



FAMILY LAW COUNCIL

**Cultural-community Divorce and the
Family Law Act 1975:**

A proposal to clarify the law

**A Report to the Attorney-General prepared by the
Family Law Council**

August 2001

Executive Summary.....	3
Part One: Introduction.....	6
Origins of the Report.....	7
Australian Law Reform Commission Report: Multiculturalism and the Law.....	8
Developments Since 1992.....	8
Government Response to the ALRC Report.....	8
Islamic community.....	9
Integrity of Court decisions.....	9
Best interests of the child.....	9
Effectiveness of civil divorces.....	9
Human Rights Law.....	9
Reference from the Attorney-General to the Family Law Council.....	10
Letter of Advice to the Attorney-General 1998.....	10
Family Law Council Issues Paper (October 2000).....	10
Consultations.....	11
Constitutionality.....	12
Terminology - ‘Religious Divorce’ or ‘Cultural-community Divorce’?.....	13
Structure of the Report.....	14
Part Two: Summary of the Difficulties.....	15
Divorce Difficulties in the Islamic community.....	15
Suggestions to assist in resolving difficulties.....	18
Pre-nuptial agreements.....	18
Cross-Cultural Mediation.....	18
Endorsing court papers.....	19
Divorce Difficulties in the Jewish community.....	20
Suggestions to assist in resolving difficulties.....	21
Part Three: Present Law.....	22
Religion and the law generally.....	22
Divorce law.....	22
Financial adjustment law under the Family Law Act.....	23
Summary.....	23
Part Four: Some Possible Approaches.....	25
Introduction.....	25
Overseas alternatives.....	25
Considering the options.....	26
Part Five: Proposal for Legislative Change.....	27
Introduction.....	27
Preferred Option.....	27
Proposal for Legislative Reform.....	28
Discussion of the Proposal.....	29
First element - decree absolute contingent on proof of removal of barriers to re-marriage.....	29
Second element - Order to appear before a Tribunal.....	30
Third element - Maintenance.....	30

Cultural-community Divorce and the Family Law Act 1975

Fourth element - Enforcement of pre-nuptial agreement relating to removing barriers to re-marriage	31
Definitions - 'tribunal'	31
Drafting an Amendment	31
Possible Objections to Legislative Change	31
Some Arguments for Legislative Change	33
(i) Best Interests of children.....	33
(ii) Fairness to Parties.....	34
(iii) Efficacy of Family Law System.....	34
Part Six: Conclusion.....	36
Recommendations	37
Selected References.....	38
Appendix A: List of Organisations/Individuals receiving letters Inviting Submissions to the Family Law Council in Response to <i>Issues Paper on Civil and Religious Divorce</i> (October 2000).....	40
Appendix B: List of Submissions to the Family Law Council in Response to <i>Issues Paper on Civil and Religious Divorce</i> (October 2000).....	43
Appendix C: Schedule of Consultations by the Family Law Council in Response to <i>Issues Paper on Civil and Religious Divorce</i> (October 2000).....	44
Appendix D: Summary of Shulsinger's case	45
Appendix E: Extracts from cases on financial adjustment.....	52
MARRIAGE OF STEINMETZ (1980).....	52
MARRIAGE OF WOOLLEY (1981).....	52
Appendix F: Extract from Australian Law Reform Commission, Report No 57	54

Executive Summary

1. Australian Jewish and Islamic communities experience divorce difficulties which are superficially similar in consequence but distinctly different in context as a result of each of their cultural-community's divorce rules differing from those of the Australian family law system.
2. The similarity is that under both cultural-community laws a partner can be held in a cultural-community marriage against their will.
3. Speaking at the most general level, what is common to both sets of cultural-community divorce laws is that the power to divorce is vested in the hands of one or both of the marriage partners concerned. Divorce is not a matter of external edict or ecclesiastical judgment. The absence of cooperation or good-will can therefore obstruct a cultural-community divorce indefinitely while allowing a divorce under the *Family Law Act 1975* to proceed.
4. This may allow the stronger or more determined spouse to withhold the required action or document which cultural-community divorce law requires. Children may become innocent victims, and property traded-off, in the pursuit of freedom.
5. The divorce difficulties are recognised by the cultural-communities themselves. Council noted that the calls for assistance that were made by the communities in submissions and during consultations reflect a high degree of consensus about the need for action, and representations made to Council uniformly embraced the need for and desirability of assistance with divorce difficulties.
6. A degree of impatience was noted on the part of the affected cultural-communities about the length of time the divorce difficulties had been under consideration by Government, without subsequent action, given that the Australian Law Reform Commission released a major Report in this area in 1992.
7. While recalcitrant spouses may be either men or women, it appears the majority of aggrieved spouses are women.
8. To properly appreciate the context of each cultural-community divorce law one may consider a complex and contested set of religious, historical and legal principles and commentaries.
9. As each cultural-community experiences different difficulties these need to be addressed by a range of different solutions.
10. The Commonwealth could assist with:
 - (a) legislative amendments to the *Family Law Act*; and
 - (b) culturally specific mediation and counselling facilities.
11. While not without doubt, it appears there are no insuperable constitutional barriers to legislative amendments of the type described in this Report.

12. The differences between each cultural-community's divorce rules impact on the degree to which Commonwealth legislative change could assist each community. Legislative amendments could seek to make civil divorces more effective by linking them to cultural-community procedures.
13. However, while the Commonwealth could make a significant contribution, it cannot remedy all the difficulties arising as a result of the separate procedures for civil and cultural-community divorces. Some aspects of the difficulties can only be addressed by way of institutional change within the particular cultural-community and changing attitudes at the individual level.
14. Essentially, submissions and consultations suggest that legislative changes could significantly diminish the difficulties experienced amongst the Jewish community.
15. In contrast, submissions and consultations suggest that the unresolved status of the Islamic divorces granted in Australia, and the absence of a Sharia court in Australia, are significant obstacles to achieving equally beneficial results in the Islamic community.
16. The proposals put forward in the joint submission of the Executive Council of Australian Jewry and Organisation of the Rabbis of Australasia (ECAJ/ORO) build on their submission provided to the Australian Law Reform Commission in 1992. It reflects extensive research about and analysis of legislation adopted in several overseas countries. Moreover, it is also the culmination of extensive consultations within the Jewish community. In this respect, the proposal generally speaking represents a 'best practice' model of how the Jewish community would wish the Commonwealth to assist with resolving their difficulties.
17. Submissions from the Islamic community contain more diverse viewpoints. Far less consensus exists on what the Commonwealth could do to assist with the Islamic community's divorce difficulties.
18. No opposition was expressed or predicted during the consultations to implementing any of the options outlined in the Issues Paper. The Islamic representatives conceded that notwithstanding that their difficulties were different to those in the Jewish community, insofar as they could be addressed, they merited Governmental action.
19. It appears that so long as courts exercising jurisdiction under the *Family Law Act* are not vested with specific discretionary powers to properly take into account the separate systems for divorce that prevail in the wider Australian community this may have the potential to undermine or compromise the integrity of some of their orders.
20. The Council sees merit in the proposition that courts exercising jurisdiction under the *Family Law Act* should have discretionary powers that afford some recognition of the adverse impact the operation of cultural-community divorce laws may have on their deliberations.

Cultural-community Divorce and the Family Law Act 1975

21. Council notes that consultations suggest that a greater degree of cultural sensitivity on the part of the judiciary and counselling staff may assist in resolving some divorce difficulties.

The Council recommends that:

1. the *Family Law Act* be amended to incorporate the substance of the proposal set out in this Report in Part 5 in order to provide courts exercising jurisdiction under the Act with a range of discretionary powers to assist in matters involving cultural-community divorce; and
2. service provision be enhanced in matters involving cultural-community divorce to ensure culturally and linguistically appropriate mediation and counselling.

Part One: Introduction

1.1 For some people in Australia being granted a civil divorce under the Family Law Act 1975 will not leave them in a position where they believe they can properly re-marry. This is because they have not only been married in a ceremony laid down in the Commonwealth's Marriage Act 1961, but have also been married in a ceremony carried out according to the particular requirements of an ethnic or religious set of traditions.

1.2 A decree of dissolution of marriage under the Family Law Act ('the Act'), what is termed here a civil divorce, will only affect the marriage which came into being under the Marriage Act.¹ A marriage contracted outside the Marriage Act will not be affected by a decree of dissolution made by a court exercising jurisdiction under the Act.

1.3 The capacity to re-marry is obviously important. But as important as the capacity to re-marry may be to a person in this situation, there may be other ways in which a person could encounter difficulties by not being able to be divorced both under the Act and at the same time be divorced according to the particular requirements of an ethnic or religious set of traditions. For example where one party has the power to grant or withhold a religious or cultural-community divorce (see 'Terminology' below), this power:

can be used as a tool to apply emotional and financial pressure on the other party in negotiations between them about the custody of, and access to, children, spousal maintenance and property.²

1.4 And it can affect the lives of others. For example, if a woman has children with another partner after a civil divorce but without obtaining a Jewish divorce, the children may be stigmatised within the Jewish community on the basis that the mother was not considered to be divorced. They:

will then be subject to very severe disabilities, including a prohibition on marriage except to another mamser [the offspring of an adulterous union].³

1.5 How many people who may have such 'dual marriages' in Australia is not known, and the incidence of such divorce difficulties has not been ascertained.⁴ However, the anecdotal evidence brought to the notice of the Family Law Council ('the Council') is that for those who find themselves caught between what are

¹ While 'marriage' is not defined in the Family Law Act itself, the Marriage Act provides clear rules for the creation and identification of valid marriages.

² Australian Law Reform Commission, Report No 57, *Multiculturalism and the Law* (1992), Chapter 5, paragraph 5.40

³ Executive Council of Australian Jewry and Organisation of the Rabbis of Australasia (ECAJ/ORA) Submission, page 2

⁴ It was suggested that there may be approximately 25-35 cases each year in the Australian Jewish community (i.e. on-going - not necessarily new cases): National Council of Jewish Women of Australia, Consultations - Melbourne 10 July 2001. The only 'hard figure' found in the literature refers to the New York Jewish community. In 1984 the number was estimated to be some 15,000 (I. Haut, *Divorce in Jewish Law and Life*, 101 (1983).

effectively two discrete legal systems, the consequences of being divorced under the rules of one system and not being able to be divorced in the other, can be emotionally, financially, and spiritually debilitating.

1.6 The subject of the reference from the Attorney-General can be formulated a number of ways, reflecting different emphases and perhaps evoking different responses in consequence. For example, in the Council's *Issues Paper on Civil and Religious Divorce*⁵ the question was posed as being to what extent, if at all, should the law seek to control or influence the behaviour of people in relation to cultural-community divorce? Thus an outward individual-centred focus is brought to the fore, the right to control an individual's behaviour.

1.7 In contrast the question could be phrased to what extent, if at all, should courts exercising jurisdiction under the Act seek to make civil divorce effective beyond severing the formal legal bonds of civil marriages?⁶ Here, one's mind is directed to the deliberations of courts exercising jurisdiction under the Act, on how they ought to apply the law and do justice in an effective manner.

1.8 Put another way, after it has been established that a marriage has broken down irretrievably, should courts exercising jurisdiction under the Act seek to create a situation which matches the formal declaration of legislative intent in section 59 of the Act:

Where a decree of dissolution of marriage under this Act has become absolute, a party to a marriage may marry again.

1.9 Here attention is drawn to a purposive interpretation of the law, what was intended by the legislature. And one argument would be that, on such a reading, courts exercising jurisdiction under the Act should remove, insofar as they are able, constraints to re-marriage arising from marriages outside the Marriage Act, that prevent a person from re-marrying.

Origins of the Report

1.10 Australia is not alone in confronting the problem of legal systems dealing with divorce which do not align. And the Council is not the first Australian body to examine the issue.

1.11 In Australia, this Report follows on from the much larger body of work undertaken in the early 1990s by the Australian Law Reform Commission⁷, and represents the culmination of several other elements of the Council's examination of the issue. The Family Law Council's *Issues Paper on Civil and Religious Divorce* (October 2000) provided background to the problem, drawing on both Australian and overseas sources. The way in which the issue has been addressed in Australia is summarised below.

⁵ Family Law Council, *Issues Paper on Civil and Religious Divorce*, October 2000

⁶ What is meant by effective in this context is placing the parties in such a position that they are in fact, rather than at law, fully free to re-marry.

⁷ Australian Law Reform Commission, Discussion Paper 46, *Multiculturalism: Family Law*, (1991), Chapter 3. Paragraphs 3.55-3.70; Report No 57, *Multiculturalism and the Law* (1992), Chapter 5, paragraphs 5.31 – 5.42.

Australian Law Reform Commission Report: Multiculturalism and the Law

1.12 The Australian Law Reform Commission (ALRC) invested considerable resources over a significant period of time in the area of what it aptly, but on one view somewhat narrowly, termed in the 1992 ALRC Report 'removing barriers to remarriage'. This investment of time, money and effort is reflected in the scope and depth of analysis contained in its Report, and as such it merits close scrutiny.

1.13 The ALRC Report focussed in the main on the problems arising out of divorce proceedings encountered in the Jewish community and the ways in which they had been addressed by the Family Court.

1.14 The proposal mooted by a majority of the Commission in the Discussion Paper which preceded the ALRC Report was that courts exercising jurisdiction under the Act should have a discretion to adjourn an application for a divorce on the ground that the applicant had not done everything within his or her power to remove any religious barriers to the spouse's remarriage.

1.15 However, by the time the ALRC Report was drafted a majority of the Commission had come to the view that the proposal did not go far enough. They supported the Canadian approach which vests the court with power to dismiss any application, and strike out any pleadings and affidavits, filed by a spouse who has failed to remove all religious barriers to the remarriage of the other spouse.⁸ However, concerned at the breadth of the discretion in the Canadian legislation, they would confine the discretion to:

- adjourning proceedings; or
- where divorce proceedings are on foot, to order that a decree nisi does not become absolute until the court is satisfied of certain matters.

Developments Since 1992

1.16 The ALRC Report was a major step forward in terms of recognising the problem and in proposing a solution. However, the passage of time since 1992 and Council inquiries have highlighted some areas which could be revisited, and some areas in which the ALRC Report may not have gone far enough. Some of these points are outlined below and will be taken up in greater detail in the body of the Report.

Government Response to the ALRC Report

1.17 In its response, which was tabled with the Justice Statement in May 1995, the Government did not support the ALRC 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

⁸ Report No 57, *Multiculturalism and the Law* (1992), Chapter 5, Paragraph 5.38

Australian legal tradition that civil and religious laws are, and should, remain separate.

Islamic community

1.18 The position of the Islamic community received less analysis than it might have done. A footnote in the ALRC Report pointed out that a similar problem arises for Muslim women whose divorce may not be recognised within the community until the husband grants her a religious divorce.⁹

Integrity of Court decisions

1.19 The Report did not develop the argument that so long as one party retained the power to grant or withhold a cultural-community divorce this may compromise the integrity of the decision-making powers of courts exercising jurisdiction under the Act.

Best interests of the child

1.20 The best interests of children were not explicitly considered. In practice, it appears arrangements ordered by the court could be subsequently undermined or circumvented because of the unconscionable use of bargaining power by one party. This was an issue adverted to in the Council's 1998 Advice to the Attorney-General, where it was noted that:

the best interests of the child could be adversely affected in any case by the prolongation of uncertainty and *agunot* status [literally a woman 'chained' to an estranged husband] 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.¹⁰

Effectiveness of civil divorces

1.21 A closely related argument, and one developed in American jurisprudence in this area, relates to the need to make secular civil divorces effective and equitable - effective so as to enable men and women who are divorced to be free to remarry - and equitable in terms of not permitting a party to benefit from a decree severing the legal ties of marriage if the Court knows that the party seeking that relief is preventing the other party from remarrying.¹¹

Human Rights Law

1.22 Developments in Human Rights law since the ALRC investigations, and its greater prominence in public debates, provides another perspective to the problems arising in this area. The debate about legislation concerning Female Genital

⁹ *ibid*, Paragraph 5.31

¹⁰ Advice to Attorney-General dated 3 August 1998, Attachment A, <http://www.law.gov.au/flc/letters/crdivorce.html>

¹¹ eg Amicus Curiae brief in *Becher v Becher*, page 7, New York Supreme Court, Appellate Division - Second Department (1997) 245 A.D 2d 408

Mutilation is an example of how human rights principles can be applied to an issue that intersects legal and cultural boundaries.¹²

Reference from the Attorney-General to the Family Law Council

1.23 In 1997 the Attorney-General asked the Council to:

- (a) examine the difficulties that may arise when one party, who under religious law is entitled to grant or refuse a religious divorce, refuses to do so in circumstances where a divorce is granted under civil law; and
- (b) advise him on whether some change of law is appropriate to address these difficulties.

Letter of Advice to the Attorney-General 1998

1.24 The Council provided a letter of advice on the subject to the Attorney-General on 30 June 1998. It took the view that the difficulties arose “from the observance of religious practices and not from any shortcomings in the Family Law Act” and recommended that the Act should not be amended.¹³

1.25 It based this recommendation on what was then considered to be the constitutional uncertainty of the proposed amendment, broader policy concerns, and the practical difficulty of drafting the amendment.

Family Law Council Issues Paper (October 2000)

1.26 In October 2000 the Council prepared an Issues Paper, seeking submissions from some thirty Jewish and Islamic groups on a range of issues concerning this subject (see Appendix A for the list of organisations). The Issues Paper drew on further comparative research in the area and noted that further advice on the constitutionality issue provided a more positive outlook for proposed legislative amendment.

1.27 The Issues Paper noted that in considering what recommendations to make, Council would have to take into account a range of matters. And, in order to stimulate discussion, the Issues Paper indicated three general areas of inquiry that it considered were likely to need consideration in the following terms:

(i) Matters of principle

It is important not to allow details of particular proposals to deflect attention from issues of principle. Some may think that it is obviously unfair that one spouse should be able to obtain a civil divorce and yet leave the other spouse in

¹² Family Law Council, *Female Genital Mutilation - A Report to the Attorney-General*, June 1994, Paragraphs 4.01-4.17

¹³ It also noted the argument 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...”: Advice to Attorney-General dated 3 August 1998, <http://www.law.gov.au/fic/letters/crdivorce.html>, Attachment A, page 9.

a position of being unable to remarry. This view might be especially strongly held having regard to the differences between the rights of men and women that seem to exist under some religious laws. Arguably, the law should not permit or encourage a situation in which there is apparent discrimination on the ground of sex.

On the other hand, it might be argued that any of the proposed changes in the law would violate the freedom of people to practise their religion. Further, it might be argued that the proposed changes would have the effect of allowing a person to participate in a religion and have the benefits of doing so, yet depart from the rules of the religion when it suits them to do so.

(ii) Australian demographics and experience

Council sought information and comments about the extent to which the issues actually arise in Australian society today. While the issues of principle would arise even if only a small number of people are affected, the numbers of religions involved, and the numbers of people involved, might well be relevant in working out an appropriate response. It may be, for example, that consultative and educational approaches, with the collaboration of the relevant religious bodies, might be more constructive than using the law as a primary vehicle. Council would therefore like to know as much as possible about the relevant Australian experience.

If only because religious laws sometimes give different rights to men and women, Council is anxious to canvass opinions and learn of relevant experiences both of men and of women.

(iii) Experience of other laws

Obviously, it would be helpful to have any available information about the way the Canadian and New York laws have worked in practice. Similarly, Council would be interested in the operation of any other laws dealing with the problem.

1.28 This Report builds on the information provided in the Issues Paper and further explores some of these, as well as other areas of inquiry.

Consultations

1.29 Given the widespread consultations undertaken previously by the ALRC, Council decided it was appropriate to undertake targeted consultations in this phase of the project. Hence, the Issues Paper was circulated to some thirty representative Australian Islamic and Jewish organisations and individuals that Council believed had a special interest in the topic. Recipients of the Issues Paper were identified as a result of wide-ranging inquiries directed to, for example, the Department of Immigration and Multicultural Affairs.

1.30 Six submissions were received (Appendix B - list of submissions). Council decided that those organisations and individuals who had put in a submission should be invited to consultative meetings to explore and clarify some of the issues raised in

the submissions. As a result, meetings were held in Melbourne and Sydney in June and July 2001 (Appendix C - schedule of consultations).

1.31 While the Issues Paper was not publicly released on the Council's website, both the Issues Paper and this Report have been made available on the Council's website to assist community consideration of the issues raised in both documents, and the particular legislative proposal set out in this Report.

Constitutionality

1.32 In Australia, it is necessary to consider whether any proposed change of law would be valid under the Constitution. Briefly, two issues arise. The first is whether the proposed law falls within an area over which the Commonwealth has legislative power. In the present case, it may be that most or all of the proposals would comfortably fall within the Commonwealth's power to make laws about marriage.¹⁴

1.33 The second issue is whether the proposed change would violate s.116 of the Constitution. This section provides:

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 or public trust under the Commonwealth.

1.34 Council has had the benefit of considering two opinions from the Chief General Counsel. The first opinion was given on 30 April 1998. The tenor of this opinion was reflected in Council's letter of advice to the Attorney-General dated 30 June 1998.

1.35 A further opinion was given by Chief General Counsel on 3 March 1999. This opinion considered a somewhat similar proposal to the New York statute, Domestic Relations Law, s.253. That law prevents a party from enjoying the benefits of a divorce, where the marriage was solemnised in a religious ceremony, unless they undertake to the court not to impose a barrier to the other spouse's remarriage by preventing the religious dissolution of the marriage.¹⁵

1.36 The Chief General Counsel advised that it is probable that amendments to give effect to the proposal could validly be made, provided that:

- the provisions were broadly framed - focussing on issues of 'equity and effectiveness';
- were directed to ensuring the removal of impediments to remarriage generally, in the sense of providing a general power to ensure the practical efficacy of civil divorce proceedings (rather than having a purpose linked only to the performance of a religious observance); and
- would not involve the Court in itself ordering the performance of a religious act or determining what specific religious acts are required to be performed.

¹⁴ s.51(xxi) Commonwealth Constitution.

¹⁵ See Appendix F for further detail - quoting the ALRC Report No. 57

1.37 The opinion concluded that:

“(a) a law that empowered a court to withhold a decree absolute until a party took steps to ensure that each party would be free to remarry following a divorce would probably be valid and not contrary to s.116.

(b) In this regard:

(i) the law should not empower the court itself to order the performance of a religious act;

(ii) the law should provide for judicial remedies to be withheld until each party has taken, or provided an undertaking to the court to take, all steps within their power to remove all barriers to the other party's remarriage.”¹⁶

1.38 The opinion also considered that a law along the lines of s.55A of the *Family Law Act 1975* would probably be valid (s 55A requires that proper arrangements have been made for children before a decree nisi may become absolute).

1.39 On the subject of discrimination the opinion suggested that a general provision allowing a court to withhold a divorce until a party took steps to make the divorce effective for all purposes, if valid under s.116 of the Constitution, is unlikely to offend the provisions of the International Covenant on Civil and Political Rights or the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.

1.40 Council's task is to provide advice on family law. It is noted, however, that the question is of some difficulty, and recommendations have been made taking account of the difficulties highlighted in the two opinions from the Chief General Counsel.

Terminology - 'Religious Divorce' or 'Cultural-community Divorce'?

1.41 While the term 'religious divorce' has been used in previous discussions in this area and at times will be used in this paper, it is acknowledged that there are valid arguments for maintaining that, for example, in the Jewish community, the nature of the ceremony is essentially secular. This was reflected in the submissions received and re-iterated in consultations.¹⁷ To reflect this view the term 'cultural-community divorce' is considered a more appropriate term, capturing both the notion of a community of believers and also a community sharing cultural norms.

¹⁶ Chief General Counsel, "Constitution, S.116 and Proposals on Religious Divorce - Further Opinion", 3 March 1999, page 8.

¹⁷ eg. ECAJ/ORR Submission: 'Jewish divorce does not involve any religious observance, or the denial of any such observance...' p2 of their Proposal. However, the proposition that Jewish marriage and divorce are purely contractual arrangements between private individuals is not uncontested. For example the form of these arrangements appears to be set by Rabbinic interpretation of biblical verses: see Freedman, E, 'Religious Divorce in Israel', *International Family Law*, April, 2000, 20.

Structure of the Report

1.42 Part Two provides a summary of the different but overlapping divorce difficulties experienced by the Islamic and Jewish communities in Australia.

1.43 Part Three outlines how the Family Court had sought to deal with Jewish divorce procedures using powers that, while not drafted with such issues in mind, were judged to be sufficiently elastic to accommodate particular strategies. The various Australian attempts to address these difficulties using existing legislation have not been greeted with unanimous support.

1.44 There are several relevant overseas legislative models that Australia could look to.¹⁸ Part Four describes how other jurisdictions, such as New York and Canada, sought to alleviate the effects of such misuse of power by introducing specific legislation.

1.45 Part Five sets out what Council considers to be an appropriate package of legislative reforms to assist in resolving some of the difficulties evident in both Islamic and Jewish communities. It also outlines some objections that could be made to legislative change and also arguments for proceeding with legislative change.

1.46 Part Six presents Council's conclusions and recommendations on how best to deal with the divorce difficulties considered in this Report.

¹⁸ Jacobus, Helen, 'Getting together', *Jewish Chronicle*, August 11, 2000 summarises the approaches of New York, Canada, Australia, South Africa, Israel, England, and Scotland. Australia is the exception in not providing courts with specific powers to deal with such divorce difficulties.

Part Two: Summary of the Difficulties

2.1 The Jewish and Islamic communities experience different divorce difficulties as a result of their community's differing divorce rules, and the inter-action of these rules with the Australian family law system.

2.2 The literature dealing with their respective family law practices and jurisprudence is voluminous and subtle in equal measure, and hence what follows can only serve to illuminate some of the general background to the arguments and discussions contained in this Report.

Divorce Difficulties in the Islamic community

2.3 Australia is home to over one hundred thousand Muslims. Australia's Muslim community has grown steadily over recent decades:

Table 1: Religious affiliation, selected years, Australia

Religions	1947 %	1971 %	1981 %	1996 %
Total Christian	88.0	86.2	76.4	70.9
Islam	0.0	0.2	0.5	1.1
Judaism	0.4	0.5	0.4	0.8
Other non-Christian	0.0	0.1	0.4	1.5
Total non-Christian	0.5	0.8	1.4	3.5
Inadequately described	0.2	0.2	0.5	0.3
No religion	0.3	6.7	10.8	16.6
Not Stated	10.9	6.1	10.9	8.7
Total population	100.0	100.0	100.0	100.0
Total population (000)	7579.4	12755.6	14576.3	17752.8

Source: Censuses of Population and Housing

2.4 Australian Muslims come from a diverse range of countries, such as Turkey, Indonesia, Egypt, Syria and Pakistan.¹⁹

2.5 Muslims in Australia may need to undergo two different ceremonies to contract a lawful marriage in the eyes of both their own cultural-community and also to comply with the Australian legal system.²⁰ The religious Muslim (*nik'ah* - literally meaning 'union of the sexes') ceremony is governed by the *Shari'a* (Islamic law), and the civil ceremony is prescribed under the *Marriage Act*.²¹

¹⁹ Freeland, R, 'The Use and Abuse of Islamic Law', *The Australian Law Journal*, Volume 73, 130

²⁰ Hasan, A, 'Marriage in Islamic Law - A Brief Introduction', March [1999] *Family Law*, 164

²¹ Mirza, Q, 'Islam, Hybridity and the Laws of Marriage', *The Australian Feminist Law Journal*, 2000 Volume 14, 3

2.6 Islamic divorce is a private matter that need not involve courts or ceremony. It has been described in the following terms:

Either party may initiate the divorce, but while a woman must usually go to an Islamic court, a husband may simply divorce his wife by telling her that they are henceforth divorced.²²

2.7 The husband may initiate divorce by pronouncing the formula of repudiation known as *talaq* (which means literally to snap off or separate). Scholars and jurisdictions differ as to the requisite formalities before an irrevocable divorce occurs, for example whether some period of time must elapse between each pronouncement of *Talaq*, or the need for witnesses.²³ The general principle however is that *talaq* spoken three times by the husband effects divorce. The first two times *talaq* is pronounced it may be withdrawn, however the third time it is pronounced it is irrevocable.²⁴

2.8 Islamic law, while it does not encourage or recommend polygamy, does permit it. Hence, there is no waiting period before the husband can re-marry. The wife must usually wait three months after *talaq* has been spoken three times before re-marrying (this period is known as *iddah*).²⁵

2.9 While the husband may divorce his wife extra-judicially when he considers the marriage has broken down, the wife may, according to some schools of Islamic law, approach a religious court and petition it for a grant of divorce.²⁶

2.10 There are also differences of opinion about the right of a Muslim cleric in Australia, as opposed to a religious court, to grant a divorce. The Lebanese community accept that he has this power on the condition the wife gives back her dowry. But this view is not shared by all. So the granting of a divorce by a Muslim cleric in Australia is not recognised by some in the Australian Muslim community.²⁷

2.11 The basis of this type of divorce (known as *khula'*) is that:

The wife must “buy her freedom” by returning something of value to her husband. Normally this is whatever she has received by way of *mahr* [a compulsory payment from the bridegroom to the bride at the time of marriage], though some jurists hold that the husband can demand more than this.²⁸

²² Freeland, op cit, 131

²³ Hussain, J, *Islamic Law and Society*, The Federation Press, 1999, 87

²⁴ Hinchcliffe, D, ‘Divorce in the Muslim World’, *International Family Law*, May 2000, 63

²⁵ Hussain, 70

²⁶ For example ‘...the Hanafi school, which is the largest of the schools of Sunni Islam...denies women the right to terminate a marriage once that marriage has been consummated...’: Hinchcliffe, D, ‘Divorce in the Muslim World’, *International Family Law*, May 2000, 64 but cf Jamal Nasir in Graham and Trotman, *The Islamic Law of Personal Status*, 1986, citing modern legislation in several Middle Eastern countries.

²⁷ Consultations, Muslim Women’s National Network, Sydney 7 June 2001: Ms Jamila Hussain noted that an experienced Islamic scholar consulted at the University in Kuala Lumpur did not agree with this interpretation.

²⁸ Hussain, 93

2.12 In Australia there is no religious court (known as the Sharia Court). Hence, in Australia, the observation that the wife must 'depend on the mercy of her husband' is particularly apposite.²⁹

2.13 Submissions and consultations were unanimous in the view that the nub of the difficulty for the Islamic community is that there is no Sharia Court in Australia. The absence of a Sharia Court in Australia means that religious divorces are not always recognised in the Islamic community.

2.14 Therefore the difficulty arises in the Islamic community chiefly where the wife has sought a civil divorce without the husband pronouncing Talaq. In that case, the wife's only recourse is to obtain a divorce from the Sharia court. In the absence of such a court in Australia her options are to go to a country where there is a Sharia court or to appoint a proxy to go in her place - both of which are expensive, time-consuming and complex undertakings. In these circumstances a vindictive husband may abuse his position of power to achieve his own ends in negotiations.

2.15 This means that, for example, to address the divorce difficulties in the Lebanese Muslim community requires the establishment of a Sharia Court in Australia. This requires the cooperation of the Government of Lebanon. Despite several high-level approaches to Lebanese authorities the indications are not positive that such a court will be established.³⁰

2.16 While the situation in other countries with large Lebanese migrant communities such as Canada and the US has not been officially confirmed, Council was informed that a Sharia representative was to be sent to Canada and that the problems encountered in Australia do not arise there.³¹

2.17 A further difficulty is that there is an increasing incidence of cross-ethnic group marriages in the Islamic community leading to more complex issues of recognition. In these circumstances it is understood that a Sharia Court would need to incorporate Imams from the various communities so that decisions would be recognised by the relevant communities.

2.18 Therefore, Council concluded that the establishment of a Sharia court in Australia would alleviate many of the divorce difficulties experienced in the Islamic community. Of course, the resolution of this impasse lies with the Islamic community. It is clearly not a matter for the Australian Government.

2.19 During consultations the various legislative proposals raised in the Council's Issues Paper - such as adjourning, dismissing, or imposing maintenance payments - were not seen as raising difficulties according to Islamic jurisprudence. These options were not considered to be 'duress'.

²⁹ *ibid*, 91, quoting Ashgar Ali Engineer, *The Rights of Women in Islam*, 1992, p.126

³⁰ The Lebanese Muslim Association took steps to sponsor a retired judge from the Lebanese Sharia Court to migrate to Australia, but this plan did not come to fruition: Consultations with Lebanese Muslim Association, Sydney, 7 June 2001

³¹ Communication from the Lebanese Muslim Association.

2.20 The consultations indicated that the Islamic community would be likely to welcome any moves to assist people experiencing divorce difficulties.

Suggestions to assist in resolving difficulties

2.21 Apart from the recognition of the centrality of the establishment of a Sharia court as a means of addressing the difficulties described above, other suggestions that might assist in this area were made in submissions and during consultations. These are described below.

Pre-nuptial agreements

2.22 The possible application of pre-nuptial agreements were raised during consultations. The recently introduced binding financial agreement procedures were mentioned as a possible aid in resolving some of the problems.³² In Malaysia such agreements are used and allow the wife to divorce easily if the husband is at fault. A Sharia court will grant a divorce on the basis of such a pre-nuptial agreement.³³

2.23 The Act makes provision for agreements before, during and after the dissolution of a marriage. The Act specifies two broad matters about which the parties to an agreement can agree. They are:

- (i) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and before the dissolution of the marriage, is to be dealt with; and
- (ii) the maintenance of either of them.

2.24 However, a financial agreement may contain matters incidental or ancillary to those mentioned in (i) and (ii).³⁴ It may therefore be possible, depending on the drafting of the particular financial agreement to utilise these provisions to assist with some divorce difficulties.

2.25 The Council acknowledges that there may be a role for such agreements in this area but in light of its recommendations has not felt it necessary at this time to reach a concluded view on the suitability or appropriateness of using financial agreements to assist with divorce difficulties.

Cross-Cultural Mediation

2.26 In the course of consultations it was suggested that courts exercising jurisdiction under the Act should be more culturally sensitive and be aware that, regardless of Australian law, where there is a clash between Australian law and Islamic law, there will be strong community pressures to abide by the tenets of

³² *Family Law Act 1975*, Part VIIIA, ss 90A-90L

³³ Consultations, Muslim Women's National Network, Sydney 7 June 2001

³⁴ See ss. 90B(3), 90C(3), 90D(3)

Islamic law. It was suggested that difficulties are best resolved by cross-cultural mediation.³⁵

Endorsing court papers

2.27 During consultations it was noted that if the Australian Government required a cultural-community divorce to be proven before a civil divorce was granted then suitably endorsed court papers may be recognised by the Lebanon authorities as constituting an effective cultural-community divorce.

2.28 This would mean that where the husband refused to pronounce talaq the wife could approach the *Imaam* (a person who leads religious prayers) and have a cultural-community divorce granted. These divorce papers, it was suggested, may be endorsed by a court exercising jurisdiction under the Act, on the assumption that this would persuade the Lebanese Consulate to accept them as official documents and thereby accept this divorce. This divorce would then be recognised as effective under the *Family Law Act* and according to Islamic law.³⁶

2.29 This however may be problematic given:

- the uncertainty about the likelihood of such recognition in Lebanon;
- the question as to whether, irrespective of what the FCA may or may not declare, such a divorce is recognised by the Lebanese community themselves; and
- the condition for having a cultural-community divorce granted may cause concerns.

2.30 As the Council understands it, the Islamic concept of marital property rights essentially gives each party to a marriage an entitlement to take out of it any property that party brought into it, plus anything acquired by that party during the marriage. In the traditional situation where women married very young and did not work outside the home, this may have meant that the wife's only property was *mahr* or anything she acquired through inheritance. However today, in Muslim communities women work before and after marriage and can acquire their own property. The matrimonial home may be put in the names of both spouses jointly, thereby giving the wife her own share of the property.

2.31 Where a civil divorce has been obtained and the wife wishes to have a cultural-community divorce granted she may approach the *Imaam* and will be met with the condition that she return any property not received in accordance with Islamic law. Or where divorce is granted in contemplation of a civil divorce the cultural-community divorce may be conditional on returning any property awarded to her by a court exercising jurisdiction under the Act. If this was not done the cultural-community divorce can be cancelled.

2.32 This scenario would present a court exercising jurisdiction under the Act with the difficulty that it may be seen to be, in some degree, undoing the effect of its own orders.

³⁵ Consultations, Muslim Women's National Network, Sydney 7 June 2001

³⁶ Consultations: Lebanese Muslim Association, Sydney 7 June 2001

Divorce Difficulties in the Jewish community

2.33 The ALRC summed up the position as follows:

Under Jewish law, a divorce can be accomplished only by the parties. It is effected by the formal delivery by the husband and the acceptance by the wife of a Bill of Divorcement (a 'gett') under the supervision of a Rabbinical Court, the Beth Din. The parties are divorced and free to marry again after the gett has been delivered and accepted.³⁷

2.34 Hence, unlike the *talaq* in Islamic law, the *Gett* is a procedure which takes place at a specific place and it is also a prescribed document. However, while it is customary for the procedure to take place under the supervision of the Beth Din, it is not considered to be a religious procedure. The *Gett* document is hand-written by a scribe in Aramaic in the prescribed form. The *Gett* signifies the Jewish divorce.³⁸

2.35 A Jewish couple is not considered divorced until they have satisfied the requirements of the *Gett*. The *Gett* can only be granted by the husband and must be voluntarily accepted by the wife.³⁹ This means that 'although the parties may be legally free to remarry after a civil divorce, they very often are not free to do so as a matter of fact, being conscience bound by the requirements of Jewish law.'⁴⁰

2.36 This places a great deal of power in the hands of a recalcitrant spouse:

[i]t can at times be an asset incapable of evaluation. At the height of emotional turmoil that surrounds divorce, a client may be inclined to try to use it against the other, to punish the other, to seek revenge...⁴¹

2.37 It has been observed that 'the consequences of violating Jewish law and remarrying without first complying with the get requirement are much more severe for the wife than for the husband'.⁴² Chief amongst these adverse consequences is that the wife will be considered to have committed adultery and any children will be stigmatised. The husband is not accorded the same judgement nor are children by his new partner stigmatised.

³⁷ Report No 57, *Multiculturalism and the Law* (1992), Chapter 5, Paragraph 5.31

³⁸ Reiss, Rabbi Jonathan, 'Jewish Divorce and the Role of Beit Din', *Jewish Law Articles*, <http://www.jlaw.com/Articles/divorcebeit.html> provides useful background information.

³⁹ Katzenberg, S, Rosenblatt, J, "Getting the 'Get'", *Family Law*, March [1999], 165

⁴⁰ Strum, A 'Getting a Gett in Australian Courts', <http://www.netspace.net.au~barkers/Family/gett.htm>, page 10

⁴¹ Katzenberg, S, Rosenblatt, J, "Getting the 'Get'", *Family Law*, March [1999], 166. For an illustrative exceptionally forthright recent New York judgment see *Giahn v Giahn*, Supreme Court, April 13, 2000, <http://www.nylj/decisions/00/04/041300b4.htm>

⁴² Freeman, Professor Michael, 'The Jewish Law of Divorce', *International Family Law*, May [2000] 58

2.38 It is also worth noting that with the increasing incidence of divorce what once might have been the ‘tragic plight of the few has become a societal problem of statistically significant dimension’.⁴³ Moreover, while there may be a significant proportion of the community who do not attend the synagogue or observe other ritual requirements, it is the case that this group will never-the-less desire to be married according to Jewish custom. And if they are the children of a mother who has not received a *Gett*, a Jewish marriage will be proscribed.⁴⁴

2.39 The proposals put forward in the ECAJ/ORA submission build on their submission provided to the ALRC in 1992. It reflects extensive research about and analysis of legislation adopted in several overseas countries. Moreover, it is also the culmination of extensive consultations within the Jewish community. In this respect, their proposal generally speaking represents a ‘best practice’ model of how the Jewish community would wish the Commonwealth to assist with resolving their difficulties.

Suggestions to assist in resolving difficulties

2.40 Apart from the ECAJ/ORA legislative proposal to address the difficulties described above, during consultations other suggestions that might assist in this area were made. These included the establishment of a Multicultural Ombudsman, education in multicultural law - particularly in tertiary law curricula - and the use of Pre-nuptial agreements.⁴⁵

⁴³ Bleich, Rabbi J. David, ‘A Suggested Ante-nuptial Agreement: A Proposal in Wake of Avitzur’, *Jewish Law Articles*, http://www.jlaw.com/Articles/antenuptial_agreement1.html, page 3

⁴⁴ Consultations: ECAJ - 10 July 2001, Melbourne

⁴⁵ Consultations: NCJWA 10 July 2001

Part Three: Present Law

3.1 In this Part we restate the material provided in the Issues Paper concerning the present position under Australian law.

Religion and the law generally

3.2 In general, there is a clear separation in Australia between religious and civil authority, between “Church and State” as it has been traditionally stated. Although Australia does not have a bill of rights, it is generally accepted that the law leaves people to follow their own religious practices and beliefs, subject only to the operation of ordinary criminal and civil laws. This approach derives from various sources: constitutional history and principles;⁴⁶ the common law;⁴⁷ and international treaties to which Australia is a party.

Divorce law

3.3 Secular divorce is governed by the *Family Law Act 1975* (Cth) . Under that Act, there is a single ground of divorce: irretrievable breakdown of marriage.⁴⁸ This can be proved only in one way, that is, by proving that the parties have been separated for one year immediately prior to the filing of the application.⁴⁹ In effect, then, the ground is one year’s separation. With one exception, when the ground has been established, the court *must* grant the divorce unless it is satisfied that the parties are likely to reconcile.⁵⁰ It has no power to delay or refuse the divorce. The exception relates to children. Where there are minor children, the court may refuse or delay the divorce if it is not satisfied that proper arrangements have been made for the children.⁵¹

3.4 Under the present law, therefore, if one party seeks a divorce and the ground is established, the court cannot as a matter of law refuse the divorce on the ground that one party has refused to do what is necessary to allow the other party to re-marry under the relevant religious law.

3.5 It is necessary in this context, however, to refer to an important decision, *Shulsinger’s case*.⁵² A summary appears in Appendix D to this paper. If this decision is correct, it would seem that where a party to a marriage gives undertakings (legally enforceable promises) to the court that he or she will take steps to arrange a religious divorce, those undertakings can be enforced. The case also suggests (but does not decide) that the court could issue injunctions to similar effect. It is not quite clear whether the Full Court intended to indicate that the court could withhold the divorce until the party had carried out his promise: this issue did not arise, because the husband did in fact give the undertakings.

⁴⁶ In particular s.116 of the Constitution.

⁴⁷ See, for example, *Evers v Evers* (1972) 19 FLR 296.

⁴⁸ Subsection 48(1).

⁴⁹ Subsection 48(2).

⁵⁰ Subsection 48(3).

⁵¹ Section 55A.

⁵² *In the Marriage of Shulsinger* (1977) 2 Fam LR 11,611.

3.6 *Shulsinger's case* has been criticised⁵³ and it is arguable whether it is good law. It is also a decision that can be read narrowly and confined to its own rather unusual facts.

Financial adjustment law under the Family Law Act

3.7 There are some reported decisions to the effect that the willingness of a party to grant a religious divorce may be taken into account in cases where a party seeks spousal maintenance or property adjustment.⁵⁴ The argument, in brief, is that where a husband refuses to do what is necessary for the wife to remarry within the religion, that will have an adverse financial consequence to the wife, in that she will not be able to obtain the financial benefits that might flow from re-marriage. However the correctness of these cases has been doubted. A contrary view is that the court is not entitled in effect to punish a party for not taking some action under religious law, and that the approach is contrary to the general principle that the court does not take into account such matters as a party's prospects of re-marriage. Another problem with the approach is that it assumes that the hypothetical re-marriage would be financially advantageous to the party who has been refused the religious divorce, whereas it cannot be predicted whether the marriage would be financially advantageous or disadvantageous.

3.8 Extracts from some of the reported cases are set out in Appendix E.

Summary

3.9 As can be seen, there is some uncertainty about the correctness of some of the decisions in this area, and the present law cannot be stated with confidence. The position can perhaps be best summarised as follows:

1. The law does not generally interfere in religious matters unless they involve behaviour that is in breach of the general civil or criminal law.
2. The provisions relating to divorce in the Family Law Act *give* the court no discretion to refuse or delay a divorce on the ground that a party has failed to take steps to enable the other party to re-marry in accordance with religious law.
3. It is unclear whether courts exercising jurisdiction under the Act can issue injunctions or require undertakings to the effect that a party will take steps to enable the other party to re-marry in accordance with religious law.
4. There is authority to the effect that in financial proceedings, courts exercising jurisdiction under the Act can properly take into account that one party is likely to be financially disadvantaged by the other party's failure to take steps to enable the first party to re-marry in accordance with religious law, although there may be some doubt about the correctness and detailed application of those decisions.
5. There appear to be no situations other than those mentioned in paragraphs 3 and 4 in which an Australian court would make orders intended to require or

⁵³ See for example the critical editor's note to the decision by Dr P E Nygh (later Justice Nygh of the Family Court).

⁵⁴ *Brett v Brett* [1961] All ER 1007; *Steinmetz and Steinmetz* (1980) 6 Fam LR 554; [1980] FLC 90-801. A contrary approach was taken by Nygh J in *In the Marriage of Woolley* (1981) 6 Fam LR 577.

encourage a person to take steps to enable the other party to re-marry in accordance with religious law.⁵⁵

3.10 Given the current position of the law in Australia it is instructive to consider how other jurisdictions, such as New York and Canada, sought to alleviate the effects of such misuse of power by introducing specific legislation.

⁵⁵ Family Law Council, *Issues Paper on Civil and Religious Divorce*, October 2000, page 4

Part Four: Some Possible Approaches

4.1 In this Part possible approaches set out in the Issues Paper are reproduced.

Introduction

4.2 In this section we attempt to identify in general terms some of the ways in which the law might be changed. At the most general level, all the options seriously canvassed appear to be based on a particular approach. None of the proposals suggest that the law should directly interfere with the religious practices involved. Instead, they all deal with a situation in which one or both parties come before a court seeking some order or relief. A party might seek orders for property adjustment or spousal maintenance, or a divorce. In each case, the options make the law's response conditional on the person taking some steps to facilitate a religious divorce. In other words, the law says, as it were: "If you want [a divorce, or financial orders, as the case may be] you will only get what you want if you take steps to facilitate a religious divorce".

4.3 In a sense, all of these responses can be seen as opportunistic. The law takes advantage of the fact that the person seeks something from it. If neither party to a religious marriage comes to the civil court wanting some remedy, none of these options apply, and the law has nothing to say about whether the party should facilitate the religious divorce.

Overseas alternatives

4.4 In its 1992 report, the ALRC described and discussed a number of alternatives, notably from New York, and Canada. In Appendix F we reproduce the relevant part of the report, with the kind permission of the Commission.

4.5 In summary, the Canadian approach is to give the court power to dismiss any application, and strike out any pleadings and affidavits filed by a spouse who has failed to remove religious barriers to the remarriage of the other spouse. In New York there is a narrower approach, preventing a person who has not removed the religious barriers from obtaining a divorce or decree or nullity.

4.6 The ALRC was divided on what recommendations should be made. But the majority made the following recommendations:

"...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 of 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."

Considering the options

4.7 The options identified in the Issues Paper were:

Option 1: Retain the present law

4.8 This is the "do nothing" option, in that no new legislative provision is proposed. However as noted earlier there is some uncertainty about what the present law is. This option would leave it to the courts to resolve existing uncertainties when appropriate cases arise.

Option 2: Clarify the present law

4.9 This option would not introduce any new proposals, but would seek to clarify the uncertain areas of law. If this is to be done, choices will have to be made about which view should prevail. The two issues appear to be:

- (a) whether the court should have any power to issue injunctions or accept enforceable undertakings to remove religious barriers to the remarriage of the other spouse; and
- (b) whether the court should be able to adjust financial orders to have regard to the unwillingness of one party to remove religious barriers to the remarriage of the other spouse.

Option 3: Introduce the ALRC recommendations, or some variation on them

4.10 The ALRC recommendation is set out above. Other options would be to adopt some variation of it, based, for example, on the Canadian or the New York approach.

Part Five: Proposal for Legislative Change

Introduction

5.1 Previous Parts of the Report either summarised or reproduced the information set out in the Issues Paper, distilled information gleaned from submissions and consultations, or noted findings or points of view in the relevant literature, so as to provide a context in which the various ideas received by Council can be best examined and assessed.

5.2 As a result of this process of critical examination Council concluded that legislative proposals which clarified the current law should be pursued further. In determining how best to go about this, Council noted that the only legislative proposal submitted was one put forward by the Executive Council of Australian Jewry⁵⁶ and Organisation of the Rabbis of Australasia⁵⁷ (ECAJ/ORA).

5.3 This proposal reflected extensive research about and analysis of legislation adopted in several overseas countries. It has the added attraction of incorporating all the significant proposals canvassed by others. The submission builds on the ECAJ submission provided to the Australian Law Reform Commission in 1992. Moreover, it is also the culmination of extensive consultations within the Jewish community. In this respect, their proposal generally speaking represents a 'best practice' model of how the Jewish community would wish the Commonwealth to assist with resolving their difficulties.

5.4 Submissions from the Islamic community contain more diverse viewpoints. Far less consensus exists on what the Commonwealth could do to assist with the Islamic community's divorce difficulties.

Preferred Option

5.5 Given this situation, the Family Law Council was faced with the options of:

- I. developing its own proposal;
- II. adapting the ALRC model described in paragraphs 1.14-1.15;
- III. adopting the ECAJ/ORA proposal which reflected extensive development and consultation within the Jewish community; or
- IV. adapting the ECAJ/ORA proposal.

⁵⁶ The ECAJ was established in 1944 as a Federal peak body to serve as the representative voice of the Australian Jewish community to the Australian government. Internationally, it participates, on behalf of Australian Jewry, in all major Jewish organisations, including the World Jewish Congress, the Conference of Jewish Material Claims against Germany and the Memorial Foundation for Jewish Culture and also in formal dialogue with peak religious organisations: (ECAJ letter to Council - 12 July 2001)

⁵⁷ Representing the Orthodox Rabbinate in Australia and New Zealand, that is all the synagogues apart from those which are Progressive or Liberal. Progressives or Liberals comprise perhaps 15-20% of the Jewish community (6-7 synagogues). Progressives or Liberals accept that civil divorce effects cultural-community divorce: (Oral communication with Rabbi M. Gutnick 16 July 2001).

5.6 Given Council's resource constraints Option I was least attractive and, in the circumstances of previous intensive examinations of this issue, both impracticable and unnecessary. Option II presented problems in that submissions and consultations had emphasised to Council that the ALRC model had inherent weaknesses, and was of limited application to the range of difficulties encountered.

5.7 Explanations provided concerning the ECAJ/ORA proposal were at pains to emphasise that it needs to be considered as a package. Moreover, the Council was cognisant that the proposal was punctiliously drafted so as to successfully negotiate the complexities of duress and compulsion, which might otherwise invalidate a *Gett*.⁵⁸ This made Option IV less attractive unless a significant improvement could be reckoned on. No fatal criticisms of the proposal have emerged to date.

5.8 On this basis Option III was preferred. While not endorsing the proposal unreservedly, it was considered by Council to be a very good starting point for further consideration.

Proposal for Legislative Reform

5.9 The proposal is as follows:

- (1) The Court shall have the power, on the application of either party, to make such of the Orders set out in sub-section (2) as it deems appropriate to encourage the other party to take all steps reasonably within his or her power to remove all barriers to the re-marriage of the applicant in accordance with the customs and usages of the religious, ethnic or ethno-religious group to which the applicant claims affiliation.
- (2) The Orders which the Court may make at its discretion are the following:
 - (a) An Order that the Decree Nisi shall not become absolute until the Court has been satisfied that both parties have taken all steps reasonably within their power to ensure that all barriers to such re-marriage have been removed.
 - (b) An Order requiring a party to appear before a recognised tribunal of the said group and a further Order that both parties may take such steps to remove barriers to such re-marriage as that tribunal shall recommend by notice in writing to the Court.
 - (c) An Order that any application, defence, pleading or affidavit by a party in respect of any proposed Order for the payment of maintenance by or to that party be adjourned or struck out, if in the opinion of the Court that party has wilfully refused to remove any barrier to such re-marriage which it is within the power of that party to remove.

⁵⁸ Povarsky, Dr Chaim, 'Intervention by Non-Jewish Courts in Jewish Divorces', *Jewish Law Report*, August 1994, Institute of Jewish Law, Touro Law Centre, <http://law.touro.edu/publications/jewishlaw/aug94/part1.html>, page 5ff for a stimulating discussion of relevant Talmudic and halachic sources.

(d) An Order enforcing a pre-nuptial agreement in a form approved by the institution performing the marriage to the extent that the agreement has the effect of encouraging the parties to remove barriers to such re-marriage.

(3) In this section

(a) “such re-marriage” means re-marriage in accordance with the customs and usages of the religious, ethnic or ethno-religious group to which the applicant claims affiliation.

(b) If the applicant claims affiliation to the Jewish community then the “tribunal” referred to in sub-clause (2)(b) must be one of the following:

(i) the court known as the “Sydney Beth Din”,

(ii) the court known as the “Melbourne Beth Din”, or

(iii) another Rabbinical Court nominated by the Registrar of either the Sydney Beth Din or the Melbourne Beth Din.”

Discussion of the Proposal

First element - decree absolute contingent on proof of removal of barriers to re-marriage

5.10 The first element of the proposal, 2(a), is the New York approach outlined in paragraph 4.5, and essentially the option favoured by a majority of the ALRC in 1992.

5.11 One reservation was that divorce should not be with-held indefinitely because that may be unfair to the aggrieved spouse. The spouse may be ‘doubly disadvantaged’ by receiving neither a cultural-community divorce nor a civil divorce. There would be a concern about legislating for such an open-ended approach.⁵⁹ It was felt that the aggrieved spouse should have the power to make choices. It was suggested that a specific time period should be included - say 12 months.⁶⁰

5.12 This argument was rejected by ECAJ/ORA on the grounds that it would enable the recalcitrant spouse to ‘sit it out’. It was, however, acknowledged that there may be a need for a mechanism to withdraw or revoke the application. This could be done either by provision providing for retaining liberty to apply or make further application, or it could be by way of a proviso - “the court may... provided that ...”. It was noted that this may leave the aggrieved spouse subject to pressure or coercion but this was considered unavoidable.⁶¹

⁵⁹ National Council of Jewish Women of Australia, Submission, p 2

⁶⁰ National Council of Jewish Women of Australia, Consultations, Melbourne, 10 July 2001

⁶¹ ECAJ/ORA consultations, Melbourne, 10 July 2001

Second element - Order to appear before a Tribunal

5.13 The second element of the proposal, 2(b), reflects the approach adopted in *Gwiazda v Gwiazda*.⁶² The Family Court, pursuant to its general injunctive power in s 114(3), granted a mandatory injunction ordering a recalcitrant spouse, in this case the wife who refused to accept the *Gett*, to appear before the Melbourne Beth Din. Emery J. observed that:

If I correctly understand the intention of the Act, then it is the clear duty of a judge of this court to...ensure that appropriate orders are made fully effective, not only in theory but in fact. In this case the husband as a matter of law can marry any woman who is free to marry, subject only to the prohibitions in the *Marriage Act*, but as a matter of fact and practicability he cannot do so.⁶³

5.14 The proposal does not however go so far as Emery J. did, by requiring that the person abide by the directions of the Beth Din. It is only attendance that is enjoined, not the doing of acts or other things that the Beth Din may order.⁶⁴

5.15 On one view, it was explained during consultations, the legislative ECAJ/ORR proposal would serve to facilitate the original role of the Jewish religious tribunal, by including it within the 'family law system', by virtue of the use of the coercive powers of courts exercising jurisdiction under the Act.⁶⁵ The tribunal's findings and recommendations would in effect be supported by a strictly limited application of judicial discretion, by virtue of courts exercising jurisdiction under the Act making appropriate orders with respect to the ordering of a *Gett*.

Third element - Maintenance

5.16 The third element of the proposal, 2(c), reflects the approach adopted in *In the marriage of Steinmetz*.⁶⁶ It might be queried whether a court would be as receptive to this argument now as it once might have been, given the changed social climate and gender roles.⁶⁷

⁶² Family Court of Australia, unreported, No. M10631 of 1982, 23/2/83.

⁶³ *Ibid.* 14-15

⁶⁴ Strum, A., "The Enforceability of Jewish Nuptial and Prenuptial Contracts and of Agreements to Execute a *Gett*" submitted on 3 September 1990 in partial fulfilment of the requirements for the Honours degree of Bachelor of Laws in Monash University, see pages 155-159 for a discussion of *Gwiazda v Gwiazda*.

⁶⁵ In Israel, religious courts, which co-exist with a civil court system, are granted jurisdiction over family law matters; Freedman, E, 'Religious Divorce in Israel', *International Family Law*, April, 2000, 19

⁶⁶ (1980) 6 Fam LR 554 see excerpts at Appendix E.

⁶⁷ See the points made by Nygh J. *In the Marriage of Woolley*, (1981) 6 Fam LR 577, 585-586, Appendix E

Fourth element - Enforcement of pre-nuptial agreement relating to removing barriers to re-marriage

5.17 The final element of the proposal, 2(d), reflects the expression of interest found in several of the submissions and during some of the consultations that pre-nuptial agreements could be a useful tool to resolve at least some cases.⁶⁸

Definitions - 'tribunal'

5.18 If this approach were to be taken it might be sensible to identify the various religious bodies in 4(b) through a regulation rather than in the Act itself so that any changes could be accommodated.

Drafting an Amendment

5.19 While the precise wording of the amendment would require further consideration, the Council endorses the substance of the proposed amendment. Council recognises that care needs to be taken to ensure that any changes would not breach specific cultural-community requirements with respect to, for example, not providing for the voluntary consent of both parties to a divorce.

5.20 The proposal could be enacted in one of two ways. Either by:

1. inserting a new provision in the Act; or
2. amending existing provisions in the Act so that, for example, 2(a), 2(b), and 2(d) become new paragraphs in s114; and 2(c) becomes a new paragraph s75(2)(q) and definitions inserted as Regulations.

5.21 The second approach may be seen as technically neater, simpler for practitioners, and reflect an incremental approach.

Possible Objections to Legislative Change

5.22 The ALRC cited two general grounds of opposition for the proposal they were considering - vesting the court with the discretion to adjourn an application. These were:

- Civil and religious law should remain separate;
- Western cultural principles of equality should not be superimposed on traditional religious cultures.⁶⁹

5.23 The first of these grounds appears to be the pre-eminent lightning-rod for opposition to legislative change. It has the capacity to polarise opinions - as it did in the ALRC - and it was also a factor in the Council's first letter of advice. The issue potentially raises sensitive political issues.

⁶⁸ See for example, National Council of Jewish Women of Australia submission, p 1 - noting that there is no rabbinical consensus of support for civil enforcement of such agreements.

⁶⁹ Report No 57, *Multiculturalism and the Law* (1992), Chapter 5, paragraph 5.34

5.24 A related objection is that the State should not intervene in the private life of citizens in what may be deemed an intrusive manner. This may be countered by noting that the State already intervenes in many areas of private life. In any event, none of the rights exercised in private life are absolute. Some balancing of competing interests is often called for.⁷⁰ This is exemplified by the extensive powers now exercised by the judiciary in matters of marriage and the economic consequences of its dissolution to ensure that parties to a marriage are dealt with justly.

5.25 There are several other grounds which may militate against amending the *Family Law Act* in the manner outlined above.

5.26 One reason for retaining the status quo, at least in the short term, is that preferable alternative strategies could be pursued.⁷¹ The ALRC summarised two of these based on their submissions:

- Pre-marital and post-marital agreements;⁷²
- Appointment of an ethnic or religious affairs ombudsman to the Family Court who would provide multicultural advisory and support services and deliver counselling services for parties in dispute;

to which could be added a third -

- Re-interpretation of the religious law.

5.27 This latter proposition was also reflected in some of the submissions received by Council.⁷³ However, as one English commentator concluded about the efforts of Jewish Rabbinical authorities:

they can only tackle the problem on an individual, case-by-case basis and do[oes] not get to the bottom of the problem. The only other answer they see is to solicit the assistance of secular authorities, hence the get provisions in the Family Law Act 1996...⁷⁴

⁷⁰ South African Law Commission, *Islamic Marriages and Related Matters*, Project 59, Issue Paper 15, May 2000, page 5

⁷¹ The status quo is understood to mean the prevailing uncertainty as regards the powers of courts exercising jurisdiction under the Act to deal with divorce difficulties arising from civil and cultural-community divorce. Retaining the status quo would not close off the possibility of future judicial forays in this area, but as the well-known cases in this area attest, on past indications such judicial activism may only occur sporadically if at all.

⁷² Freeman, Professor Michael, 'The Jewish Law of Divorce', *International Family Law*, May [2000] 61 for a discussion of these agreements in English jurisprudence.

⁷³ National Council of Jewish Women of Australia Submission: '[the National Council] maintains its continuing preference for promoting measures within the Jewish Law to remove impediments to the Gett and remarriage of both spouses.', page 1. The submission goes on to discuss pre-nuptial agreements. This was also the conclusion reached by Freeman, Professor Michael, 'The Jewish Law of Divorce', *International Family Law*, May [2000] 62

⁷⁴ Freeman, Professor Michael, 'The Jewish Law of Divorce', *International Family Law*, May [2000] 59 - where deficiencies with s9(3) of that Act are discussed.

5.28 There is also the ‘unintended consequences’ objection to change. It might for example be suggested that a broad discretionary power could leave it open to the Court to impose a range of conditions not sought to be covered by the amendment, thereby introducing consequences which may be undesirable from a policy perspective.

5.29 Some might argue that the fact that proposed legislation will only partially address the problem is a sufficient reason for not proceeding with legislation. The Council does not agree.

5.30 A related argument is that susceptibility to constitutional challenge is a reason for not pursuing legislative change. Moreover, the proposed legislative package does go further than the proposition considered in the second opinion from Chief General Counsel provided to the Council. While the Council acknowledges that there may be nice questions of law incidental to the proposed legislation, this possibility does not of itself negate the promised protection and benefits consequential on successfully implementing the change.

5.31 While discussing this issue, it might be noted that the proposal has been drafted with an eye to avoiding the charge that a judicial function is being delegated to another tribunal. The proposal appears to comply with the strictures laid down by the High Court in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1. In broad summary, the High Court held that the principle of the separation of judicial from executive powers established by the Constitution means that:

- judicial functions may only be exercised by a court; and
- non-judicial functions cannot be exercised by a court.⁷⁵

5.32 By way of summary on the constitutional issue, while, as was said in the introduction, the Council does not purport to warrant the constitutionality of the proposal, and the constitutional position is not one of complete certainty, it appears that on balance there are reasonable prospects of its constitutionality being upheld.

Some Arguments for Legislative Change

(i) Best Interests of children

5.33 Children born where a cultural-community divorce has not occurred are innocent victims of the divorce difficulties outlined in this Report. The stigma that they may suffer as ‘illegitimate’ should not be under-estimated. While the broader

⁷⁵ Australian Government Solicitor, ‘The Brandy Decision and Judicial Power’, *Legal Note*, No. 1, 19 April 1995. “[T]he High Court of Australia held that certain sections of the *Racial Discrimination Act 1975* (Racial Discrimination Act) were invalid. These provisions provided for enforcement of a determination of the Human Rights and Equal Opportunity Commission (the Commission) as if it were an order of the Federal Court. The Court held that these sections provided for the Commission, which is not a court in accordance with Chapter III of the Constitution, to exercise judicial power, and were therefore invalid...The effect of the decision is that any attempt to make a decision of an administrative body which performs a function comparable to the Commission’s enforceable as an order of a court, merely on registration of the decision in a court, without making provision for a *de novo* hearing by the court, will be invalid.”

Australian community has in many respects abandoned attitudes, administrative and legal forms that previously diminished the full enjoyment of and participation in the Australian community of those born ex-nuptially, in more traditional cultural-communities, overt, significant and on-going discrimination can still impact adversely on the children concerned.

5.34 As the ‘stigma of illegitimacy’ pertains to the Islamic community in the United Kingdom one commentator noted that:

[it] would bring, more likely than not, shunning by the society, ostracisation by the people and dishonour to the mother and her family that may not have been seen in the UK since Victorian days.⁷⁶

5.35 In the Jewish community one submission noted that children born to a mother in these circumstances will be ‘subject to severe disabilities as *manserim*, the offspring of an adulterous union.’⁷⁷

(ii) Fairness to Parties

5.36 There is a significant element of unfairness when one party can be ‘held to ransom’ by a recalcitrant spouse. The denial of the right to re-marry and the subsequent infliction of harm on future children and their descendants invites condemnation.

5.37 In Australia, community values are often expressed in shorthand form by the term ‘a fair go’. There may be tensions between such assessments by the wider community and legal traditions of cultural-community groups, especially when these legal traditions institutionalise inequality between men and women. In such instances hard decisions may be required as to the limits on multiculturalism - ‘limits on the right to cultural freedom’ - and value-judgements may be called for on where to draw the line.⁷⁸

(iii) Efficacy of Family Law System

5.38 Providing courts exercising jurisdiction under the Act with appropriate discretionary remedies would ensure that ‘parties to a dispute have an institutionalised mechanism to resolve their differences without recourse to self-help’.⁷⁹ This argument follows on from the point raised in the Introduction that courts exercising jurisdiction under the Act should seek to make civil divorce effective beyond severing the formal legal bonds of civil marriages.⁸⁰ It focuses on the efficacy - the desired effect or state

⁷⁶ Hasan, A., ‘Contact and Illegitimacy in the Muslim Community’, *Family Law*, December 2000, Volume 30, 929

⁷⁷ ECAJ/ORA Submission, page 5. It goes on to note that: ‘If the husband does the same, his children will not suffer the same disability, since adultery is defined as a sexual relationship with a married woman.’

⁷⁸ Australian Law Reform Commission, Report No 57, *Multiculturalism and the Law* (1992), Chapter 1, paragraph 1.18

⁷⁹ *Concorde Plastics (Pty) Limited v NUMSA and Others* 1997(11) BCLR 1264 (LAC) at 1644 F, quoted in South African Law Commission, *Islamic Marriages and Related Matters*, Project 59, Issue Paper 15, May 2000, page 21

⁸⁰ See Introduction, paragraphs 1.7-1.8

of affairs - sought by the Family Law System. The argument would be that a system that stops short of providing any remedy in these circumstances would lack efficacy. It would be to that extent ineffectual.

5.39 The desired effect or state of affairs can be expressed in a variety of ways, *viz*:

- to remove the inequities and misuse of the existing power differential between parties to a divorce;
- to advance the legitimate secular purpose of ensuring that individuals divorced under state law are able to again exercise their constitutional right to marry;
- to advance the state's interest in ensuring the integrity of the decisions of its civil courts in matrimonial actions; and the right to provide some measure of protection from improper coercion;
- to ensure individuals who are divorced will be free to remarry; and
- to prevent one party from maintaining inequitable control over the future marital and financial status of the other party.⁸¹

5.40 A related point is that enacting a legislative package with the specific purpose of clarifying how the law might be used to resolve such divorce difficulties may fortify or embolden some judges in their decision-making. There may also be a benefit in terms of clarifying the law for ecclesiastical courts, where it has been suggested there is currently some uncertainty about Australian Family Law generally.

⁸¹ Extracted from Amicus Curiae brief in *Becher v Becher*, New York Supreme Court, Appellate Division - Second Department (1997) 245 A.D 2d 408; <http://www.jlaw.com/Briefs/bvb.html>

Part Six: Conclusion

6.1 The Family Law Council views the problems that have been brought to its attention in submissions and during its consultations as warranting Government consideration. On a human level the plight of ‘chained women’, a term used in the Jewish community but equally applicable to those similarly circumstanced in the Islamic community, evokes compassion; as does the position of children born to some women who may be stigmatised in consequence.

6.2 At a systemic level, the Council notes that the effectiveness of courts exercising jurisdiction under the Act in dealing with parties who may be affected by cultural-community divorce procedures is called into question. It appears that, so long as courts exercising jurisdiction under the Act are not vested with specific discretionary powers to properly take into account the separate systems for divorce that prevail in the wider Australian community, this has the potential to undermine or compromise the integrity of certain Family Court orders, however carefully and insightfully framed.

6.3 Hence, the Council sees merit in the proposition that courts exercising jurisdiction under the Act should have discretionary powers that afford some recognition of the adverse impact the operation of cultural-community divorce laws may have on courts’ deliberations. Such legislation appears advantageous from a number of perspectives. Council is also attracted by the suggestion raised during consultations that a greater degree of cultural sensitivity on the part of the judiciary and counselling staff would assist in some divorce difficulties.⁸²

6.4 The Council recognises that alleviating all the difficulties that arise in this area is beyond the Government’s reach. For example, even assuming the best synthesis of legislation from around the world, it is only where a court exercising jurisdiction under the Act has some leverage, that is where one party approaches it and wants something from it, that the Court can consider how best to properly address the broader range of divorce issues by using its range of mooted discretionary powers. Its reach will not extend to other cases.

6.5 It has also become plain that the Islamic community confronts a particular challenge of its own with respect to establishing its own legitimate Islamic judicial system in Australia.

6.6 However, the Council is not persuaded that the prospect of achieving limited success is a reason for not pursuing change at all. Not only is it important to provide justice for each individual but it is important for courts exercising jurisdiction under the Act to be seen to be responding to obvious injustices that come to their notice. The Council is persuaded that on balance legislative change is warranted.

6.7 The Council appreciates the work that has gone into the drafting of the proposed legislation by ECAJ/ORR and notes the widespread support for the proposal expressed in submissions and during consultations. It supports such legislation in

⁸² Cross-Cultural Mediation, *supra* page 13

principle and notes it has much to recommend it. It believes it deserves greater public scrutiny, in particular to ensure that there are no unintended consequences.

6.8 Council has been informed not only by a range of legal sources but also by examining broader social issues that have been outlined in this Report. For example, the Council noted that such divorce difficulties can be seen as an important human rights issue.

6.9 In summary then, Council would answer the question posed in the Issues Paper - to what extent, if at all, should the law seek to control or influence the behaviour of people in relation to religious divorce? - by saying that it considers that proposals for both legislative responses and enhanced provision of services to court clients have merit and should be progressed with a sense of urgency and be accorded a priority commensurate with the human costs associated with the problem.

Recommendations

The Council recommends that:

- 1. the Family Law Act be amended to incorporate the substance of the proposal set out in this Report in Part 5 in order to provide courts exercising jurisdiction under the Act with a range of discretionary powers to assist in matters involving cultural-community divorce; and**
- 2. service provision be enhanced in matters involving cultural-community divorce to ensure culturally and linguistically appropriate mediation and counselling.**

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Appendix A: List of Organisations/Individuals receiving letters Inviting Submissions to the Family Law Council in Response to *Issues Paper on Civil and Religious Divorce (October 2000)*

Islamic community organisations:

1 Australian Federation of Islamic Councils

932 Bourke St Zetland NSW 2017

President: Mr Abbaf Ahmed, PO Box 1185 Waterloo DC NSW 2017

2 Islamic Forum for Australian Muslims Inc

43 Harrow Road Auburn NSW 2144

3 Muslim Women's National Network of Australia

President: Aziza Abdel-Halim- 6 Yarrabee Rd Northmead NSW 2152

4 Islamic Women's Association of Qld Inc

152 Lumley St Upper Mt Gravatt QLD 4122

President: Fatima Abdel-Karim, PO Box 487, Woodridge QLD 4114

5 Muslim Women Association

47 Wangee Road Lakemba NSW 2195

President: Ms Maha Abdo

P.O Box 264 Lakemba NSW 2195.

6 Muslim Women's Association

Torrens Building 1st Floor 220 Victoria Square

Adelaide SA 5000

Executive Committee Member: Zainab Moraby, PO Box 3294, Rundle Mall, Adelaide 5000

7 Lebanese Muslim Association

84 Wangee Road Lakemba NSW 2195

President: Mr Samih Zreika, PO Box 297 Lakemba NSW 2195

8 Ahmadiyya Muslim Association

20 Hollinsworth Road Marsden Park NSW 2765

General Secretary: Mr Nasir Khalon, PO Box 89 Riverstone NSW 2765

9 Bosnian & Hercegovina Muslim Society of SA Inc

1 Frederick Road Royal Park SA 5014

Cultural-community Divorce and the Family Law Act 1975

10 Islamic Malay Australian Association of NSW

12 Eden St Arncliffe NSW 2205

11 Somali Islamic Centre

79 Haldon Street Lakemba NSW 2195

12 Al-Zahra Muslim Association

1 Wollongong Road Arncliffe NSW 2205

13 Al-Zahra Muslim Womens Association

1 Martin Ave Arncliffe NSW 2205

President: Fatima Hammoud, PO Box 130 Arncliffe NSW 2205

14 Bosnian-Hercegovian Muslim Society (Inc)

Bosnian Centre Lot 289 Beechboro Road

Beechboro WA 6063

President: Muhamed Merdjanic

15 Islamic Women's Welfare Council of Victoria

161 Victoria Parade

Collingwood VIC 3066

President: Leila Alloush, c/o Joumana El-Matrah, PO Box 1389 Collingwood VIC 3066

Email: iwwcv@vicnet.net.au

16 Alkhalil Mosque

Imam Hamza, Sheikh Ameen and Sheikh Soulainan

Cnr Torrens & Audley Street

Woodville North SA 5012

Email: alkhahilmosque@com.au

Academics etc

17 Salah Ahmed

Email: s_ahmed@bdonline.com

18 Ghena Kreyem, University of Sydney Law Faculty

Email: kghena@hotmail.com.au

19 Jamila Hussain, Lecturer, UTS Faculty of Law (Vice President of Muslim Women's National Network of Australia - see 3 above)

Email: jamila.hussain@law.uts.edu.au

20 Ms Inaam Tabbaa

PO Box 430, Seven Hills NSW 2147

Jewish community organisations

1 National Council of Jewish Women

Headquarters: 133 Hawthorn Rd Caulfield VIC
President: Dr Geulah Solomon OAM Phone:
PO Box 2220 Caulfield Junction VIC 3161

2 Australian Jewish Democratic Society

14 Yarraford Ave Fairfield VIC 3078
President: Mr Harold Zwier, PO Box 685 Kew VIC 3101

3 Jewish Community (ACT)

National Cct Forrest ACT 2603
Dr Allan D.Shrood, PO Box 3105 Manuka ACT

4 Jewish Adelaide Progressive Congregation (Beit Shalom Synagogue)

39 Hackney Rd Hackney SA 5069

5 Jewish Congregation- Adelaide Hebrew Congregation

13 Flemington St Glenside SA 5065

6 Jewish Community Council of Victoria

306 Hawthorn Rd South Caulfield VIC 3162
President: Dr Phillip Bliss

7 Jewish Centre in WA (Inc)

61 Woodrow Ave Yokine WA 6060
Chairman: Peter Lenny

8 Perth Hebrew Congregation

Freedman Rd (cnr Plantation St) Menora WA 6050
Rabbi David Freilich

9 Jewish Progressive Synagogue

34 Clifton Crs Mt Lawley WA 6050

10 Executive Council of Australian Jewry

Mrs Josie Lacey
146 Darlinghurst Road
Darlinghurst NSW 2010

Appendix B: List of Submissions to the Family Law Council in Response to *Issues Paper on Civil and Religious Divorce* (October 2000)

1 Muslim Women's National Network of Australia

President: Aziza Abdel-Halim- 6 Yarrabee Rd Northmead NSW 2152

2 Lebanese Muslim Association

84 Wangee Road Lakemba NSW 2195

President: Mr Samih Zreika, PO Box 297 Lakemba NSW 2195

3 Ahmadiyya Muslim Association

20 Hollinsworth Road Marsden Park NSW 2765

General Secretary: Mr Nasir Khalon, PO Box 89 Riverstone NSW 2765

4 Ms Inaam Tabbaa

PO Box 430, Seven Hills NSW 2147

5 National Council of Jewish Women

Headquarters: 133 Hawthorn Rd Caulfield VIC

President: Dr Geulah Solomon OAM

PO Box 2220 Caulfield Junction VIC 3161

6 Executive Council of Australian Jewry

Mrs Josie Lacey

146 Darlinghurst Road

Darlinghurst NSW 2010

Appendix C: Schedule of Consultations by the Family Law Council in Response to *Issues Paper on Civil and Religious Divorce* (October 2000)

Sydney Thursday 7 June

- 1 Ahmadiyya Muslim Association
- 2 Lebanese Muslim Association
- 3 Muslim Women's National Network of Australia
- 4 Executive Council of Australian Jewry

Melbourne 10 July Tuesday

- 1 National Council of Jewish Women
- 2 Andrew Strum, Barrister
- 3 Executive Council of Australian Jewry

Appendix D: Summary of Shulsinger's case⁸³

The husband applied for a divorce. The wife was a resident and citizen of Israel. She was represented at the hearing. The husband was unrepresented. It emerged from discussion between the judge and the parties that an Australian divorce decree would be ineffective to allow the wife to remarry in Israel unless the husband agreed to write her a divorce in Jewish law. The husband undertook to the Family Court that he would do everything necessary to give the wife a bill of divorcement in accordance with the Jewish faith and the law of the state of Israel. The Court then granted the divorce.

In June the same year, the wife applied to rescind the divorce decree to punish the husband for contempt, and for costs. The husband did not appear in person, but was represented. There were several adjournments of the Family Court proceedings arising from difficulties associated with proceedings in the Rabbinical Court in Melbourne. The husband did not appear before that court as he had been expected to do.

In September, the wife brought a further application for contempt, and for costs, before the Family Court. A number of orders were made at that hearing, including one that the husband pay to the wife her costs of the Family Court proceedings.

The husband appealed against some of the costs orders that had been made in favour of the wife. The grounds of appeal were, in part, that:

- (a) the undertakings given were not ones in respect of which the Court could issue injunctions, and therefore could not be enforced by contempt proceedings; and
- (b) such contempt proceedings were therefore to no effect and an order for costs could be made upon them.

As to the first point, it was argued that the undertaking involved essentially a religious question, and, by virtue of s.116 of the Commonwealth Constitution, the Court could not make an order for an injunction in the same terms as the undertaking, and the Court could not require an undertaking which covered matters in respect of which an injunction could not be ordered.

The Full Court dismissed the husband's appeal. It held that:

- (a) the undertaking sought and given did not involve any infringement of s.116 of the Commonwealth Constitution; and
- (b) the undertaking was to avoid the injustice that would arise if the husband sought and obtained a divorce in Australia, but refused to relieve his wife of the obligations of marriage.

⁸³ *In the Marriage of Shulsinger* (1977) 2 Fam LR 11,611.

The Full Court also held that:

- (a) consistently with his duty under s. 43(a) of the Family Law Act, the trial judge was bound to ensure that the same freedom from the obligations of marriage was made available to the wife as would be available to the husband;
- (b) as it would have been extremely difficult to make an order in the nature of an injunction which effectively ensured that the wife would be free to marry in Israel, the trial judge's action was the obvious and practical way of approaching the problem;
- (c) it had long been accepted that an undertaking given to a court was equivalent to an injunction, so far as an application to punish for its contempt was concerned; and
- (d) justice required the trial judge to seek such an undertaking and, from there on, the appearances before the Family Court were occasioned by the conduct of the husband. Thus the order for costs was properly made.

EXTRACT FROM THE JUDGMENT OF THE FULL COURT (DEMACK, WATSON AND EMERY JJ)⁸⁴

“The remaining points which were argued on the appeal were:

- (a) The undertakings which were given were not ones in respect of which the Court could issue injunctions, and therefore could not be enforced by contempt proceedings.
- (b) The contempt proceedings were therefore to no effect and no order for costs could be made upon this...

As to the first point, it was argued that the undertaking which Mr Justice Joske sought from the appellant involved essentially a religious question, that s 116 of the Australian Constitution keeps a division between secular and religious questions, and therefore this court cannot make an order for an injunction in the same terms as the undertaking. It was further submitted that the court cannot require an undertaking which covers matters in respect of which an injunction cannot be ordered.

So far as s 116 of the Constitution is concerned, this was considered by Carmichael J in *Evers v Evers* (1972) 19 FLR 296, and with respect we agree with the following passage in his Honour's judgment at 302:

“Section 116 of the Commonwealth Constitution enacts: ‘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 or public trust under the Commonwealth.’

⁸⁴ At 11,616-7. Reproduced with the permission of Butterworths.

The Commonwealth, in pursuance of its powers, enacted the laws which give this court its jurisdiction and powers. The Commonwealth cannot confer on the courts which it creates powers which the Commonwealth itself is prohibited from exercising. It follows that the court cannot prohibit the free exercise of any religion. It is implicit in this last statement that the court cannot discriminate against any person for holding any religious beliefs or exercising his religion.

The freedom I see so granted is a freedom from the imposition of any theological ideas: Parliament and the courts cannot prefer Christianity to any other religion, or prefer any religion to none at all.”

It is clear that the undertaking sought by his Honour did not involve any infringement of s 116 as that section is properly understood. Rather what his Honour was concerned with was the serious question of the injustice that would arise if the husband sought and obtained a divorce in Australia, but refused to relieve his wife of the obligations of the marriage. It is contrary to all notions of justice to allow such a possibility to arise in a court, and to say that the court can do nothing.

We were informed that a citizen of Israel cannot remarry unless a divorce is obtained according to Israel's law. In essence this law requires the marriage to have been dissolved by a Rabbinical Court. The application before the Rabbinical Court must be made by the husband, although there are procedures which allow the wife to exert strong pressures upon the husband to obtain the divorce. However as we understand the situation, these latter pressures can only be effectively applied if the husband also resides in Israel.

Here the husband applied for divorce in Australia, and, unless he takes steps to obtain a divorce in a Rabbinical Court the wife is effectively bound by a marriage from the obligation of which he has been forever freed. Consistent with his duty under s 43(a) his Honour was bound to ensure, as far as he could, that the same freedom was made available to the wife, as would be available to the husband.

However it is equally certain that it would be extremely difficult for his Honour to make an order in the nature of an injunction that effectively ensured that the wife would be free to marry in Israel. The reason for this lies in the fact that another tribunal is involved in the process. What his Honour did was the obvious and practical way of approaching the problem.

It has long been accepted that an undertaking given to a court is equivalent to an injunction so far as an application to a court to punish for its contempt is concerned: *Halsbury* 3rd ed, vol 21, par 917.

If the undertaking is given in a wider form than was intended this is something that effects the enforcement of the undertaking, but if the undertaking has been given then it is not something that can be ignored: *Cutler v Wandsworth Stadium Ltd* [1945] 1 All ER 103. Similarly if the undertaking is in respect of something in respect of which it may be extremely difficult to frame an

injunction this is a relevant circumstance in considering enforcement of the undertaking rather than a deterrent to seeking the undertaking.

In our view justice required his Honour to seek the undertaking he sought, and that from there on the appearances before the Family Court were occasioned by the conduct of the husband which could easily have denied the wife the freedom that he had obtained.

In our opinion neither the first or the second points argued afford any reason for interfering with Mr Justice Asche's order."

Editorial note on Shulsinger's case

The following editorial note, published with the decision in the Family Law Reports⁸⁵, usefully raises some of the issues involved:

"Editor's Comment: In a letter published in 47 ALJ 53 Rabbi Porush drew the attention of solicitors acting for Jewish parties in divorce proceedings to the need for a religious divorce or *gett* to be effected in accordance with Jewish law before either of them could remarry in the synagogue. He also referred to a new procedure which had developed in England and Australia whereby the court is informed of an undertaking by the parties to have a *gett* arranged as part of the divorce settlement. He went on to note: "At times such undertaking is incorporated in the court order or at least taken notice of in the official divorce proceedings."

The Rabbi's letter invited some criticism. In a letter published in 47 ALJ 151, Mr Phillip Opas QC criticized the Rabbi's letter as an unwarranted interference by religious authorities in the affairs of the secular law and expressed extreme doubt "whether any undertaking by a party to consent to a *gett* ... would be enforceable by a court in the event of breach": see also the reply by Mr Arnold Bloch 47 ALJ 407.

The *Shulsinger Case* has now raised that very issue. Mr Shulsinger gave an undertaking to give his wife a *gett* in accordance with Jewish law to Joske J in the Family Court in return for an undertaking by his wife that she would not apply for maintenance. Upon the husband's failure to do so, the wife filed an application for his committal for contempt of court. The contempt application was dismissed by Asche J but the wife was released from her own undertaking not to apply for maintenance and awarded her costs. The husband appealed on the question of costs on the ground that the undertakings which were given by him were not matters in respect of which the court could issue injunctions and therefore could not be enforced by contempt proceedings. Consequently the contempt proceedings were of no effect and no order as to costs could be made in respect of them. The Full Court held that the application for contempt was proper and upheld the wife's costs.

The Family Law Committee of the Sydney University Law Graduates Association then under the chairmanship of Mr R S Watson QC, who as

⁸⁵ At 11,612-4.

Watson J constituted one of the members of the Full Court, addressed itself to the question of whether a court could use its powers under the Matrimonial Causes Act 1959 to compel or induce the granting of a *gett* by an unwilling husband in a letter published in 46 ALJ 602. A very interesting and full discussion of the issue is also found in an article written by Miss Susan Maidment entitled “The Legal Effect of Religious Divorces” in (1974) 37 Modern Law Review 611.

Miss Maidment describes the *gett* as follows:

“A Jewish divorce is effected by the husband delivering a *gett* [Bill of Divorcement], ie a written document, to his wife. The wife must consent to the divorce. The ceremony takes place before a rabbi and two witnesses. The divorce however takes effect by the act of the husband; the requirement of the rabbi and witnesses is more to authenticate the delivery and to insure that moral grounds exist for the divorce and that the parties both consent and understand the nature of the act. Nowadays the religious authorities [for Orthodox Jews who constitute the great majority of Jews in Great Britain, the Beth Din, ie the Court of the Chief Rabbi, in London] enter the divorce in the records of the Beth Din. The parties are then free to remarry after 90 days upon the delivery of the *gett*. It is quite clear that in theory this procedure involves no real judicial inquiry or declaration.”

In Israel, where the religious law and the law of the land coincide, this is the only legal way in which a Jewish marriage can effectively be dissolved. Israeli law will not recognise a civil divorce between Jews even if obtained in a country where both were then domiciled. It may be noted that in *Shulsinger* the wife was an Israeli citizen and wished to be divorced in a manner that would be legally effective in that country.

Under Jewish law, it appears, the wife must consent but the husband must deliver the *gett*. If the husband refuses, there can be no divorce. It seems, however, that in Israel a rabbinical court can order a husband to deliver a *gett* on pain of imprisonment until he complies or induce him to do so by awarding a punitive rate of maintenance if he fails to do so: see Shiloh, “Marriage and Divorce in Israel” (1970) Israeli Law Review 479. But if he prefers martyrdom, there is nothing that can be done to dissolve the marriage against his will.

What can or should an Australian court do? There are three possibilities:

1. Could or should the court issue a mandatory injunction under s114(3) of the Family Law Act ordering the husband to issue a *gett*? The Full Court in *Shulsinger* said that it would be extremely difficult to make such an order and cited as the reason “The fact that another tribunal is involved in the process”. But the passage cited earlier from Miss Maidment’s article makes it clear that the Beth Din (which presumably is the “other tribunal” referred to by their

Honours) does not have a judicial or investigatory function to perform in the matter.

It is argued, however, that the reasons given by the Family Law Committee in its 1972 letter against the use of an injunction under s 124 of the Matrimonial Causes Act 1959 still hold good in relation to s 114(3) of the Family Law Act. Basically their argument was that “if a mandatory injunction were granted it would not in any way make the divorce decree more effective as a matter of law, nor would it increase the legal capacity which both parties have by virtue of the decree absolute of validly contracting another marriage. It would not remove a legal barrier, but only a social one”.

It is true that in the *Shulsinger Case* the barrier existed by virtue of the law of Israel. But it is the function of an Australian court to dissolve the marriage according to Australian law. It is not the function of the court to dissolve it according to the law of Israel, or Malta or Greece, all of which impose certain religious requirements upon its citizens wherever they may be.

It is true that s 116 of the Constitution granting freedom of religion has been restrictively interpreted by Australian courts, unlike its United States model, as requiring only that the state shall not impose a religion, but not restraining the state from interfering with matters of a religious nature. But the nature of our pluralistic society, I think, does require the court to be exceedingly cautious in the exercise of the discretion to issue injunctions. If the court can order a Jew to issue a *gett*, can it order a Muslim to pronounce *talaq* or a Catholic to petition the Roman Rota for annulment of marriage? One can well imagine what the reaction of the Catholic hierarchy would be to such an order. Conversely, could a Catholic spouse seek an injunction restraining the applicant from proceeding with a petition for dissolution on the ground that such a decree would be ineffective in the eyes of the Church and make him or her an outcast in Church circles, citing s 43(a) in support?

2. Could the court proceed in the manner advocated by Rabbi Porush and receive an undertaking from the husband to deliver a *gett* within a stated period on penalty of contempt proceedings if he does not? The Full Court has answered this clearly in the positive in *Shulsinger* by allowing the wife her costs of the proceedings for contempt.

It is regrettable that the Full Court did so. Basically the Full Court appears to have taken the view that the undertaking was validly received, because, although an injunction could have been issued because of practical difficulties, the subject matter of the undertaking was a matter of concern to the court. It is here that the court erred, in my respectful submission, for the reasons already adduced against the granting of an injunction.

The court read into s 43(a) an obligation of the court to ensure that the same freedom was available to the wife as would be to the husband. In the first place, it seems strange to read this obligation into a clause that gives paramountcy to the need to preserve the marriage “as a union entered into for life” and secondly, the only “freedom” that a court of law can grant is legal

capacity under Australian law which the court had already granted by its decree.

Fortunately, the manner in which the case reached the Full Court makes it possible to restrict the scope of its decision. The Full Court merely held that, such undertaking having been given and the husband having failed to honour his undertaking, the wife was entitled to her costs in proceedings for contempt which were eventually dismissed but which also led to the release from her undertaking. The view expressed by their Honours that “justice required his Honour to seek the undertaking he sought” is *obiter* only, and cannot dictate to other judges sitting at first instance whether or not, in the circumstances of each case, they should accept or seek such undertakings. If they do, then clearly they must do likewise with other religious or national groups which impose restrictions on the right to remarry after divorce. To discriminate against Jewish husbands only would clearly be intolerable...⁸⁶

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Appendix E: Extracts from cases on financial adjustment

MARRIAGE OF STEINMETZ (1980)⁸⁷

Evatt CJ (Ellis and Emery SJJ agreeing):

"...The order made by his Honour, order number 7, appearing at p 9 of the record, is in the following terms: That the husband pay to the wife by way of lump sum maintenance the sum of \$4000 within three months of this date, provided that if within that time the husband has caused the wife to be granted a gett then his obligation under this order be reduced to the sum of \$2000. This order is linked to his Honour's findings on pp 20 and 21 of the record about the husband's refusal to grant the wife a gett. His Honour found the husband was vindictive in this matter and he adopted the approach applied in *Brett v Brett* [1961] All ER 1007. In his Honour's view, and I quote: The husband's attitude in this respect is a matter properly to be considered as relating to the financial resources of the wife and at his wish the husband's control over them as being applicable under the provisions of s 75(2)(o).

I entirely agree with his Honour's approach. The husband has it within his power to prevent the wife from remarrying and gaining the benefit of additional financial support which might come to her from marriage. Because of this it is proper in my view for a larger sum to be ordered as maintenance if the wife is denied the opportunity of remarriage."⁸⁸

MARRIAGE OF WOOLLEY (1981)⁸⁹

Nygh J:

"...It was argued on the part of the husband that I should pay regard to the wife's chances of remarriage. No doubt in earlier times I would have remarked on the wife's youthful appearance and lively personality and speculated that she would have no trouble in attracting "another man". Indeed a certain gentleman was strongly urged upon her as a likely candidate and questions, which once would have been regarded as highly embarrassing and humiliating, were put to her which she quite frankly answered.

In *Steinmetz and Steinmetz* (1980) 6 Fam LR 554; [1980] FLC 90-801 Hogan J took the view that the wife's opportunity to remarry was properly to be considered as part of her financial resources. In so holding his Honour purported to follow the decision of the English Court of Appeal in *Brett v Brett* [1969] 1 WLR 487 where a differential order was made depending on whether the husband granted the wife a religious divorce or not. This was justified on the basis that if the wife were not granted the divorce she could not in good conscience remarry and thereby find other means of support.

That decision was made however in other times when another morality prevailed. Its underlying philosophy does not appear to be consonant with the Family Law Act

⁸⁷ *In the Marriage of Steinmetz* (1980) 6 Fam LR 554, at 556.

⁸⁸ Reproduced with the permission of Butterworths.

⁸⁹ *In the Marriage of Woolley* (1981) 6 Fam LR 577, 585-6.

1975. If it is inappropriate to compensate a wife for the loss of her career as a wife and mother, it must be equally inappropriate to reduce her future maintenance on the ground that she should seek a fresh husband. As indicated by members of the High Court in *Gronow v Gronow* (1979) 29 ALR 129; 5 Fam LR 719 at 723 per Stephen J, Fam LR at 727 per Mason and Wilson JJ, and Fam LR at 730 per Murphy J, the effect of social change on our law cannot be ignored.

Section 75(2) makes express reference in para (m) to the circumstances in which financial support from a person other than a husband or former husband becomes relevant. As interpreted by Asche J in *Grabar and Grabar* (1976) 2 Fam LR 11,581 at 11,588, 11,589 this requires evidence that the wife is co-habiting with another person and, in addition, that she is receiving financial support from that person to such an extent as to relieve the need of the husband in whole or in part to support her. The evidence in the present case falls short of establishing that the wife is co-habiting with anyone at the time of the hearing and there was no evidence to suggest, that even if she had co-habited with the gentleman in question at periods in the past, she had derived any financial support from it. In appropriate circumstances the more or less definite prospect of remarriage might influence the choice between making an order for periodic maintenance as against an order for lump sum maintenance having regard to the operation of s 82(4). However in this case I detected from the submissions a general desire that the maintenance order should be by way of lump sum. It would be inconsistent with accepted principles of statutory interpretation to allow the restriction of para (m) to be transcended by invoking either para (b) or para (o). For these reasons I will not take into account any prospect of remarriage on the part of the wife."⁹⁰

⁹⁰ Reproduced with the permission of Butterworths.

Appendix F: Extract from Australian Law Reform Commission, Report No 57⁹¹

"Removing barriers to remarriage"

The gett

5.31. Under Jewish law, a divorce can be accomplished only by the parties. It is effected by the formal delivery by the husband and the acceptance by the wife of a Bill of Divorcement (a 'gett') under the supervision of a Rabbinical Court, the Beth Din. The parties are divorced and free to marry again after the gett has been delivered and accepted. Until such a divorce is effected, a man may marry again only if he obtains a dispensation from the Rabbinical Court. A woman may not remarry unless her husband dies. If she does (in a civil ceremony) any children of any subsequent marriage will be regarded as 'illegitimate' in the Jewish community. Because both the giving and the receiving of the gett is voluntary, either party may put considerable pressure on the other in negotiations about the custody of the children and the division of property.⁶⁰ The problem has been raised in the Family Court on several occasions. The Court has accepted an undertaking from a husband to do everything necessary to give his wife a gett⁶¹ and has ordered a wife to appear before the Beth Din and accept a gett.⁶² On the grounds that the wife's opportunity of remarriage was reduced by the husband's refusal to deliver a gett, the Court ordered that the lump sum maintenance payable by a husband was to be reduced if he did so.⁶³

Discussion paper proposal

5.32. **The proposal.** In DP 46 the Commission considered whether the civil law should be used to compel a party within whose power it is to grant a religious divorce to do so when the marriage has been dissolved under civil law. The Commission was divided on the issue. A majority of the Commission proposed that the Court should have a discretion to adjourn an application for a divorce on the ground that the applicant had not done everything within his or her power to remove any religious barriers to the spouse's remarriage. Some members of the Commission took the view that the court should be given further powers to compel a spouse to grant a religious divorce. One member opposed any mixing of religious and civil law.

5.33. **Response to the proposal.** This proposal elicited considerable comment most of which supported the proposal in principle. The submissions reflect the division of opinion within the Commission. They fall into three groups: opposition to the proposal, support for the proposal as made and submissions to the effect that the proposal does not go far enough.

⁹¹ Australian Law Reform Commission, Report No 57, *Multiculturalism and the Law* (1992), Chapter 5, paragraphs 5.31 – 5.42. Reproduced with the permission of the ALRC.

⁶⁰ A similar problem arises for Muslim women whose divorce may not be recognised within the community until the husband grants her a religious divorce.

⁶¹ *Schulsinger and Schulsinger* (1977) FLC 90-207.

⁶² *In the marriage of Gwiazda*, unreported, 23 February 1983 (Emery SJ).

⁶³ *Steinmetz and Steinmetz* (No 2) (1981) FLC 91-079.

5.34. **Grounds of opposition to the proposal.** A number of submissions reject the proposal on the ground that civil and religious law should remain separate.⁶⁴ One submission notes that introducing principles of equality, desirable though they may be, may amount to superimposing western culture on a traditional religious culture and be in conflict with the aims of multiculturalism.⁶⁵ Two Jewish organisations oppose the proposal: one on the ground that there is no need to obtain a gett to effect the dissolution of a Jewish marriage⁶⁶ and the other on the ground that, as most members of the Jewish community in Australia are not orthodox Jews, the proposed change would have little effect.⁶⁷

5.35. **Alternative strategies.** Some submissions suggest alternative strategies. Pre-marital and post-marital agreements about granting a gett should be enforceable.⁶⁸ Consideration should also be given to adjourning ancillary applications, for example, property applications and applications for custody of children, where one party recalcitrantly fails to do everything within his or her power to remove religious barriers to divorce.⁶⁹ An ethnic and religious affairs ombudsman should be appointed to the Family Court. His or her duties would include providing multicultural advisory and support service to the court, legal professionals and the parties in dispute and developing and delivering a volunteer counselling service for disputing parties.⁷⁰

5.36. **Last resort.** Some submissions suggest that, if the proposal were adopted, the discretion should be exercised only in limited circumstances. One submission suggests it should be exercised only if the parties are able to demonstrate that grounds exist for the grant of a religious divorce and it is in the power of one party to effect the divorce but he or she refuses to do so.⁷¹ Another suggests it should be reserved for cases where failure to do so would seriously disadvantage or penalise one of the parties.⁷²

5.37. **The proposal does not go far enough.** A number of submissions support the proposal as far as it goes but suggest that it is inadequate. The proposal does not address the difficulties faced by an applicant for divorce whose spouse refuses to deliver or to accept the gett.⁷³ Many of these suggestions urge the Commission to

⁶⁴ eg Catholic Multicultural Council *Submission* April 1991; Presbyterian Women's Association of Australia in NSW *Submission* April 1991; Baptist Union Queensland *Submission* May 1991; Dr H A Finlay *Submission* May 1991; Sydney Anglican Diocese, Ethnic Workers Forum *Submission* May 1991; cf Ethnic Affairs Commission of New South Wales *Submission* June 1991 which accepts the principle of separation of civil and religious law but states that adjournment of an application for divorce is a legitimate function of the civil law when the fundamental freedom of an individual is deliberately inhibited by the spouse seeking a civil divorce.

⁶⁵ Department of the Attorney-General (Qld) *Submission* July 1991.

⁶⁶ Jewish Secular Humanistic Society *Submission* August 1991.

⁶⁷ National Council of Jewish Women of Australia *Submission* June 1991.

⁶⁸ eg A Strum *Submission* April 1991; T Schwarcz *Submission* May 1991.

⁶⁹ Law Council of Australia, Family Law Section *Submission* May 1991.

⁷⁰ National Council of Jewish Women of Australia *Submission* June 1991.

⁷¹ Justice JV Kay *Submission* March 1991.

⁷² Dr HA Finlay *Submission* May 1991.

⁷³ eg Executive Council of Australia Jewry, Jewish Women's Issues Committee *Submission* April 1991; Federation of Community Legal Centres (Vic) Inc, Violence Against Women & Children Working Group *Submission* July 1991; Perth Jewish Ecclesiastical Court *Submission* April 1991; T Schwarcz *Submission* May 1991; G Hammer *Submission* April 1991; Dr V Ranki *Submission* April 1991; A Berger *Submission* April 1991; Rabbi JB Kamins *Submission* April 1991; Women's International Zionist Organisation NSW *Submission* April 1991; Australian Federation of Women's

adopt the Canadian model.⁷⁴ Submissions also referred to the difficulty in changing the Jewish law and the need for the civil law to adopt a positive approach to the problem.⁷⁵

Overseas responses

5.38. ***Canada.*** Legislation providing for no fault divorce came into effect in Canada in June 1986. Following consultation with all major religious groups, the *Divorce Act 1985* (Can) was amended to give the court the power to dismiss any application, and strike out any pleadings and affidavits, filed by a spouse who has failed to remove all religious barriers to the remarriage of the other spouse. The legislation was expected

- to place spouses on a more equal footing in civil divorce actions
- to encourage women in particular to exercise fully their rights under the law and
- to maintain the integrity of the *Divorce Act 1985* (Can) by helping to ensure that refusing to accept or to give a religious divorce is not used as a bargaining tool to gain concessions on child custody and access, or monetary support.

Under the legislation a spouse may serve on the other spouse and file with the court an affidavit stating

- the nature of any barriers to his or her religious remarriage, the removal of which is within the other spouse's control
- he or she has removed, or has indicated a willingness to remove, any religious barriers to the remarriage of the other spouse, the removal of which is within his or her control, and the date and circumstances of the removal or indication of willingness to remove
- he or she has, in writing, requested the other spouse to remove all religious barriers, the removal of which is within the other spouse's control, to his or her remarriage
- the date of the request and
- the other spouse, despite the request, has failed to remove the barriers.⁷⁶

If a spouse who has been served with such an affidavit does not within 15 days (or longer with leave of the court) serve on the other spouse and file with the court an affidavit stating that the barriers have been removed and satisfy the court that they have been removed, the court may make certain orders. It may, subject to any terms it considers appropriate, dismiss any application and strike out any other pleadings or affidavits filed by the spouse under the Act.⁷⁷ If the court is satisfied that a person has

International Zionist Organisations *Submission* April 1991; Australian Jewish Welfare Society *Submission* April 1991; A Gordon *Submission* April 1991; I Nemes *Submission* April 1991; Professor S Encel *Submission* April 1991; National Status of Women Council *Submission* May 1991; A Naylor *Submission* May 1991; South Australian Government *Submission* September 1991; L Rosenblum *Transcript* Brisbane 14 May 1991.

⁷⁴ See para 5.38.

⁷⁵ L Rosenblum *Transcript* Brisbane 14 May 1991.

⁷⁶ *Divorce Act 1985* (Can) s21.2(2).

⁷⁷ *Divorce Act 1985* (Can) s21.2(3).

genuine grounds of a religious or conscientious nature for refusing to remove the barriers the court may decline to make any orders.⁷⁸

5.39. *New York.* In New York, the court cannot enter a judgment of annulment or divorce unless any barriers to religious remarriage by a spouse, the removal of which are within the control of the other spouse, have been removed. The *Domestic Relations Law* s253 provides that, in a contested divorce, any applicant whose marriage was solemnised by a religious celebrant must file a statement that

- he or she has taken, or will take, all steps within his or her power to remove all barriers to the other spouse's remarriage or
- the other spouse has waived in writing the applicant's obligation to file the statement.

In an uncontested divorce, both parties must file such a statement or waive the obligation of the other party to do so. A final judgment of divorce or annulment cannot be entered unless the court receives the statements. Even if the statements have been filed, final judgment cannot be entered if the person who solemnised the marriage swears that, to his or her knowledge, the applicant has failed to take all steps within his or her power to remove all barriers to the other party's religious remarriage.⁷⁹

Recommendation

5.40. *Should the law be changed?* The first question is whether legislation should give the court specific power to take measures, whatever they be, to try to compel a person to perform a religious act or to undertake a religious proceeding. It may be argued that the Family Court has adequate powers to deal with the situation. The *Family Law Act 1975* (Cth) s114 gives the court power to grant injunctions. In some proceedings, this includes the power to grant an injunction in aid of the enforcement of a decree.⁸⁰ Failure to comply with an injunction is contempt of court. A person who is in contempt because he or she has failed to comply with a court order may be imprisoned until he or she complies with the order. In the Commission's view, a person who refuses to deliver or accept a gett should not be at risk of imprisonment. Imprisonment is not an appropriate sanction in the circumstances and may well ensure that the person becomes a religious martyr. For this reason, the court should have alternative powers to deal with the situation. On the other hand, it may be argued that to give the court specific powers to deal with the situation is inconsistent with the traditional separation between church and state that has been maintained in western democratic legal systems in modern times at least. However, to the extent that the Family Court has, on a few occasions, used its powers to do what it can to ensure that a man delivers, or a woman accepts, a gett,⁸¹ that principle has given way to the interests of the party who may be prejudiced by the wilful refusal of the other to do what he or she has power to do. A woman whose husband refuses to deliver a gett is

⁷⁸ *Divorce Act 1985* (Can) s21.2(4).

⁷⁹ For a discussion of the New York legislation, see M Feldman, 'Jewish Women and Secular Courts: Helping a Jewish Woman to Obtain a Get' (1989-90) 5 *Berkeley Women's Law Journal*, 139.

⁸⁰ *Family Law Act 1975* (Cth) s114(3); see also *In the marriage of Gwiazda*, unreported, 23 February 1983 (Emery SJ).

⁸¹ See para 5.31.

able to remarry according to civil law; her subsequent marriage is a valid marriage. Her position is no different from that of a woman whose divorce is not recognised by the Catholic church and who is unable to remarry in a Catholic church. On the other hand, delivery and acceptance of the gett, unlike the granting of a Catholic annulment, is within the power of the parties alone. Only the husband can deliver, and the wife accept, a gett. The Rabbinical Court can cajole and persuade but, in a secular society, it has no powers of enforcement. In the context of civil divorce proceedings, refusal to deliver or accept the gett can be used as a tool to apply emotional and financial pressure on the other party in negotiations between them about the custody of, and access to, children, spousal maintenance and property. This is inappropriate and its inappropriateness is widely recognised in the Jewish community. Failure to obtain a gett means that a woman who is divorced under the law cannot fully enjoy the benefits of her divorce not because this is not allowed under religious law but because her former husband will not do what is necessary to make it possible. For these reasons a majority of the Commission⁸² favours changing the law in a way that would ensure that she can.

5.41. **Options for reform.** There are a number of options for reform. The majority view expressed in the discussion paper was that the court should have a discretion to adjourn an application for divorce unless the applicant had done everything in his or her power to remove any religious barriers to the spouse's remarriage. The discretion would be exercisable only when the person refusing to deliver, or accept, the gett was the applicant for the civil divorce. It would not be exercisable if the respondent to the divorce proceedings failed to deliver, or accept, the gett. Either party, applicant or respondent to the divorce proceedings, should have this protection. The discretion would be exercisable only in the context of divorce proceedings and not in any subsequent proceedings. One party may be vulnerable to pressure from the other to agree to a disadvantageous property settlement in return for a promise to deliver or accept a gett. A majority of the Commission is now of the view that the discussion paper proposal does not go far enough.⁸³ However, the Commission does not favour the New York approach. That law imposes an obligation on all persons married in a Jewish religious ceremony, whether or not the couple has come to an amicable arrangement between themselves. In the Commission's view, the statute should apply only when the parties are in dispute. To this extent, a majority of the Commission favours the approach adopted by the Canadian legislature. However, the discretion given the court in the Canadian legislation is too broad. It would allow the court to dismiss an application or strike out pleadings in cases involving children. Such cases should be decided on the basis of the best interests of the child and the court's capacity to take account of matters relevant to this should not be prejudiced. The Canadian approach would, for example, allow a court to strike out a party's defence in property proceedings and make orders for the distribution of property as if the defence had not been filed. This is not appropriate in the circumstances and contrary to the principles of natural justice. The Court's discretion should be limited to adjourning proceedings and, in divorce proceedings, ordering that a *decree nisi* does not become absolute until the court is satisfied of certain matters.

⁸² Justice Nygh dissents.

⁸³ Most submissions support the Commission's view.

5.42. **Recommendation.** A majority of the Commission⁸⁴ recommends 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 of 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.

⁸⁴ Justice Nygh dissents from this recommendation.