes, including the principle of 'no fault' divorce. The underlying theme of the new legislation is the intention that all financial arrangements as well as requirements with regard to the welfare of children will be complete before the divorce can be finalised, and that where possible cases be resolved through mediation rather than the courts. Section 9 of the Act requires production of documentary evidence of completion of financial arrangements.

In addition, where the marriage was recognised in civil law but involved a religious ceremony (a ceremony under s.26(1) of the *Marriage Act 1949* (UK)) so that the couple needed to cooperate for the marriage to be dissolved in accordance with that religion, s.9(3) provides that the court may, on the application by either party, direct that both parties must cooperate to obtain the religious divorce. There is no specific penalty for a failure to comply with the court's direction under s.9(3). The court also has the power to exempt the parties from these requirements in certain circumstances, including domestic violence, or alternatively to grant an order preventing a divorce where it would cause substantial hardship.