

# **JEWISH WOMEN & RELIGIOUS FREEDOM IN AUSTRALIA STATUS REPORT**

**Friday, 18 March 2011**

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## **Part I: Introduction**

1. Project Description
2. Aims of the Project
3. Governing Principles
4. Methodology

## **Part II: Background Information**

1. Jewish Women in Australia
2. The Position of Jewish Women in Judaism: A picture of Inequality?
3. The Relationship Between Jewish Law & the Law of the State
4. Australian Law & Freedom of Religion

## **Part III: Issues for Jewish Women**

1. Equality Between Religions
2. Dignity and Respect
3. Facilitating Inclusion

## **Part IV: Freeing Chained Women – Divorce Under Civil & Jewish law**

1. The Nature of the Problem
2. Freedom of Religion and the *Aguna* Problem
3. Preempting the Problem
4. On Civil Divorce
5. After Civil Divorce
6. Proposals for Law Reform

## **Part V: Conclusion & Recommendations**

Appendix 1: Bibliography

Appendix 2: Notes from Consultation with Jewish Women

Appendix 3: Model Pre-Nuptial Agreement

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## **Part I: Introduction**

### **1. Project Description**

This report discusses the impact of freedom of religion in Australia on Jewish women. Freedom of religion is a human rights principle, concerned with the relationship between the State and religious belief and practice. The operation of the law must, to be consistent with the principle of freedom of religion, maximise the right of the individual to engage with his or her spirituality and to live within a community of like-minded worshippers, while ensuring that the fundamental values of Australian liberal democracy are maintained. Australian law and policy strives to provide ample space for diverse religious practice, at the same time as protecting the community from the threats posed by religious extremism and religiously motivated terrorism.

### **2. Aims of the Project**

The objective of this report is to establish what role, if any, the State should play with respect to Jewish women in Australia. There are two sides to this: First, the question arises as to whether, and to what extent, the operations of the State interfere with Jewish women in the fulfilment of their religious duties, or in their performance of rituals and practices. The second question to be explored is the extent to which the State: (a) enhances – or could enhance – the experiences of Jewish women in relation to worship or their adherence to Jewish law; and (b) could protect Jewish women from discrimination.

### **3. Governing Principles**

In order to establish the appropriate operation of law and policy with respect to freedom of religion, this Report looks to the fundamental values of human rights. These are Dignity, Equality & Inclusion – ideas and ideals which are also strategic tools available to assess social action for its consistency with human rights.

#### **Dignity**

The principle of dignity is a reiteration of the 18<sup>th</sup> Century philosopher Immanuel Kant's categorical imperative never to treat people as means, only as ends in themselves<sup>1</sup>. A simple application of this is known in Christianity as the Golden Rule. The source in Judaism is the teaching by Rabbi Hillel "Do not do unto others, that which is hateful to you."<sup>2</sup> If each member of society is valued and learns to value herself, the importance of treating all people with dignity and respect will be readily accepted.

#### **Equality**

The principle of equality is the principle that all members of the society are entitled to be treated like all other members of society, such that all social and political action is predicated upon the principle that all people are valued equally. This does not mean that we each should be treated in an identical fashion to each other. On the contrary, it is almost always necessary to treat different cases differently, such that citizens can have equal outcomes. Substantive equality will only be achieved when structural and systemic discrimination are located and rectified. This involves recognition of subjugation or oppression where it occurs and a commitment to rectify power imbalance.

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<sup>1</sup> Kant [\*Groundwork for the Metaphysics of Morals\*](#)

<sup>2</sup> Mishna Shabbat 31a.

[*Mishna* refers to a compilation of Oral Law redacted in the 2<sup>nd</sup> Century CE. *Shabbat* refers to the particular section and *31a* to the folio page.]

## **Inclusion**

The principle of inclusion requires that all people have available to them access to all the goods and benefits that society has to offer. Inclusion transcends the liberal value of tolerance and goes beyond acceptance. Inclusion is not just the opposite of social exclusion. It is a positive principle that requires that we overcome exclusion by welcoming all members of society into all operations of the community and the state.

The application of these principles to experiences of Jewish women in Australia leads to recommendations for State action.

## **4. Methodology**

The research for this project involved two steps. First, a literature review was conducted, both of traditional scholarly material and of the Internet, representing a spectrum of Jewish opinion. The literature related to all aspects of being a Jewish woman – ranging from sociological material to a consideration of the position of women in *Halacha* (Jewish law). Material on the doctrine of freedom of religion and on law pertaining to the rights of faith communities and of individuals to religious belief, practice and participation, was considered. A Bibliography of works consulted can be found in Appendix 1.

Secondly, consultations with Jewish women were held in Sydney and Melbourne (where Australia's largest Jewish communities are located, together accounting for 85% of all Australian Jews). The project was discussed with the Executive of the National Council of Jewish Women – the peak body of Australian Jewish women. Women leaders from a wide range of Jewish and other women's organisations were then invited to a 3 hour consultation, and invited to continue the discussion by email. A summary of the Consultations is to be found in Appendix 2.

## **Part II: Background Information**

*Worldwide, women and children are among those most affected by human rights abuses; women and children make up the majority of victims of domestic violence; it is mainly women and girls who are deprived of an education, or even denied an appropriate position in the labour market despite a good education; political opportunities for women are still minimal, despite active and passive suffrage. This is the case regardless of culture or religion. In this sense, achieving gender equality is one of the greatest political challenges of our century.<sup>3</sup>*

Seyran Ates, author of this comment, admitted that this 'standardised picture requires one qualification' and pointed out the grave differences between what has already been reached in western countries and the reality for countless women in most Islamic countries and in South America, Asia and Africa. We would add a further qualification. Despite the small number of issues that will be highlighted in this paper, Jewish women generally fare very well both within the Jewish community and in the broader community. The disadvantages that Jewish women experience in ritual life and in religious law are, in almost every case, minor compared to women in some other cultural settings.

### **1. Jewish Women in Australia**

*What different groups and communities of Jews have brought and continue to bring to their understanding of Torah is the "chain of tradition" (shalshet kabbalah) that represents a plurality of expressions of Judaism, each only a partial expression of the truth. The many branches of Orthodox, Progressive and other forms of Judaism are all only partial expressions of the truth that Judaism as a "tree of life" represents; and only God knows the ultimate truth. For this reason, it is not for any one group to say of another that it does not practice authentic Judaism. In short, there is more than one way to be Jewish<sup>4</sup>*

The 120,000 Jews living in Australia define their 'Jewishness' variously as their 'religion', their 'nationality', their 'ethnicity' and their 'identity'. A recent survey conducted by Monash University<sup>5</sup> found that 25% consider themselves 'Orthodox' or 'Ultra-Orthodox', indicating a high degree of identification with traditional religious practice and law. 16% define themselves as belonging to non-Orthodox branches of Judaism. 36% consider themselves 'traditional', which may indicate that they do not affiliate with any particular religious institution but that they do observe many Jewish customs and celebrate festivals. A further 23% define themselves as 'secular'. Over 90% of respondents in all groups considered their 'sense of being Jewish' as significant.

Attempting to reflect the range of attitudes from women across all these groups (estimated to be 50% of the total in all cases, numbering some 60,000 in Australia) has been a major challenge for the authors of this paper. Indeed, the question arose to what extent the views of 'secular' Jews are relevant to the question of 'religion', which is the underpinning of this task. However, in the case of Judaism, the distinction between 'religion' and 'culture' cannot be clearly made and 'cultural' Jews are an inseparable part of the faith community.

There are issues of concern for secular Jewish women regarding the lay leadership and decision-making authority within the community. These are not dissimilar from the concerns of Australian women in general regarding the inequality between the genders that persists.

Most of the issue relating to women and Judaism are experienced only with respect to Orthodox Judaism, which includes a range of communities, from those whose practice is based on enlightened or

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<sup>3</sup> Ates, Seyran (26 September, 2009) *The Guardian* ([guardian.co.uk](http://guardian.co.uk))

<sup>4</sup> Rabbi Fred Morgan, Temple Beth Israel, Melbourne, January 2010

<sup>5</sup> Preliminary results released by Professor Andrew Markus from the Australian Centre for Jewish Civilisation in August 2009. Released in booklet form by the Jewish Communal Appeal in Sydney and published in the *Australian Jewish News*

liberal constructions of *Torah*<sup>6</sup> obligations to those who are bound by unyielding interpretations of duties and responsibilities, including a strict understanding of gender differentiation. Whereas other branches of Judaism place the locus of authority and choice on the individual, Orthodoxy holds that there are obligations that emanate from a covenantal relationship between the Jewish people and G'd. However, as already noted, there is no single interpretation of how those obligations are to be enacted.

## 2. The Position of Jewish Women in Judaism: A picture of Inequality?

Any discussion of Judaism and Jewish life must take into account social practice in addition to a close inspection of the Jewish belief system. This is particularly relevant to beliefs about the inequality of Jewish women within Judaism. Principles of *Halacha* (Jewish law), including principles of equality, justice and dignity, are considered to be timeless and immutable<sup>7</sup> but as so often happens, Jewish social practice is not always informed solely by Jewish belief/theology.

From a 21<sup>st</sup> century perspective, there is much to criticise with respect to the position of women in Judaism. Men dominate leadership positions in both communal and religious practice. Many women have felt disenfranchised from Orthodox religious practice, and this has played a significant role in the development of religious alternatives within Judaism – current Reform and Conservative practices reflect this view.<sup>8</sup> However, this is not an alternative for those who subscribe to Orthodoxy and does not answer the feelings of exclusion.<sup>9</sup> As the opportunities have flourished in recent years, many Orthodox women have committed themselves to studying Jewish sources and have sought means of promoting women's equality within Orthodox Judaism. The last 20 years have seen remarkable changes in the composition of lay leadership of synagogues - where the involvement of women would once have caused a scandal, women are now commonplace. Parallel developments within Orthodox synagogue practice have been far slower, and in many communities there is little sign of change. However, alternative inclusive communities, which provide a role for women while maintaining *halacha*, do exist.<sup>10</sup> Such communities nonetheless remain in the shadow of a male patriarchal Judaism.

It is nonetheless a mistake to assume that current practices are a simple reflection of modern feminism. Understanding the position of women in Judaism requires an appreciation of history, for the interpretation of woman's role has changed over time.<sup>11</sup> Whereas in the *Torah* itself, many women are portrayed as powerful, autonomous beings, under Rabbinic Judaism, which delineated the *mitzvot* (commandments/obligations of Jews), the obligations of women are less numerous than those of men. In a system where obligations defined status, (that is, the greater the number of obligations fulfilled, the closer to G'd one could be), this had a detrimental effect. In many respects, the position of women in Judaism in the post-Biblical era can be seen as a reflection of general social constructions of women and of the gendered structure of society.<sup>12</sup> Jewish law is a living instrument. Its teachings have been interpreted and re-interpreted in every generation, always with the intention to understand how Divine law is to be applied in a particular social setting.

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<sup>6</sup> The term '*Torah*' is variously used to denote the Five Books of Moses, (the first part of the Hebrew Bible), the entire Hebrew Bible or the body of laws that has been extrapolated from it. Here, it is used in the third sense.

<sup>7</sup> For a discussion on this topic see Hartman, David A *Living Covenant: The Innovative Spirit in Traditional Judaism* (Jewish Lights, 1998) et al

<sup>8</sup> Beecher Sue (1999) "The Treasure Chest of Diversity: Contemporary Australian Jewish Women Respond to Feminism" *Australian Feminist Studies*, Vol. /4, No. 30, /999

<sup>9</sup> Fein Y (2006) "A suitable Jewess" in Fagenblat M, Landau M & Wolski N *New Under the Sun* Black Ink 179-191

<sup>10</sup> Such as Shira Chadasha community in Melbourne

<sup>11</sup> Henkin, Yehuda (1999) *Equality Lost: Essays in Torah Commentary, Halacha, and Jewish Thought* (Lambda)

<sup>12</sup> Fein op cit

At a fundamental level, women in Judaism have equal status to men and are of equal moral worth.<sup>13</sup> This is because Judaism considers that all humans are created in the image of G'd. Women and men are equally endowed with divine attributes. The Jewish G'd has no gender – indeed, to ascribe gender to G'd is a form of idolatry.<sup>14</sup> In Judaism, G-d is both omnipotent and immanent, transcendent and present. The 12<sup>th</sup> Century philosopher, Moses Maimonides, who is the most influential figure in post-Biblical Judaism, insisted that we can only describe the Divine in negative terms – G'd has no physical form, no limits to His existence. For 20<sup>th</sup> Century philosopher, Martin Buber 'God is not divided but everywhere whole, and where he reveals himself, there He is wholly present.'<sup>15</sup> This emphasizes the non-corporeal nature of G'd.<sup>16</sup>

Traditionally, Judaism has subscribed to the *principle* that women are inherently different from men but that this difference is not an indication of an inferior status.<sup>17</sup> From the Biblical perspective, men and women are complementary parts of the same original human. 'Male and female He created them.' (Gen 1: 24) (meaning that the original 'Adam' was androgynous). G'd decides that it is 'not good for man to be alone' and separates the genders. Women are givers of life (the name 'Eve' is '*Chava*' meaning 'life' in Hebrew); men are tillers of the ground (the word 'Adam' is related to '*adama*' meaning 'earth/ground').

Marriage is idealized as the re-uniting of the two halves of the human (the original 'Adam' was androgynous).<sup>18</sup> Because the Biblical account describes the woman as coming from the man and speaks of a man 'taking' a wife, traditional Jewish marriage can be viewed as disadvantaging the woman. This has no implications (legal or otherwise) for a woman in marriage but becomes an issue if the marriage breaks down. The process of divorce reflects the man's 'ownership' of the marriage and creates significant problems for Jewish women divorced under civil law but denied a religious divorce. This will be discussed in detail below.<sup>19</sup>

At many times and in many places, the emphasis on the home as the focus and fulcrum of Jewish life ensured that women were held in high esteem as the leading figures and managers of the home.<sup>20</sup> In some quarters, a Jewish man who was a scholar was a highly desirable partner, and, after marriage, religious men were supported financially by their wives in order to be free to study Torah all day. As such, it was women who had the skill and knowledge of the merchant, and who were expected to ensure the profitability of the family business.<sup>21</sup> Over and beyond this, women's ability to create life and to raise a family brought with it respect – even awe. Rabbinic literature is replete with the praise of women.<sup>22</sup> The hierarchy of obligations was established in such a way that bearing and rearing children was prioritised over other matters; indeed, the future of Judaism depends on the education of children and this finds many expressions in ritual and liturgy.<sup>23</sup>

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<sup>13</sup> Henkin op cit

<sup>14</sup> Although implicit in Jewish thought since Second Temple times, this principle was articulated by 12<sup>th</sup> Century philosopher and Jewish legal expert, Moses Maimonides, in his 'Thirteen Principles of Faith', partly as a response to Christianity, and it is Maimonides' principles which have permeated and provided the basis for Jewish thinking into modern times.

<sup>15</sup> *Martin Buber: The Life of Dialogue* by Maurice S. Friedman in 'religion-online'

<sup>16</sup> The use of the male pronoun should not be interpreted as implying gender. Hebrew has no neuter gender and the 'simple' form of verbs and pronouns is the male singular. Nevertheless, in translation into languages including English, where gender in language implies gender in form, the use of 'He' has been misinterpreted and abused.

<sup>17</sup> Henkin op cit

<sup>18</sup> This Rabbinic interpretation, which is normative in Judaism, is found in the ancient *Midrash Rabbah* - Genesis VIII: 1

<sup>19</sup> This is the subject of discussion in Part IV

<sup>20</sup> For a contemporary view which reflects this traditional position see [http://www.chabad.org/library/article\\_cdo/aid/108397/jewish/Woman-in-Judaism.htm](http://www.chabad.org/library/article_cdo/aid/108397/jewish/Woman-in-Judaism.htm)

<sup>21</sup> Whereas the phenomenon of the woman as bread-winner is already evident from Second Temple literature (see Proverbs 31:10-31), sociological studies in Israel since the late 1990s have emphasized the role of women as primary providers in the Ultra-Orthodox community. ,

<sup>22</sup> See, Menachem Brayer, *The Jewish Woman in Rabbinic Literature: A Psychohistorical Perspective*. New Jersey: Ktav Publishing, 1986.

<sup>23</sup> The fact that most Jewish rituals take place in the home is designed to include children, who are valued as a Divine gift. The Talmud states that "childhood is a garland of roses" and that "the very breath of children is free of sin." (Babylonian Talmud, Shabbat 152, 119). The Midrash says: Rabbi Meir said: "When the Children of Israel stood at Mount Sinai to receive Divine Revelation, the Holy One, blessed be He, said to them: 'Bring

Because Jewish life revolved around fulfilment of Torah obligations, a principle was devised that said that women were exempt from 'positive, time-bound commandments.'<sup>24</sup> This was to ensure that they should not be obligated to participate in a ritual duty at a particular time – an unrealistic expectation if responsibilities towards children were to be prioritised.<sup>25</sup> Women had the same 'negative' commandments (prohibitions) but many fewer positive obligations. This was to become a 'double-edged sword'.

Over time, the emphasis on home and family responsibilities disadvantaged women. In traditional Jewish circles, women were denied equal (Jewish) educational opportunities with men and thus were prevented from participating fully in Jewish ritual or legal life or from economic independence. In a society, which ascribed status to learning, the status of women was diminished by their exclusion from higher Jewish learning. In most parts of the Jewish world this is no longer the case and women have access to all types of education. In the ultra Orthodox community, however, this is still an issue to be tackled.<sup>26</sup>

Throughout the 19<sup>th</sup> Century, industrialisation and technological developments, which wrought dramatic change to society, brought with them political emancipation for some Jews.<sup>27</sup> Many Jews in Western Europe and America assimilated into society, foregoing their distinct Jewish culture. One of the features of modernity was the gradual emancipation of women. A vast chasm opened between Jewish women in modern, emancipated circles and those in traditional settings.

For Jews who remained within the traditional life, the synagogue and public life were the domain of men. These areas were considered important for the maintenance of community but inferior to the home in terms of their ability to ensure a Jewish future. While certain prayers could only be said in a 'community' setting,<sup>28</sup> the purpose of community was to support the family. Women were not expected to contribute to the public arena while they were devoting their energies to the more important role of maintaining the home. Consequently, no thought was given to facilitating their participation in Synagogue life. Indeed, their presence in the Synagogue was often considered a distraction for the male congregants.

Over time, the role of the synagogue and public ritual gained more significance. At the same time, sociological changes, based in part on improvements in health, mean that women had begun to have a much smaller part of their lives dedicated to child bearing and rearing. There is now a significant period of time between 'coming of age' as a Jewish woman (age 12) and marriage and children and an even greater amount of time for most women in the post-parenting period of their lives. Today, the Orthodox community maintains the distinction between men and women in Synagogue life, leading women to explore alternative expressions of spirituality and new rituals. In the non-Orthodox world, where the concept of *mitzvah* (obligation) is not the basis of decision-making, men and women have equal status in the Synagogue. In fact, in non-Orthodox branches of Judaism, the synagogue/temple replaces the home as

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me good guarantors that you will keep my Revelation and then I will give it to you.' They replied: 'Sovereign of the Universe, our ancestors will be our guarantors.' Said God them: 'Your guarantors need guarantors themselves, for they have not been without fault.' They answered, 'Our prophets will be our guarantors.' God replied: 'They have also not been without fault.' Then the Israelites said: 'Our children will be our guarantors.' To which God replied: 'in truth these are good guarantors. For their sake I will give it to you.'" (Shir Hashirim Rabbah, 1:4).

24 Mishnah Kiddushin 1:7

<sup>25</sup>The prioritizing of child-rearing is reflected in the debate over whether women who choose to fulfil commandments from which they are exempt of obligation should recite the blessing acknowledging the obligation which usually accompanies fulfillment of a commandment. This debate begins in the 5<sup>th</sup> Century CE and continues in Rabbinic literature throughout Mediaeval times until today. Although the essence of the debate is how the differentiation between

<sup>26</sup> See, for example, Shoshana Zolty, *And All Your Children Shall be Learned: Women and the Study of Torah in Jewish Law and History*, Jason Aronson, NJ, 1993.

Also, [http://www.chabad.org/theJewishWoman/article\\_cdo/aid/338925/jewish/Transforming-Womens-Torah-Learning.htm](http://www.chabad.org/theJewishWoman/article_cdo/aid/338925/jewish/Transforming-Womens-Torah-Learning.htm)

<sup>27</sup> This is a generalisation. There exists the myth of the modernisation of Jews in the 19<sup>th</sup> Century but Emancipation did not reach the major population centres of Jews. It was the events of the 1<sup>st</sup> half of the 20<sup>th</sup> Century, and the aftermath of WWII, which created the dilemmas and awareness of inequality to significant numbers of Jewish women.

<sup>28</sup> A 'minyan', or quorum, consisted of 10 men. It has been acknowledged that insistence on a minimum of ten ensured that Jews created communities and did not live isolated from one another.

the locus of Judaism. This has significant consequences for the equality /inequality of women. Because the non-Orthodox synagogue is organised around the principle of gender equality, and because the synagogue has replaced the home as the locus of religious life within non-Orthodox Judaism, issues for non-Orthodox women are significantly diminished. Inequality persists, however, within Orthodox and ultra-Orthodox communities. Negotiating a better outcome for women within the Orthodox world is a matter for each synagogue community, and, to the extent that pressure exists and women continue to challenge the male power structure of Judaism in a manner they deem appropriate, the issue of gender inequality will maintain a place on the Jewish agenda.

### **3. The Relationship Between Jewish Law & the Law of the State**

Orthodox Judaism, the largest religious segment of the Australian Jewish community, is singular in its adherence to *halacha*. It is comprised of a range of communities from those whose practice is based on enlightened or liberal constructions of *halacha* to those groups sometimes considered to be fundamentalist or extremist in their attitude to Judaism. Even these groups are obliged by Jewish law to obey the laws of the State. One of the precepts of *halacha* that is central to Jewish practice around the world, is *dina demalchuta dina* (the law of the land is the law). As such, Jews are required by Jewish Law to obey the law of the society in which they live. Women are obliged by Jewish law, just as men are.

Only in circumstances where a state law specifically requires a Jew to act contrary to Jewish law may a Jew deviate from the above principle. History informs us of numerous occasions when an antisemitic dictator has required his Jewish subjects to disobey the laws of circumcision or *kashrut* (dietary requirements) or to forego the practice of religion and of religious rites. Jews were then authorised by Jewish law to resist the law and to undertake acts of civil disobedience. However, as a general rule, oppressed communities were too disempowered to act. This is not the position of Jews in Australia today.

Government commitment to Multiculturalism, involving a confluence of the celebration of diversity in harmony with social cohesion, has provided space for minority religious and cultural groups to flourish. The Jewish community has benefitted from this inclusive attitude. Antidiscrimination law has addressed the worst examples of blatant discrimination, and while a significant underbelly of antisemitism remains, legal tools are available to respond to antisemitic acts, as required.

The practice of Judaism does not in any way challenge current public policy. The fear of terrorism and the threat of racial violence is, unfortunately, a reality of Jewish existence. Jews are often the target of the hatred and vitriol of extremist groups; such groups threaten the very existence of the State of Israel. Jews have a self-interest in ensuring the success of counter-terrorist and other laws designed to protect the values of social democracy.

It will be seen that the issues for Jewish women and the recommendations made in this paper do not challenge the legal system or current laws. The matters raised might benefit from additional legislation or minor adjustments to existing laws but in no way conflict with existing principles or practice.

### **4. Australian Law & Freedom of Religion<sup>29</sup>**

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<sup>29</sup> The scope and application of the principle of freedom of religion in Australia is mapped out in Jones, M "Freedom of Religion and Belief" *Human Rights*, The Laws of Australia, Law Book Co. (1995) 77-105. See also Gaze E & Jones M *Law, Liberty and Australian Democracy* (1990) Law Book Company pp243-284 which explores freedom of religion, and the human rights issues arising, at the interface between Australian law and religious practice.

The value of existing law for Jewish women in Australia, imperfect as it may be, should not be underestimated. Jewish identity is passed through the maternal line and women are conscious of their responsibility for the continuity of Judaism. They may feel particularly affected when the sanctity of Judaism is denied or where expressions of Judaism are threatened and are heartened when they are upheld. As such, mention must be made of laws which promote an inclusive society and which underpin the experience of Jews, and therefore Jewish women, in Australia.

Freedom of religion is protected by s116 of the Australian Constitution. Of particular benefit is the protection against the establishment of a state religion. The Constitution thereby provides for equality between religions and provides those from minority religious groups with legitimacy. Interpretations of the Constitution have made it clear that the state is able to offer support for religious groups, particularly by funding religious schools.<sup>30</sup> The Jewish community has benefitted from this and there is a flourishing Jewish dayschool movement that is responsible for the education of more than half of all Jewish students in Australia. Jewish women are responsible to ensure that their children have an appropriate Jewish education, so the provision of support for Jewish learning is significant for Jewish women.

The fact that there is no mandated separation of church and state in Australia leads to a special responsibility of the State to refrain from interfering with religious worship or practice. This is a fine line, but it is crucial that self-determination on the question of 'who is a Jew'<sup>31</sup> is retained by the various sectors within the religious Jewish community. In this regard, Jewish women are concerned that Australian courts or other decision-makers do not adopt the position of the English courts in the *Jewish Free School* case.<sup>32</sup> In that case, the House of Lords required an Orthodox school, which subscribed to *halacha*, to admit a student who was recognised as Jewish by some non-Orthodox standards, but was not Jewish according to *halacha*. The effect of the decision was a legal pronouncement that the various sectors of the religious Jewish community were not entitled to make determinations on the fundamental question of Jewish identity. The Jewish women consulted were clear that this was an instance of the State overstepping its powers and was an illegitimate interference with freedom of religion.

Interference with freedom of religion can also come about when inherently secular activities are imbued with Christianity (or any other religion) or effectively exclude members of a minority religion because they operate on terms that members of a religious community cannot fill without compromising their religious beliefs. An example of the first was demonstrated by the decision of the NSW Supreme Court in *Benjamin v Downs*.<sup>33</sup> In that case, the Court found that it was acceptable for a state school to require students to recite Christian prayers such as the Lord's Prayer, to sing Christian hymns and to say Christian grace after eating lunch. Jewish women may well feel that they cannot send their children into an environment where they are coerced into non-Jewish prayer. Jewish women also consider it unacceptable that religious bodies have been delegated responsibility for the exercise of government functions, particularly with respect to rape and domestic violence counselling. This leads to the possibility of undue influence of religious doctrine and alienates Jewish women from having equal access to these services.

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<sup>30</sup> See *Attorney-General (Vic) v Commonwealth* (1981) 33 ALR 321 (the GOGS case)

<sup>31</sup> One of the most important issues for Judaism is the question of 'who is a Jew'. Judaism has traditionally been passed down the maternal line. Jews are either born to a Jewish mother or have converted. Throughout Jewish history, there have been disputes as to the legitimacy of certain conversions based on the status of the Rabbinic authority validating the conversion or on the motivation of the convert. Ultimately, the Jewish community itself is the only arbiter of whether an individual is considered a Jew – whether a conversion is 'valid'. The ramifications include whether the individual can be included in the synagogue community, married as a Jew, buried as a Jew. The status of the mother naturally affects the status of children. Today, the Orthodox community does not recognize conversions performed by other sectors of the community. This matter is an internal one for the community. Non-Orthodox converts choose that particular form of conversion and have the choice to practice Judaism in the non-Orthodox community. There would be great resistance to the Australian courts grappling with the question of 'who is a Jew' as the courts in Britain recently have done.

<sup>32</sup> See J. H. H. Weiler in *The Jewish Review of Books* No 1 Spring 2010

<sup>33</sup> [1996] 2 NSWLR 199

Anti-discrimination laws and laws proscribing racial vilification are of great importance for Jewish women.<sup>34</sup> Discrimination on the grounds of religion is unlawful in Victoria, the ACT, Queensland, Western Australia and the Northern Territory. In NSW, the Jewish community is protected from discrimination on the ground of 'ethno-religious origin'; in South Australia and the Commonwealth Jews are protected from discrimination on the grounds of 'race'. In Queensland racial vilification is outlawed on the basis of 'religion'; in Victoria and Tasmania on the basis of 'religious affiliation'. More generally, vilification is proscribed on the basis that Judaism is recognised as a 'race': at Commonwealth level and in NSW, the ACT, South Australia, Western Australia and the Northern Territory.

Jewish women are doubly vulnerable of becoming victims of antisemitic discrimination or antisemitic vilification by virtue of their dual minority status as members of a minority religious group and on the basis of gender. As such, the non-remedial benefits of anti-discrimination and racial vilification laws are pertinent. First, the flow-on educational potential of these laws leads to a safer environment for all. Secondly, law is more than symbolic in the absence of specific complaints. It constitutes a proclamation by the state that those of minority groups are valued members of society – so valued, in fact, that the State will intervene to protect potential victims of hatred.<sup>35</sup> Many Jewish women came to Australia after the Holocaust, many having been victims of torture – all as victims of trauma. As the population of Holocaust survivors ages, more women than men are living with their early indescribable experiences. Living in a multicultural, secular, peaceful society, which eschews antisemitism, is particularly appreciated by this group of women. They also may have particular needs as senior citizens due to their childhood trauma.

One weakness of the current law is that it does not require the use of 'enhanced sentencing' where a crime is motivated by hatred.<sup>36</sup> Referred to in the US as 'hate bias' crimes, enhanced sentencing sends a message to would-be offenders that religious or racial hatred is unacceptable.<sup>37</sup> As women can be victims of racial violence, whilst also being generally expected to take responsibility to deal with the consequence of violence directed at other family members, laws of this nature are of great benefit to Jewish women.

Jewish women also support the Government's strategy toward terrorism. While recognising that anti-terrorism legislation may interfere with freedom of religion and other human rights principles, Jewish women are generally supportive of it (in the light of faith that those administering the law will be respectful of human rights to as great an extent as possible). Jewish women, globally, have been victims of terrorist attacks, and it is not uncommon for terrorist organisations to single out Jews as their targets. Jewish women are often those left to deal with victims of terrorism and must live with the trauma of family members and other survivors of terrorist activity.

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<sup>34</sup> On racial vilification laws, see Akmeemana, S & Jones M "Fighting Racial Hatred" in The Race Relations Commissioner (ed) *The Racial Discrimination Act: A Review* AGPS 1996, p129-182

<sup>35</sup> Jones M, "Empowering Victims of Racial Hatred by Outlawing Spirit Murder" (1994) *Australian Journal of Human Rights* Vol 1(1) 299-326

<sup>36</sup> In 2009, the Victorian Government implemented the independent Sentencing Advisory Council's recommendations by amending the *Sentencing Act 1991* to require a sentencing court to have regard to whether an offence was motivated (wholly or partially) by hatred of, or prejudice against, a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated. The new provision, subsection 5(2)(daaa), came into effect on 2 December 2009. Similar legislation has operated in *New South Wales since 2003*.

<sup>37</sup> See generally, Jones M "The Legal Response to Dealing with Hatred: A User's Guide" in Cunneen C & Fraser D (eds) *Faces of Hate* Hawkins Press 1997 p214-241

### **Part III: Issues For Jewish Women**

Freedom of religion is primarily a measure of the absence of state involvement in religion, religious belief or religious practice. As a general rule, the state has no right to interfere with matters internal to religion. Australia has a high level of religious freedom and little interference in religious matters by the state. Jewish women respect and value the freedom they enjoy in Australia and are wary of any moves towards more interference of the state in religious matters. In particular, the State should not intervene where women have an alternative within Judaism. For example, as has been acknowledged in Part II, there is inequality of women in the ritual practice in Orthodox Synagogues but such inequalities do not exist in non-Orthodox synagogues. Jewish women have the choice to leave or join any particular Synagogue community, to accept the practices or to work within their own community for change. Individual women are not required to remain in a community that they consider to be discriminatory. This may not be easy for female members of the Ultra-Orthodox communities, as these are very tightly structured and are a life-style package. Nonetheless, this is not a matter for the state.

However, there is a role for the state in protecting the rights of members of minority religions and a role for the state in enhancing inclusion in society. In particular, state intervention is both appropriate and desirable when:

- there is discrimination against Jewish women or hatred directed at Jewish women, because of their status either/or as women or as Jews – (where there is sexism, antisemitism, vilification, and/or a crime committed which is motivated by hatred of Jews or of women);
- the activities of the State exclude full and equal participation by Jewish women – where we seek a mechanism to provide inclusion; and
- the requirements of the State infringe on the dignity of Jewish women; and when
- there is serious inequality between Jewish women and Jewish men that affects the ability of Jewish women to participate as equals in the society at large.

The first of these is discussed above, the second and third are discussed in this section. The last is the issue of divorce in *halacha* – where there are serious consequences for Jewish women who remain married *halachically*, even after a civil divorce. This is the subject of Part IV of this report.

We turn, here, to laws and activities of the state (including state instrumentalities and organisations that are state subsidised), which are not directed at Jewish women, but, nonetheless, have consequences for them. Because these laws, policies or social actions are concerned with other matters, there is generally no thought about the impact of these laws, policies or social actions on Jews, on women, or on Jewish women.

Orthodox Judaism involves much more than religious observance or ritual action. Judaism is a way of life, which affects the way we think, the way we act and the choices that we make. It is not possible split the identity of an Orthodox Jew, as the French attempted to do by including Jews who were to be Frenchmen in public and Jews in private. Emancipation of Jews resulted in the assimilation of Jews into the broader community, and brought with it the phenomena of secular and cultural Jews whose identity was not one of religion per se. Assimilated women escaped the stigma associated with being a member of a subordinated religious group, and believed that their experience of discrimination was a matter of gender inequality rather than religious oppression. Hitler demonstrated that this was wrongheaded – one's identity was generational rather than personally constructed. Disempowerment, then, is inherent to Jews except when they live in a functioning democratic multiculturalism.

The pull of the secular has meant that practicing Jewish women have felt constrained to leave unchallenged practices which, if pointed out, would bring attention to their difference. Rather than complain about infringements on religious inequality, there is a tendency to carry the burden of the discrimination, and to

work around the issue. Inquiries about freedom of religion provide the opportunity to offer a taste of the problems Jewish women face. Of themselves these matters may seem trivial, but it is the picture which emerges from the trivial that allows us to see trends and to seek means for redress.

## 1. Equality Between Religions

The constitutional protection of freedom of religion in section 116, which proscribes the establishment of a state religion, should be understood as providing equality between religions. The state may not give preferential treatment to one religion over another, and may not be governed by the religious doctrines of any group. Yet, Australia remains a Christian secular state rather than a religion-neutral state. As many of the fundamental ethical precepts in Christianity are derived from Judaism or have developed hand in glove with Judaism, this is not totally objectional to Jewish women. However, it should be acknowledged that Australia operates according to a Christian calendar, and prioritises Christian celebrations over those of other religions. While it would be unthinkable for a meeting of state importance, such as the 20/20 Summit, to be held on Christmas or Easter, there is not a similar respect for festivals of other religions. Indeed, the Summit was held over an important Jewish holiday, effectively excluding participation from Jews who adhere to basic traditional practices such as celebrating the festivals. More than one so-called human rights event, sponsored by the state or delivered by a state instrumentality has been held on a day of Jewish religious observance, which would exclude any Orthodox Jew and many traditional Jews from participating.

In order to ensure equality between religions, it is also important that public services are made available to all members of the community on equal terms. This means that it is inappropriate for the state to delegate state functions to religious bodies. Employment services, for example, should not be run by church instrumentalities, even though the church is one of the largest employers in the state. Of more importance when examining matters pertinent to women, the delegation of domestic violence services and rape counselling and support services to church bodies may prevent Jewish women from accessing those services.

## 2. Dignity & Respect

Many infringements of dignity and respect experienced by Jewish women have an equivalent impact on others. Some apply across gender and/or across faith groups. Nevertheless, it is within the scope of this report to draw attention to matters raised in the consultations with Jewish women.

Orthodox Jewish women share with Muslim women a sense that they are not always treated with dignity and respect. This is particularly the case for women who choose to dress in ways that designate them as members of a minority community. Some Jewish women wear hats or scarves (in preference to the more popular choice of wigs in the ultra-Orthodox community). It is women who wear distinctive dress require the protection of the State and to be treated with sensitivity by state authorities.

Of particular discomfort is when women are asked to remove their head coverings in public. This is often the case in airports. Although there is provision for women to be taken to a private cubicle to remove their head-coverings, this is not always offered as a first suggestion. Women may feel humiliated if they are not offered this option as a matter of course.

## 3. Facilitating Inclusion

One of the roles of the State is ensuring that services for women (such as domestic violence and rape counselling) are made specifically available to women in all communities, including those who may not receive information via television or the Internet. Women in the Ultra-Orthodox (Jewish) community are unlikely to have access to television and there is a need to utilise their unique communication channels for the provision of information. An important asset for communication between women and about women's issues is the *mikveh* (ritual bath), which observant Jewish women attend monthly. This is a 'safe place' for Jewish women. If the state is to provide services for all women equally, it will find access to women of all faiths – for Jewish women, this means providing information at the *mikvah*.

As already mentioned, there are some areas of inclusion that affect both Jewish men and women but may be experienced more sharply by women. Sabbath observing Jews experience feelings of frustration and exclusion when they experience difficulties crossing major roads on the Sabbath. Women have additional concerns because of their primary responsibility for the welfare of children. This was an issue mentioned by women in the consultations and one, which is simple to remedy. If pedestrian crossing lights in areas with large Jewish populations were set to change automatically from sunset on Fridays until sunset on Saturdays on the major Jewish holidays, it would facilitate the sense of inclusion of observant Jews and also contribute to their physical welfare in Australian society.

Another matter that affects the ability of Jewish women to participate in society is that of *Kashrut*. Where food is supplied at meetings, conferences, workshops or ceremonies, the inability of an Orthodox Jew to participate by 'breaking bread' with her colleagues is a result of the failure to provide *kosher* food. The ideal resolution to this is for there to be government policies providing that catering at events should follow the laws of *Kashrut*. The advantage of this is that everyone with dietary restrictions can eat *kosher* food. Muslims, Shi'eks, Jews and Christians alike will be well served by *kosher* catering. The alternative is to cater vegetarian, but for this to be acceptable to religious Jews the provider must be strictly vegetarian, and available to take on board any recommendations of the a *Mashgiach* – a person expert in the rules of *Kashrut*.

There is a current review of food labelling laws that has raised questions about *kosher* insignias and their meaning. At present, there are a number of different Australian *Kashrut* Authorities, Jewish communal institutions regulating the acceptability of food products from the perspective of *halacha*. Each Authority endorses products, and each has its own following. Questions about *Kashrut* are matters of concern to Jewish women – for it is predominantly women who manage households and who make food purchases. The expense of keeping *kosher* limits the access of many families to nourishment at a level on par with other Australian households. It is unclear whether a centralised Australia-wide authority could meet the needs of different communities, and whether the meaning of the label would be clearer were one body to preside. It is uncertainly whether monopoly would reduce the cost of keeping *kosher*, or increase it. Diversity of *kashrut* authorities has resulted in opening the range of *kosher* products and food outlets. The question for the present purposes is that those involved in the decision-making process recognise that this is a significant issue for Jews and that neither rationalising a process nor making it more efficient is the of inherent importance to Jewish women. The availability of *kosher* products and the cost involved are the key factors, and are relevant for the inclusion of Jewish women. This is also the case for those non-Jewish organisations, which provide *kosher* alternatives to Orthodox Jews to ensure their participation in the broader community.

Another means of ensuring the inclusion of Jewish women in the wider Australian community is to ensure that the needs of Orthodox women are taken into account in the delivery of public services. This requires knowledge of the needs of Orthodox Jewish women, whose needs are shared by women in other minority cultures. As mentioned above, many Orthodox women cover their hair for reasons of modesty. These same women will generally not engage in mixed leisure activities and not wish to have men attending them. Simple solutions become apparent when the issue is on the agenda. For example, women only sessions at public facilities such as swimming pools would allow Orthodox women access to services otherwise denied them. Local government areas where Jewish communities reside should think creatively about inclusion of all their constituents and not disadvantage them on the basis of religion. As the needs of Orthodox Jewish women are echoed in many other minority religious and cultural groups, benefitting one group will facilitate inclusion of others.

Modesty requirements have other implications for women in the wider community. It is inappropriate for men to *touch* Orthodox Jewish women, and this includes touching as part of team-building activities or as part of counselling or trauma management. The operation of public institutions such as hospitals, which are intended to be accessible to all, will be exclusionary of many women who are religiously opposed to, for example, sharing wards with unrelated men. Many less observant women would find the hospital process

less traumatic if the modesty needs of women were to be given sufficient prominence. It should be noted that Jewish girls become women at 12, so proactive inclusion needs to address children's services as well as those designed for adults.

What these examples show is that the full inclusion of Orthodox Jewish women is predominantly limited by the vision of policy-makers and service providers. Educating the community about religious and cultural minorities, and about the values of multiculturalism and human rights which celebrate diversity, is probably all that is required to transform an indifferent society into an inclusive one. Those charged with carrying out the work of the state – including politicians at federal, state and local level; public servants; policy makers; administrators; judges and the police – should be expected to undertake continuing education about the needs of minority groups.

## **Part IV: Freeing Chained Women – Divorce Under Civil & Jewish Law**

### **1. The Nature of the Problem**

The major area where state intervention may be helpful in responding to discrimination against Jewish women in a matter internal to Judaism, is with respect to divorce according to Jewish law. Divorced women who are not in receipt of a *get* from their ex-husband are actively and significantly disadvantaged.

To understand the significance of the *get*, it is essential to appreciate the nature of Jewish marriage. Although marriage is undertaken by the mutual agreement of bride and groom, the groom accomplishes the marriage by asking the bride to be his wife 'according to the law of Moses and Israel'. He alone 'acquires' a spouse. She is 'acquired'. Thus, *halacha* (Jewish law) logically dictates that the marriage may be ended only by the husband granting his wife a *get* (bill of divorcement) – him undoing the acquisition that he has made.

In order for the *get* to be universally recognised within the Jewish world, it is essential that the *get* procedures should be affected under the auspices of an orthodox *Beth Din* (Court of Jewish religious law), where it is given and accepted in the presence of 'kosher' witnesses. A *get* is considered 'granted' by mutual consent of both parties. The husband (or his legal agent) hands the wife the *get* document, and she (or her legal agent) in turn has formally to agree to accept the *get*. A woman whose marriage has ended and who has not been given a *get* is called an *agunah* (a chained woman).

An *agunah* is placed under the most severe restrictions. She cannot re-marry in an Orthodox synagogue, even if she has been through a civil divorce because, according to *halacha*, she remains married until she receives her *get*. If she decides to undertake a civil re-marriage, then this is held to be invalid under *halacha*. She remains an *agunah*. Moreover, if she has children while she is an *agunah*, they will be deemed *mamzerim* (illegitimate) and will suffer cruel penalties. Should they wish to live within the Orthodox community, they would find that they could marry only other *mamzerim* or converts. The problem does not end there, as all their descendants will also be *mamzerim*. An *agunah* awaiting her *get* would be most unwise to seek a new husband in anticipation of receiving it or even forming a serious relationship with another man. While she is an *agunah*, any association with a man other than her husband is deemed adulterous, and when she is finally granted her *get* it will stipulate that she may not marry this man.

For these reasons, a *get* is essential. Women whose marriages have irretrievably broken down usually consult the *Beth Din* in the first instance to ensure that they have the best chance of obtaining a *get*. Most husbands are reasonable and will provide the *get* freely in such conditions. It is the few who refuse to grant their wives a *get* who provide the instigation for the concern and suggestions below. Where there are problems, women have often been persuaded to part with property or money or to agree to unreasonable conditions in order to convince recalcitrant husbands to grant them a *get*. They often consider themselves considerably better off than those who have been unable to prevail.

Until Rabbis are required to or voluntarily adopt such a recommendation, it is important that all family court personnel, from counsellors, to lawyers to judges, understand the disadvantage that a woman faces if not granted a *get*. With such an understanding, they may be reluctant to grant a man any financial or other benefit until such time as he 'frees' his wife.

There are approximately 325 marriages in Australia each year conducted under *halacha*, meaning that a *get* would be required should the marriage end.

## 2. Freedom of Religion and the *Agunah* Problem

Although a court would not help a Jewish woman (or an affected man) by ordering that a *get* be issued, there are a range of strategies developed internationally that can provide a solution to the *agunah* problem. Before turning to the strategies and recommendations we propose, there are two questions that must be considered. The first question is whether state intervention designed to overcome the inequality and indignity associated with the *agunah* problem would undermine the doctrine of freedom of religion. Freedom of religion is not only a basic liberty, it is also protected in Australia by s116 of the Constitution and by the international obligations adopted as a result of the ratification of treaties – in particular Article 18 of the ICCPR. The second question is whether state involvement is desirable from the perspective of Jewish women. Our conclusion is that Jewish women have been active in lobbying governments to intervene, and that the doctrine of freedom of religion is not undermined, and may even be enhanced, by state action protecting the rights of Jewish women.

### 2.1. Does Freedom of Religion Prohibit Intervention?

Establishing whether the principle of freedom of religion is offended by legislative or judicial action which removes the inequality and indignity experienced by Jewish women in the context of Jewish divorce, is a matter of law as well as of political theory. In this section we explore this question in the light of: the findings of two Australian instrumentalities which researched the issue, and the government's response to their conclusions; Australian judicial consideration of the issue; and a recent Canadian decision which tackled the question head on. It is unnecessary to discuss the range of international approaches at this stage, although their very existence is testament to our conclusion that freedom of religion is not compromised by state action in this area.

#### 2.1.1. The Australian Law Reform Commission

The Australian Law Reform Commission issued Discussion Paper 46 on *Multiculturalism and the Law*, and called for submissions from the public in response. In that Discussion Paper, a majority of the ALRC considered that it was appropriate to use civil law to compel a party with power to grant a religious divorce to do so when the marriage has been dissolved under civil law.<sup>38</sup> The proposal was 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".<sup>39</sup> For some members of the ALRC this did not go far enough, and proposed that the court should also be given the power to compel a spouse to grant a religious divorce. Only one member opposed the proposal on the grounds that it involved an impermissible mixing of religious and civil law.

The public response to the proposal reflected a similarly diversity,<sup>40</sup> with some submissions opposing the proposal on the grounds of freedom of religion, others supporting the proposal, still others considering that it did not go far enough. Alternative proposals were also made, as was the suggestion that court intervention should be a matter of last resort. After consideration of the public submissions and the overseas experience, the ALRC concluded that there is a need for law reform. In response to objections based on the principle of freedom of religion, the ALRC commented:

...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

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<sup>38</sup> ALRC (1992) Report No 57 *Multiculturalism and the Law* at 5.32

<sup>39</sup> *Ibid*

<sup>40</sup> *Id* at para 5.34 -5.37.

its powers to do what it can to ensure that a man delivers, or a woman accepts, a gett 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.<sup>41</sup>

The Australian Government of the time rejected the recommendations of the ALRC with respect to the *get*. In its 1995 Justice Statement the Government argued that the recommendations of the ALRC involved an attempt to administer religious law and if this were allowed it would 'significantly change the nature of divorce and create unintended consequences for the civil law in relation to divorce'.<sup>42</sup>

### **2.1.2. Family Law Council**

In 1997, the Attorney-General approached the Family Law Council (FLC) and requested it conduct an investigation into cultural and religious divorce in Australia. In response, the Family Law Council argued that this was unnecessary because the difficulties for Jewish women arose as a result of 'the observance of religious practices' and that they did not arise 'from any shortcomings in the Family Law Act'. As such, it was considered that no change in the law was necessary.<sup>43</sup> In the opinion of the FLC the courts already had the power to intervene: they could 'legitimately refuse a civil divorce application' in the event that a religious divorce was refused by one party, on the reasoning that the requirements of s 48 of the Family Law Act had not been satisfied (irretrievable breakdown of marriage).<sup>44</sup>

Despite their earlier view, the Family Law Council reopened the issue in 2000 when it sought submissions from affected religious and cultural groups regarding non-civil divorce as well as information on approaches in other jurisdictions. The FLC also sought advice on the constitutionality of possible amendments to the *Family Law Act 1975 (Cth)*, from the Chief General Counsel. With respect to freedom of religion under s116 of the Constitution, the Chief General Counsel advised that amendments to the *Family Law Act 1975 (Cth)* would be valid so long as they were broadly framed and concentrated on the removal of barriers to remarriage (by preventing a decree absolute until a religious divorce was effected) rather than ordering the performance of a religious act. As a result, in its 2001 report, *Cultural-community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law* the Family Law Council concluded that reform is required, and made recommendation about the nature of reform. However, the carefully researched work of the FLA was rejected by politicians, just as had that of the ALRC. The Attorney-General of the time, Philip Ruddock, considered that legislation allowing the Family Court 'to pressure one partner for a religious divorce would threaten the nation's no-fault divorce system' and would also be 'unconstitutional'.<sup>45</sup>

### **2.1.3. Australian Judicial Opinion**

It would seem that the overwhelming weight of Australian opinion is that responding to the *get* through law reform would not interfere with freedom of religion. This is consistent with the opinion of the majority of courts, which have considered the issue of freedom of religion in a small number of cases.<sup>46</sup> *In the*

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<sup>41</sup> Id at para 5.40

<sup>42</sup> Per Williamson, Amanda (2004) "An Examination of Jewish Divorce under the Family Law Act 1975 (Cth)" 11 *James Cook University Law Review* 132-58 at 135

<sup>43</sup> Ibid

<sup>44</sup> Advice to Attorney-General, 3 August 1998,

[http://www.law.gov.au/agd/WWW/ficHome.nsf/Page/Letters\\_of\\_Advice\\_Letters\\_Civil\\_and\\_Religious\\_Divorce](http://www.law.gov.au/agd/WWW/ficHome.nsf/Page/Letters_of_Advice_Letters_Civil_and_Religious_Divorce) at 20 April 2005 cited by Williamson, Amanda (2004) "An Examination of Jewish Divorce under the Family Law Act 1975 (Cth)" 11 *James Cook University Law Review* 132-58 at 136

<sup>45</sup> Per Walker V & McKinnon M 'Divorce Will Stay Secular: Ruddock', *The Australian*, 19 January 2004, at p4. Cited by Williamson, Amanda (2004)

"An Examination of Jewish Divorce under the Family Law Act 1975 (Cth)" 11 *James Cook University Law Review* 132-58 at 132

<sup>46</sup> See Gaze E & Jones M (1990) *Law Liberty & Australian Democracy* (Law Book Co) 243ff. See also *Kiorgaard v Kiorgaard and Lange* [1967] Qd R 172; *Evers v Evers* (1972) 19 FLR 298; *In the Marriage of Steinmetz*, (1980) 6 Fam LR 554; *New v New* [1982] FLC 91-111 & HCt unreported No M96 of 1981; *In the Marriage of Frey* 12/11/1984 FamCt 65/84; *Marriage of G* Family Court of Australia at Melbourne, unreported, No M10631 of 1992; and *Marriage of J* No ML8858 of 1992

*Marriage of Shulsinger*,<sup>47</sup> the husband gave an undertaking to the Australian Family Court that he would do everything in his power to remove barriers to remarriage within Jewish law. When the Court ordered him to comply with his undertaking, the husband appealed against the court's order, arguing that, by virtue of s 116 of the Commonwealth Constitution, the Court did not have the power to enforce an undertaking to perform a religious act. This argument was rejected, as it was held that the nature of the undertaking was a tool to avoid injustice resulting from the civil divorce, rather than a tool interfering with religious affairs in contempt of the Constitution. The Full Court of the Family Court also held that the undertaking and its enforcement did not involve any infringement of sec 116 "as that section is properly understood".<sup>48</sup>

The other Australian cases add little to the decision in *Shulsinger*. *In the Marriage of N*<sup>49</sup> Gibbs CJ was bemused by the suggestion that s116 of the Constitution should limit the capacity of Family Court judges to deal with the *get*. Had this been seriously argued, he would have allowed the appeal to the High Court to be heard. There is one judgment, which refused an application for help with respect to a *get* on the grounds of freedom of religion. *In the Marriage of J*<sup>50</sup>, a single judge of the Family Court, Hase J, considered an order for a woman to attend the Beth Din and accept a *get* to be "an imposition of a religious observance, which is forbidden by s116" On almost identical facts, another single judge of the Family Court, Emery J, came to the opposite conclusion *In the Marriage of G*.<sup>51</sup>

Even if a reading of s116 was found to exclude consideration of the *get*, it must be recognised that s116 only limits the action of the Commonwealth legislature and does not apply to acts of the judiciary or executive, or to those of the judiciary. It is at least arguable that the courts are better placed to deal with the issue of *agunot* than is the legislature. As Strum argues, "the Constitution only restricts the legislative power of the Commonwealth, that is, the Federal Parliament. It does not restrict the executive or judicial powers of the Commonwealth nor does it constrain the States of Australia."<sup>52</sup> As such, there is opportunity for legislative and judicial creativity to resolve the inequality of Jewish women resulting from the operation of Jewish law.

#### **2.1.4. A Recent Judicial Analysis of the Issue of Freedom of Religion: *Bruker v. Marcovitz***

The 2007 decision of the Canadian Supreme Court, *Bruker v. Marcovitz*,<sup>53</sup> is the most recent decision of a superior court which focuses on freedom of religion in the context of Jewish divorce. The case did not involve an application for aid in obtaining a *get* in compliance with Jewish law, as is often the case. Rather, Bruker brought an application for compensation for the losses she sustained as a result of the failure of her ex-spouse to comply with an undertaking he had made to the Court that he would remove barriers to remarriage promptly after the grant of the civil divorce. Instead of providing Bruker with a *get* in 1981, at the time of the civil divorce, Marcovitz consistently refused her requests to issue a *get* until 1996. By this time, Bruker was almost 47. She argued that she had substantial loss as a result. She claimed to have lost the opportunity to remarry within her faith and to establish a new family (with the possibility of having children in another relationship). The Quebec Court of Appeal accepted her argument and damages were awarded.<sup>54</sup> Marcovitz appealed to the Supreme Court, arguing that the award of compensation constituted an unwarranted interference of his freedom of religion. As such, the Court was specifically called upon to

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<sup>47</sup> (1977) 2 FamLR 11, 611

<sup>48</sup> *Id* at 617.

<sup>49</sup> Unreported, No M96 Of 1981, delivered 5/3/82, per Gibbs CJ, Stephen and Mason JJ.

<sup>50</sup> unreported No ML8858 of 1992, delivered 13/9/96

<sup>51</sup> unreported, No M10631 of 1992, delivered 23/2/83

<sup>52</sup> Strum, Andrew (1997) "Getting a Gett in Australian Courts" 12 *Australian Family Lawyer* (No. 1) 21 at 27; Strum, A (1991) "Jewish Divorce in Australian Family Law: The Enforceability of Jewish Nuptial and Prenuptial Contracts" 17 *Mon LR* 182 at pp 243 - 249.

<sup>53</sup> 2007 SCC 54, [2007] 3 S.C.R. 607

<sup>54</sup> [2005] RJQ 2482, 259 DLR (4<sup>th</sup>) 55

consider the relationship between intervention to improve the position of an *agunah* and the doctrine of freedom of religion. The decision, held by a majority of 7-2, found in favour of the respondent and upheld the claim for damages for the loss sustained by the failure of her ex-husband to issue a *get* promptly.

With respect to freedom of religion, the majority considered that their task was one of “classic and cautious balancing” of potentially conflicting rights: viz, the right to freedom of religion and the right to equality of women.<sup>55</sup> They held that the mere fact that a dispute has a religious aspect does not by itself make it non-justiciable; that the right to freedom of religion does not impose a blanket prohibition on adjudication.<sup>56</sup> Rather, while every individual is entitled to hold and to manifest whatever beliefs and opinions his or her conscience dictates, this entitlement is limited by the requirement that “such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own”.<sup>57</sup> The challenge is for judges to always be respectful of the complexity, sensitivity, and individuality inherent in the issue of concern.<sup>58</sup> In this case, the majority considered that Marcovitz’s claim that his freedom of religion had been infringed was disingenuous. He did not provide any evidence that he had religious reasons for refusing to deliver the *get*. In fact, he admitted that what motivated his decision to refuse to issue the *get* was that he was simply too angry with his ex-wife to give her what she wanted. The Court found that while Marcovitz’s could, under Jewish law, refuse to issue a *get*, this is quite different from being required by his religion to refuse to give a *get*.<sup>59</sup>

The conclusion of the majority was that this was a case about equality between the sexes and the duty to comply with legally binding undertakings, as much as it was about freedom of religion. Further, the issue of freedom of religion was as much a matter for Bruker as it was for Marcovitz. Bruker could not get on with her life within her religious community without a *get*. If she was not an adherent to Orthodox Judaism, there would be no dispute. The Court took into account the fact that a *get* is not valid under Jewish law unless it has been accepted by the wife, but noted, crucially, that *get* refusal “has a disparate impact on women.”<sup>60</sup> The majority recite the words of Ayelet Shachar who comments:

The family law realm . . . vividly illustrates the troubling paradox of multicultural vulnerability, by demonstrating how well-meaning attempts to respect differences often translate into a license for subordination of a particular category of group members — in this instance, primarily women. [p. 62]<sup>61</sup>

Such subordination of women, in the name of protecting Jewish minority culture, is unacceptable to the majority. The principle of gender equality, which is designed to protect the rights of women, would be subverted if an undertaking to issue a *get* could be avoided by a claim of interference with freedom of religion.

Deschamps and Charron JJ dissented. Although sympathetic to the plight of *Agunot*, they held that freedom of religion prevented secular involvement in disputes of a religious character.<sup>62</sup> Deschamps and Charron JJ found Marcovitz’s undertaking to issue a *get* to be a purely religious obligation, not a legal contract. As such, they held that its enforcement was outside the realm of a secular court. They accept the majority’s view that claims involving religion can be adjudicated by the courts, but they limit judicial

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<sup>55</sup> Id [20]

<sup>56</sup> Id [41]

<sup>57</sup> Id [71], citing, with approval, the decision of Dickson J in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295

<sup>58</sup> Id [20]

<sup>59</sup> Id [68]

<sup>60</sup> Id [82]

<sup>61</sup> Shachar, Ayelet (2001) *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*. Cambridge: Cambridge University Press, quoted Id [82]

<sup>62</sup> Id [183]

intervention to cases where there is a breach in terms of religion in the application of a positive law.<sup>63</sup> This is what is required for there to be a “neutral basis” for cases. They argued that the courts “may not use their secular power to penalize a refusal to consent to a *get*, failure to pay the Islamic *mahr*, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc. Limiting the courts’ role to applying civil rules is the clearest position and the one most consistent with the neutrality of the state in Canadian and Quebec law”.<sup>64</sup>

*Bruker v. Marcovitz* has excited considerable debate amongst scholars concerned with freedom of religion and women’s rights. In support of the minority position, DeCosta is affronted by the decision of the Court. He argues that:

Bruker threatens to make conformity to state values the measure of the acceptability at law of the faith of individuals and communities; it does so by rendering the state’s values—what I have here dubbed Caesar’s faith—superior to the precepts and practices of faith; and in this, as I shall later argue, totalizing fashion, it so turns the “precious achievement” of religious liberty upside down and inside out, that little may remain of it beyond state sufferance.<sup>65</sup>

He considers that logic of the judgment in *Bruker* puts at risk the fundamental institutions of the liberal state – the sanctity of the family and the right of individuals to subscribe to the religious life of their choice. He sees the decision as one that could be described as either ‘legal imperialism’ or ‘legal discrimination’ - both of which are legal philosophical constructs that run contrary to western liberal values.<sup>66</sup> He considers that Court has placed us “in jeopardy of expanded state colonization those practices that are most dear and meaningful to those whose liberty and forms of life it is pledged by constitutional principle and tradition to serve and protect”.<sup>67</sup> DeCosta’s conclusion paints an ugly picture:

... the judgment in *Bruker* discloses a Court so convinced of and so committed to the righteousness of imprinting its understanding of state values on the life-world that in the wake of this judgment, it is difficult to discern anything, logic and principle alike, that might ever convince this Court to cease its totalizing impulse. In consequence, we may, I think, expect no relief from the Court’s relentless march towards the subordination of private life, its values, practices and traditions, to the sovereignty of judicially-manufactured state values. That the substance of this disclosure is the Court’s transmutation of religious liberty from a negative freedom to be let alone to a state-centred positive liberty not to be “arbitrarily disadvantaged” by religion leaves the matter of liberty under and through law in all the more precarious a position.<sup>68</sup>

Although we do not share deCosta’s rising panic at the loss of liberalism, we do not challenge his view that the judgment takes a step back from traditional Western liberal values. This should not really be of concern, as the movement from 19<sup>th</sup> to 21<sup>st</sup> century values represents a shift away from freedom as the foundational value of society to a human rights perspective, which prioritises dignity, equality and an inclusive society. The traditional liberal perspective has been exposed as a gendered or patriarchal perspective, which, by leaving an unregulated private sphere (“the man’s castle”) has the effect of leaving women (and many other minority groups) disempowered. Just as the liberal division between the public and private sphere left domestic violence and rape within marriage behind closed doors, an anti-intervention strategy with respect to the plight of the *agunah* constitutes the legitimisation of wrongful

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<sup>63</sup> Id [122]

<sup>64</sup> Id [184]

<sup>65</sup> DeCoste FC (2009) “Caesar’s Faith: Limited Government and Freedom of Religion in *Bruker v. Marcovitz*” 32 *Dalhousie Law Journal* 153-176, citing Jurgen Habermas, “Notes on a post-secular society” (18/06/2008), online: Sign and Sight <<http://www.signandsight.com/features/17114.html>>

<sup>66</sup> Id at 171-173

<sup>67</sup> Id at 175

<sup>68</sup> Id at 175-6, citing *Bruker* at para [19]

action by recalcitrant spouses who can use freedom of religion as a cover and the *get* as a tool for abuse of women.

Shachar embraces this post-liberal perspective as a ‘multicultural feminist’, which involves a “deep commitment to respecting women’s identity and membership interests, as well as promoting their equality both within and across communities.”<sup>69</sup> She argues that “a carefully regulated recognition of multiple legal affiliations (and the subtle interactions among them) can allow devout women to benefit from the protections offered by the state to other citizens, yet without abandoning the tenets of their faith.”<sup>70</sup> This is essential as, in the context of *agunot*, it is clear that women seek the protection of the state from within their religious community and identity. The strict separation of state and religion, and calls for state neutrality, ask women to choose between their multiple sources of identity and force women either into the unviable position of an *agunah* or into cultural homelessness that come from living both within and outside Judaism. As Shachar puts it:

The significance of [*Bruker v Marcovitz*] ... lies in its recognition that both the secular and the religious aspects of divorce matter greatly to observant women if they are to enjoy gender equality, articulate their religious identity, enter new families after divorce, or rely on contractual ordering just like any other citizen. This joint-governance framework offers us a vision in which the secular system may be called upon to provide remedies in order to protect religious women from husbands who might otherwise cherry-pick their religious and secular obligations as they see fit.<sup>71</sup>

It is important to recall that Jewish women are not requesting courts or legislatures to engage with and interfere with an act of faith. It would be of no help to Jewish women were a court or legislature to order that a man issue a *get*. This is so primarily because a *get* will be invalid at Jewish law if it is not the voluntary act of the spouses. What is being asked is that a man be required to act consistently with his own undertaking or that he appear before a religious tribunal, *Beth Din*, and abide by its ruling. The law in Canada, and the decision in *Bruker*, should not be viewed as a “triumph of gender equality over faith”<sup>72</sup> but as a consideration of how “women’s freedom and equality can be partly *promoted* (rather than inhibited) by law’s recognition of certain faith-based obligations that inform the regulation of marriage and divorce for religious citizens.”<sup>73</sup> As Jukier & Van Praagh argue, the decision in *Bruker v Marcovitz* constitutes judicial recognition of the “reality, capacities and needs of religious women for whom separating gender from faith is simply not possible.”<sup>74</sup>

It should now be clear that there is overwhelming support for the proposition that freedom of religion is not undermined by state intervention to address the problem of *agunot*. There is also opinion that freedom of religion is *enhanced* through the process of negotiating the interplay between gender and religion,<sup>75</sup> because by freeing *agunot* or protecting women to so as to prevent them becoming *agunot* in the first place, increases the participation of women within the religious communities of which they are members.

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<sup>69</sup> Shachar A (2009) “Entangled: State, Religion, and the Family” 49 Harvard ILJ Online 132-145 at 136; see also Shachar, Ayelet. *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*. Cambridge: Cambridge University Press, 2001

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Per Jukier R & Van Praagh S (2008) “Civil Law and Religion in the Supreme Court of Canada: What Should We Get out of *Bruker v Marcovitz*” 43 SCLR (2d) 381-411 at 406

<sup>73</sup> Shachar A (2009) “Entangled: State, Religion, and the Family” 49 Harvard ILJ Online 132-145 at 136

<sup>74</sup> Per Jukier R & Van Praagh S (2008) “Civil Law and Religion in the Supreme Court of Canada: What Should We Get out of *Bruker v Marcovitz*” 43 SCLR (2d) 381-411 at 406

<sup>75</sup> See Shachar A (2009) “Entangled: State, Religion, and the Family” 49 Harvard ILJ Online 132-145; Kleefeld J & Kennedy A (2008) “A Delicate Necessity”: *Bruker v. Marcovitz* and the Problem of Jewish Divorce 24 *Canadian Journal of Family Law* 205-82; Kislowicz H (2009) “Cultural Membership in *Bruker v. Marcovitz*”; Jukier R & Van Praagh S (2008) “Civil Law and Religion in the Supreme Court of Canada: What Should We Get out of *Bruker v Marcovitz*” 43 SCLR (2d) 381-411; Fishbayn, Lisa (2008) “Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce” 21 *The Canadian Journal of Law and Jurisprudence* 71-96

## 2.2. Do Jewish Women Want the State to Intervene?

Jewish women around the world have formed or joined lobby groups in their own countries; formed alliances across state boundaries; and even taken the problem to international meetings of women such as Beijing. Whenever possible, Jewish women and men, who also take this problem very seriously, have made submissions to government inquiries and asked the state to intervene. A similar process has happened in Australia. The need to address the issue of agunot is on the agenda of a wide range of Jewish and women's organisations and is considered a matter of great importance.

At the Melbourne consultation held as part of the process of researching this paper, there was one dissenting voice about the plight of *agunot*, a voice has also been heard during previous consultations in government circles.<sup>76</sup> The objection to state involvement in responding to *agunot*, which was unanimously supported in Sydney, was based in the belief that the solution to the *agunot* problem should be found within Jewish law. We agree with the sentiment "that where there's a *halachic* will, there is a *halachic* way"<sup>77</sup> - that is, if there is a serious commitment on the part of rabbinic experts in Jewish law, a way of overcoming the abusive practice of *get*-denial would be found.<sup>78</sup> There is legitimate concern that the provision of civil state remedies could have the effect of allowing religious authorities to deny their responsibility to resolve the problem.<sup>79</sup> If this were inevitable, we would not request the state to intervene. There is evidence, for example, that since the enactment of Canadian legislation, creative *halachic* energies in Canada have been channelled into making the legislation work.<sup>80</sup> It is important that the law works, and so long as the focus on the civil solution is a short-term response of religious experts, it is really not problematic. For women caught in the trap of being religiously tied to an abusive partner many years after the breakdown of their marriage, what is needed is a remedy now. And, if the state can play a role in preventing the problem from the outset, such that women do not become chained, this is all for the better. Further, as many commentators have noted, there is a problem of authority within the Jewish legal system, so a *halachic* remedy is not likely to come about quickly.<sup>81</sup> This leads to the desire for state intervention to deal with this degrading practice.

Legislative or judicial action will highlight the problem of *agunot*, and perhaps embarrass Jewish authorities into action.<sup>82</sup> The purpose of state intervention is remedial, but it also can have an educative outcome. Further, where the path to state intervention involves discussion of the issue not only between the state and governing umbrella organisations of the Jewish community, but also throughout the community, reaching out to women's groups, individual synagogues, communal organisations and youth groups, it

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<sup>76</sup> See submission to Rpt 57

<sup>77</sup> Yitz Greenberg

<sup>78</sup> Rabbinic commentators have not completely delegated the task of dealing with agunot to civil authorities. There is on-going debate about strategies such as expanding the power of the Beth Din to grant annulments, encouraging pre-nuptial contracts, and reviving traditional remedies such as excommunication. In Israel the Religious Courts which are responsible, inter alia, for family law matters, have used imprisonment, confiscation of passports and removal of driving licences as incentives for recalcitrant husbands to issue their exwife a *get*

<sup>79</sup> See, for example Freeman M Freeman, M. D. A. (1992) "The Law On Get And Why It Disappoints" (From Wembley Shul Magazine) [http://www.agunot-campaign.org.uk/civil\\_law.htm](http://www.agunot-campaign.org.uk/civil_law.htm), Baroness Miller of Hendon, in the House of Lords, cautioned that the UK legislation allowed the British Rabbinate to persist in their refusal to find a solution to the agunah problem. HANSARD, (House of Lords, June 30, 2000)

<sup>80</sup> See Fishbayn, Lisa (2008) "Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce" 21 *The Canadian Journal of Law and Jurisprudence* 71-96 at 81

<sup>81</sup> Jackson. B.S. (2004), "Agunah and the Problem of Authority: Directions for Future Research", *Melilah* 2004/1, pp.1-78 - a much expanded, fully documented version of the above lecture: <http://www.mucjs.org/MELILAH/2004/1.pdf>

<sup>82</sup> Fishbayn notes that the dialogue around the Canadian law included the argument that the injustice perpetrated by the Jewish law brings shame upon the Jewish community and this may spur Jewish authorities into action. See Fishbayn, Lisa (2008) "Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce" 21 *The Canadian Journal of Law and Jurisprudence* 71-96 at 84

becomes a transformative dialogue which negotiates the discriminatory terrain of minority status and social values of equality, dignity and respect. Fishbayn comments that the process of developing the Canadian get legislation successfully involved:

...[an] overlapping consensus, acceptable to liberal lawyers, government and constitutional scholars because it addressed an injustice in ways that did not commingle church and state and was acceptable to rabbinic authorities because it addressed this harm in a way consistent with Jewish law.<sup>83</sup>

In Australia, a similar outcome is possible. The dialogue has been conducted over many years. Legal resolution consistent with human rights values and overcoming objections based on freedom of religion is an option, and, as there is no immediate likelihood of an authoritative resolution to the problem of *agunot* within Jewish law, the assistance of the state is desperately sought.

Once it is concluded that state intervention is both possible (without offending the principle of freedom of religion) and desirable, the question of the form the intervention should take remains a matter for debate. There are 3 times in the life of a marriage where the question of the issuing or accepting a get come into play. Our proposal is that a strategy be put in place at each of these points, for this is the only comprehensive solution to the problem. The first solution is to preempt the problem in the hope of bypassing the problem. This can be achieved by intervention at the time of the marriage. The second point at which intervention should be considered, is at the point of civil divorce. Civil divorce is only available if there has been an irretreval breakdown of the relationship. It makes sense to ensure that all the consequences of the marriage as well as the consequences of the breakdown of the marriage are dealt with comprehensively at the point of divorce. Failure of the state to intervene at this point promotes the inequality and indignity women experience as *agunot*. The third point for intervention is where the get has not been provided at the point of civil divorce, such that women are left chained to their ex-husbands. Intervention is designed to addresses the reality of existing *agunot* in Australia. These women are cruelly left to languish in the nether state of being chained to recalcitrant husbands yet supposedly free at the behest of the state. It is important for the state to address the position of these women, or it is complicit in denying equality rights to women. The strategies proposed draw on international as well as Australian attempts to empower women in general and women at risk of becoming *agunot* in particular. We do not canvass all of the proposals and resolutions suggested at different times and places. Rather, our proposals are for resolutions consistent with both Australian law and culture and Jewish law.

### 3. Preempting the Problem

The state has the capacity to preempt the problem and to ensure that no future Australian brides become agunot. Two strategies are available to the courts and could be entrenched in legislation. The first strategy is to recognise the Katubah as an enforceable contract between the parties to the marriage. The second strategy is to use prenuptial agreements to provide advance commitment to agree to a get on the dissolution of the marriage. The first has the advantage that it will cover all women married according to Jewish law. As such, the right to award or accept a *get* would become automatic. The second strategy has the advantage that prenuptial agreements are already recognised by Australian law. Our proposal is that prenuptial agreements become entrenched into the marriage process. The Federal Government has the power to alter the Family Law Act to require all couples to sign prenuptial agreements prior to marriage. This would have the advantage of alerting all parties to the serious and legal status of the marriage contract

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<sup>83</sup> Fishbayn, Lisa (2008) "Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce" 21 *The Canadian Journal of Law and Jurisprudence* 71-96 at 76

and to give serious thought to the range of potential consequences of both the marriage and any subsequent divorce.

### **3.1. The Ketubah - marriage and divorce as contract**

As mentioned above, Jewish marriage has distinct elements that parallel the elements of Australian contract law. Unlike other marriages, which are sacramental, Jewish marriages involve personal acts undertaken by the partners to the relationship. In fact, Jewish marriage is not a religious act and is governed by the part of Jewish law that is akin to secular family law rather than the body of religious law. A Rabbi in attendance at a wedding ceremony has no religious task to perform and nothing he recites is a prerequisite for marriage. Although the contract is delivered by the husband to his wife, such that the contract may be thought of as unilateral rather than bilateral, this could be seen as a reflection of the power relationships within Judaism (albeit a contested reality) and a reflection of patriarchal society (bearing in mind that Jewish law dates from 5570 years ago). For public recognition of the marriage, and formal legitimisation of the contract, the contract must be viewed and signed by two witnesses. The *Ketubah* is considered to be a Jewish woman's most valued possession, as her rights are determined by it and the original document must be produced to claim those rights. The *Ketubah* contains two elements of great importance here. The first is that the *Ketubah* (which can be varied by the parties) specifies the man's legal and financial obligations to his wife should the marriage breakdown (and a *get* be delivered and accepted). The second is that the *Ketubah* confirms that the couple are entering the marriage relationship "according to the laws of Moses and of Israel". This reference is understood as the means by which the entire corpus of Jewish family law is incorporated into the marriage contract. This includes obligations with respect to the *get* and provides for financial support of the wife in the event of death or the breakdown of the marriage.

The suggestion that the *Ketubah* be recognised as a legally binding contract is not novel. Courts in a number of jurisdictions (Germany, England, Canada, Australia & a number of US states) have considered this question, sometimes concluding that the *Ketubah* constituted a legally binding contract.<sup>84</sup> The majority of the Canadian Supreme Court, in *Bruker*, specifically endorsed the dissenting judgment of Chief Justice Freedman in *Morris v Morris*.<sup>85</sup> In that case, Mrs Morris asked the court to enforce the terms of the *Ketubah*, which were in the traditional (ie unamended) form.<sup>86</sup> Based on a misunderstanding of the nature of marriage in Jewish law, the majority rejected the claim on the basis of interference with freedom of religion. On this point, Chief Justice Freedman disagreed. He stated that:

That the [marriage] contract is deeply affected by religious considerations is not determinative of the issue. That is the beginning and not the end of the matter. Some contracts rooted in the religion of a particular faith may indeed be contrary to public policy. Others may not. Our task is to determine whether the rights and obligations flowing from the... contract -- specifically, the husband's obligation to give and the wife's right to receive a Get -- are contrary to public policy.

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<sup>84</sup> For a carefully considered analysis of the cases, see Strum, A (1991) "Jewish Divorce in Australian Family Law: The Enforceability of Jewish Nuptial and Prenuptial Contracts" 17 *Monash University Law Review*, 182-251 passim. See also Kleefeld J & Kennedy A (2008) "A Delicate Necessity": *Bruker v. Marcovitz* and the Problem of Jewish Divorce 24 *Canadian Journal of Family Law* 205-82

<sup>85</sup> (1973), 36 D.L.R. (3d) 447, 10 R.F.L. 118, [1973] 3 W.W.R. 526 (Man. Q.B.), rev'd (1973), 42 D.L.R. (3d) 550, 14 R.F.L. 163, [1974] 2 W.W.R. 193 (Man. C.A.), leave to appeal granted (1974), 51 D.L.R. (3d) 77, 15 R.F.L. 234, [1974] 3 W.W.R. 479 (Man. C.A.)

<sup>86</sup> It is possible for a Jewish couple to renegotiate the terms of the *Ketubah*, and most cases have involved clearer arrangements regarding the *Get* or other financial arrangements. See Kleefeld J & Kennedy A (2008) "A Delicate Necessity": *Bruker v. Marcovitz* and the Problem of Jewish Divorce 24 *Canadian Journal of Family Law* 205-82

I find difficulty in pinpointing the precise aspect of public policy which [the implied contractual obligation to provide a get] may be said to offend. The attack upon it is on more general grounds. It appears that the real basis on which enforcement of the contract is being resisted is simply that it rests on religion, and that on grounds of public policy the court should keep out of that field. But the law reports contain many instances of courts dealing with disputes having a religious origin or basis....<sup>87</sup>

The express approval of Freedman CJ's decision suggests that another attempt to enforce the terms of a Ketubah would be successful in Canada. After a careful analysis of Jewish law, Australian family law and the law of contracts, Strum demonstrates that the *Ketubah* meets the requirements of contract law such that there should be no bar to its enforcement in the Australian courts.<sup>88</sup>

### 3.2. Prenuptial agreements

Since the 27th December 2000, when s 90B of the Family Law Reform Act 2000 came into operation, prenuptial agreements became enforceable in Australia. While prenuptial agreements are referred to as "binding financial agreements", prenuptial agreements are now used successfully as a means of contracting that, where a Jewish marriage has irretrievably broken down, a *get* will be provided by the husband and accepted by the wife.<sup>89</sup> In general, the agreement is concerned with how 'property or financial resources' are to be dealt with 'in the event of breakdown of the marriage',<sup>90</sup> but it is also possible to contract about maintenance provisions,<sup>91</sup> and may include 'ancillary matters'.<sup>92</sup> There is evidence that many individual Rabbi's and communities require a prenuptial agreement about the *get* as a condition of marriage in that community. Given the availability of draft prenuptial agreements (one such is appended in Appendix B), there is no need to either make out the case for the use of prenuptial agreements or to consider the wording that is required for such an agreement to have effect in Jewish law.

However, the state could take the existing position one step further. Legislation could specify that, where a marriage has a religious or cultural component (as it will whenever a Minister of any religion is the marriage celebrant for the purposes of Australian law), agreement must be made prior to the marriage about the removal of any barrier to remarriage in the circumstances of a divorce. There would be no need to single out Jewish marriages and would therefore be unproblematic from the point of view of those who object to involvement on the basis of freedom of religion. This would be a means of protecting all Jewish women, whether or not they belong to a relatively enlightened Orthodox community. Reform and conservative Rabbis, too, would be required to counsel their congregants about the value of participating in religious 'divorce proceedings', even though until now they have been symbolic and voluntary. Further, this would avoid the problem averted to by Williamson, that those who sign voluntary prenuptial agreements are generally self-selecting and may not include the parties of concern – those who might refuse to issue a *get* in the event of their marriage ending.<sup>93</sup>

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<sup>87</sup> Morris, *ibid*, 42 D.L.R. (3d) 550 at 559-560. per Kleefeld J & Kennedy A (2008) "A Delicate Necessity": *Brucker v. Marcovitz* and the Problem of Jewish Divorce 24 *Canadian Journal of Family Law* 205-82

<sup>88</sup> Strum, A (1991) "Jewish Divorce in Australian Family Law: The Enforceability of Jewish Nuptial and Prenuptial Contracts" 17 *Monash University Law Review*, 182-251

<sup>89</sup> There is evidence that with respect to financial matters, prenuptial agreements may reinforce women's disempowerment, and be a retrograde step to the gains made by the Family Law Act. See for example Mackay, Anita (2003) "Who Gets a Better Deal? Women and Prenuptial Agreements in Australia and the USA" [2003] *UWSLawRw* 6; 7(1) *University of Western Sydney Law Review* 109. Marriage celebrants should be advised of this danger, and ensure that the removal of one inequality (ie the *get*) is not replaced by another.

<sup>90</sup> under s90B (2) (a)

<sup>91</sup> under s90B (2) (b)

<sup>92</sup> under s90B (3)

<sup>93</sup> Williamson, Amanda (2004) "An Examination of Jewish Divorce under the Family Law Act 1975 (Cth)" 11 *James Cook University Law Review* 132-58 at 147, endorsing the view of Aranoff S 'Orthodox Jewish Divorce--Imbalance in Bargaining Power: An American Response', in S Silberstein-Swartz (ed), *A Leadership Dialogue: Voices of British and American Jewish Women Community Leaders* (2001) 42 at p 42

#### 4. At point of civil divorce

The time when obtaining a *get* become crucial is at the point of civil divorce. This is where most work has focused, as the husband's recalcitrance only becomes evident at this point or shortly thereafter. Common law courts, including the Australian courts, have been reasonably creative in finding ways to help a woman (or man) to obtain a *get*. However, only a fraction of *agunot* get to court, and the judicial decisions are ad hoc, even arbitrary, in their application. A disproportionate number of judicial decisions involve applications from men. Nonetheless, the various strategies adopted with respect to the *get* are instructive. It is important to consider the remedies granted in the light of the limited role a court can play, if it is to help resolve the problem consistently with Jewish law. In the *Marriage of G*,<sup>94</sup> Emery J commented:

If this court does have jurisdiction to require the wife to take any action, it could only be to submit to the jurisdiction of the Rabbinical Court. She could not be ordered to consent to any orders or procedures except those involved in the putting into effect of any orders made by that tribunal ... [T] his court could not place any fetter on her right to make any application to or submission to such a tribunal. In like manner the Rabbinical Tribunal could not be required or ordered to grant a *gett*.<sup>95</sup>

That there have been a number of cases in Australia is evidence of the possibility of remedies being available to Jewish women for *get recalcitrance*.<sup>96</sup> Providing a solution, albeit a 'parochial one'<sup>97</sup> is consistent with the objectives of family law:

If I correctly understand the intention of the Act, then it is the clear duty of a judge of this court to proceed - ... within the bounds set by Parliament - 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 of practicability he cannot do so.<sup>98</sup>

Equally, the factual situation of *agunot* must be considered in each case. It is the lived experience of Jewish women divorced at civil law but denied the *get*, which is at issue in the cases. The ability of the court to do justice, by recognising inequality and responding to it, is crucial to *agunot* coming before the court. As noted in *In the Marriage of Shulsinger*:

it [is] the duty of the court to ensure that all parties [are] afforded the same freedom from the obligations of marriage, which may involve enforcing any undertakings given by the parties to complete a religious divorce.<sup>99</sup>

##### 4.1. Enforcing Undertaking by Parties

While the *Ketubah* and prenuptial agreements may be enforceable undertakings, there are occasions when additional undertakings to provide a *get* are made to the Court as part of the negotiated settlement of rights and entitlements arising from the marriage. This occurred, for example, in *In the Marriage of Shulsinger*,<sup>100</sup> where the Family Court managed to extract an undertaking from the husband that he would

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<sup>94</sup> Family Court of Australia at Melbourne, unreported, No M10631 of 1992, delivered 23/2/83, per Emery J cited by Strum, Andrew (1997) "Getting a *Gett* in Australian Courts" 12 *Australian Family Lawyer* (No. 1) 21 at 27

<sup>95</sup> Per Emery J at p6 *In the Marriage of G* Family Court of Australia at Melbourne, unreported, No M10631 of 1992, delivered 23/2/83 cited by Strum, Andrew (1997) "Getting a *Gett* in Australian Courts" 12 *Australian Family Lawyer* (No. 1) 21 at p 14-15 *Id* at p6

<sup>96</sup> The fact that there are cases to cite must not be taken as evidence that Australian Jewish women are receiving justice through the domestic courts. On the contrary, the cases cited provide evidence of what is possible, not what is in fact happening.

<sup>97</sup> The ideal solution to the issue of *agunot* is an Halachic solution – ie a solution found within Jewish law. All other remedies are temporary and bound to time and place. See Jackson. BS (2009), "The Manchester Analysis -Launch Lecture" (*Working Papers of the Agunah Research Unit*: <http://www.mucjis.org/LaunchLecture.pdf> at 3

<sup>98</sup> *In the Marriage of G* Family Court of Australia at Melbourne, unreported, No M10631 of 1992, delivered 23/2/83, per Emery J cited by Strum, Andrew (1997) "Getting a *Gett* in Australian Courts" 12 *Australian Family Lawyer* (No. 1) 21 at p 14-15

<sup>99</sup> (1977) 2 *FamLR* 11, 611

<sup>100</sup> *Ibid*

do everything necessary to give his wife a *get* in order for her to be remarried according to her Jewish law. The Court considered that a civil divorce would be ineffective unless the husband agreed to grant the *get*. When the husband attempted to renege, the court rejected his argument that enforcement would interfere with his right to freedom of religion, and ordered that he comply with the undertaking.

*In the Marriage of Frey*, the need for court action was accepted and it was noted that “provided the need can be shown for the Court to intervene, in order to exercise effectively its jurisdiction in respect of matrimonial causes, it is no objection that the granting of a *get* involves proceeding before a religious tribunal”.<sup>101</sup>

#### **4.2. Specific Performance**

Where the parties have agreed to grant a religious divorce upon the dissolution of the civil marriage, whether contractually, through a prenuptial agreement, by contracting the terms of the *Ketubah*, or by an undertaking to the court, there must be mechanisms to hold potentially recalcitrant husbands to account. One option arising from contract is an order for specific performance. This cannot be specific performance to provide a *get*, as such an order would backfire. This is because, under Jewish law, a valid *get* must be given voluntarily. However, an unwilling party can be ordered to appear before the Beth Din and to abide by its decision regarding the *get*. The obligation acquired is a civil obligation to undertake an agreed course of action, rather than a religious obligation. The secular courts are simply directing the parties to do that which Jewish law, the law by which they have agreed to be governed, requires. The US case of *Avitzur v Avitzur*<sup>102</sup> is an example of a case upholding of a civil prenuptial agreement where the parties agreed to submit themselves to the Beth Din in the event of dissolution and abide by any decisions made. It was held that as the parties had contractually agreed to a specific method of dispute resolution, the court was able to uphold the agreement.

#### **4.3. Injunction**

Where a party does not act consistently with the terms of the *Ketubah*, prenuptial agreement or undertaking made to the court, one option available to the courts is to issue an injunction requiring the ‘*get* refuser’ to act consistently with his stated commitments. In the *Marriage of Shulsinger* the Family Court held that it was the duty of the court to ensure that all parties were afforded the same freedom from the obligations of marriage, which may involve enforcing any undertakings or involve the imposition of an injunction.<sup>103</sup> Similarly, in the *Marriage of Gwiazda*, Emery SJ ordered a woman to appear before the Beth Din and to accept the *get*. A mandatory injunction was granted under s 114(3) of the Family Law Act. Emery J noted that it was the duty of the court to “ensure that appropriate orders are made fully effective, not only in theory but in fact”.<sup>104</sup>

#### **4.4. Contempt**

If a party fails to comply with an order of the court, he or she may be held in contempt of court. Therefore, if the court requires a party to appear before the Beth Din and comply with its decision, failure to do so would amount to contempt. Extreme cases of *get-denial* have led to men preferring to be jailed rather than give his ex-wife a *get*. It is highly unlikely that an Australian would choose to go to jail for 32 years and die in prison, as did one Israeli, rather than issue a *get*.

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<sup>101</sup> 12/11/1984 FamCt 65/84 per Evatt CJ, Lindemayer and Nygh JJ at 11

<sup>102</sup> 446 NE 2d 136 (1983)

<sup>103</sup> *In the Marriage of Shulsinger* (1977) 2 FamLR 11, 611

<sup>104</sup> *In the Marriage of Gwiazda*, (Unreported, 23 February 1983) at 14-15

#### 4.5. *Withholding Decree Absolute*

Another strategy, adopted by a number of jurisdictions including New York,<sup>105</sup> Maryland,<sup>106</sup> UK (England & Wales),<sup>107</sup> and Scotland<sup>108</sup> has been to refuse to grant a full divorce until such time as a *get* has been offered and accepted. The court requires evidence that the parties have done everything in their power to remove barriers to remarriage. This may mean a delay in making a property settlement or a guardianship decision. This could be effective if, for example, the woman could remain in the family home with her children and access to joint bank accounts. Delaying making arrangements which may involve selling the family home to divide family property, could be an incentive for a recalcitrant spouse to give in and give his wife a *get*.

It is equally possible, however, that delaying the completion of the dissolution of the marriage will disadvantage women. There is evidence from New York-based NGO, Agunah International, that this strategy on its own is not very helpful for women seeking a *get*. Agunah International found that there was one case in which the New York law was prevented a woman from becoming an *agunah*. Because the husband was eager to finalise his civil divorce in order to marry a new partner, he was prepared to grant a *get* once confronted by delay in the civil procedure.<sup>109</sup>

#### 4.6. *Taking Barriers to Remarriage as Factors in Settlement of Divorce*

Taking into account the question of whether any barriers to remarriage have been removed when determining settlement of a divorce seems to be a more effective strategy than delaying finalisation of a divorce. This is the strategy taken in the second New York Get Law<sup>110</sup> and in the Canadian legislation. Perhaps more valuable than the threat of consequences of non-compliance is the specification of a process by which to seek aid from the courts in getting a *get*. For example, the protocol developed under the Canadian law, specifies that:

- One spouse writes to the other asking them to remove all barriers to remarriage that are within their power. The initiator requests that this be done within 15 days of receipt of the letter (10 days in Ontario) and warns that failure to do so will result in an application under the Act.
- After 15 days, the affected spouse applies to the Court, stating that while they have done all within their power to remove barriers to remarriage; their spouse has not, despite a request being made of them.
- The other spouse then has 10 days to file a similar statement.
- If there is a failure to comply, the court has power to strike out the husband's claims and defenses in a divorce proceeding, including claims and defenses relative to custody, child support, spousal support, and the like. This means that the court may simply grant an *agunah's* claim without considering the spouse's arguments in reply. can result in the entire striking of
- If the recalcitrant spouse renegs at some time in the future, and grants a *get*, the court will then consider any claim that is made by this party.

Fishbayn reports that this process has been successful in bringing Canadian would-be *get-refusers* into a negotiating position with the Beth Din, which in turn has had an impact of the incidence of

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<sup>105</sup> S 253 Domestic Relations Law 1983

<sup>106</sup> Maryland Bill 2000 Family Law Section 7-104.1 Annotated Code of Maryland

<sup>107</sup> S 10A Divorce (Religious Marriages) Act 2002 (UK) amending Matrimonial Causes Act 1973

<sup>108</sup> S15 Family Law (Scotland) Act 2006 amending 1976 Act

<sup>109</sup> Aranoff S, "Orthodox Jewish Divorce--Imbalance in Bargaining Power: An American Response" in S Silberstein-Swartz (ed), A Leadership Dialogue: Voices of British and American Jewish Women Community Leaders (2001) n 13, 45

<sup>110</sup> S 236B Domestic Relations Law 1992

*agunot*. Since the legislation commenced there have been very few cases proceeding to court. Family lawyers are now advising men that it is against their interests to refuse to issue a *get*, and the warning letter is sufficient in most cases to solve the problem.

#### **4.7. Monetary Inducement**

Although men may be willing to be the subject of disapproval within their own communities<sup>111</sup> they may be less willing to forego property for their principles. While a *get* will not be valid in Jewish law if it is induced rather than given voluntarily, the courts have found a means of financial encouragement. In *the Marriage of Steinmetz*,<sup>112</sup> the Family Court held that the failure to provide a *get* constituted a barrier to remarriage, which in turn had an impact on the wife's financial future. As such, *get-refusal* was a relevant consideration to be taken into account in awarding maintenance payments under s 75(2)(o) of the Family Law Act. The Court held that it was within the husband's power to prevent the wife from remarrying (and therefore gaining the financial benefits that would accrue from remarriage) or make it possible for her to remarry by giving her a *get*. As such a larger than usual sum of maintenance could be imposed. Were the husband to provide the *get*, the amount of maintenance would be reduced.

#### **4.8. Damages**

In *Steinmetz's*<sup>113</sup> case the Court recognised the financial disadvantages of being chained to a recalcitrant husband. It would not be difficult for the Court to build on this and grant damages with respect to *get-refusal*. Damages could follow from breach of contract, where the *Ketubah* is recognised as such or there is a prenuptial agreement. They could follow where there is a failure to comply with an undertaking to the court. They could also apply when the court wears an equity hat, and considers this necessary to do justice between the parties. The language that is used is crucial, however, for otherwise an order for the payment of damages could backfire. To be helpful any legal creativity must avoid the problems associated with the second NY Get Statute<sup>114</sup> which provides for compensatory damages for failure to provide a *get* (as well as provision for punitive maintenance as above).

The problem is demonstrated by the New York case of *Becher v Becher*.<sup>115</sup> In that case, the husband successfully argued that if he gave his wife a *get* in the shadow of the *Domestic Relations Law* it would be invalid under Jewish law. As such, Becher argued that he would be acting reprehensively if he were to give his wife a *get*, because this would lead her to unwittingly commit the terrible sin of adultery. Mrs Becher could not take the risk that he was halachically correct in his analysis of the invalidity of the *get*. As a result, she waived her rights under the *Domestic Relations Law*.<sup>116</sup>

### **5. After Civil Divorce**

To have Australian women subjected to emotional abuse or economic hardship or for the Australian state to countenance blackmail is unacceptable. We argue that there are two strategies potentially available that may be of help to Australian *agunot* who have languished for an extended period of time.

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<sup>111</sup> Although there are now NGOs which target individual *get-refusers* and protest outside their houses and find other means to embarrass men into delivering a *get*.

<sup>112</sup> (1980) 6 Fam LR 554

<sup>113</sup> (1980) 6 Fam LR 554

<sup>114</sup> The 1992 New York State Domestic Relations Law s 523

<sup>115</sup> *Becher v Becher*, 706 NYS 2d 619, 620 (2000).

<sup>116</sup>

## 5.1. Revisiting Settlement of the Court

Where there is evidence that a civil divorce has been settled, and agreements finalised, as a result of blackmail or other coercion, it should be open to the Family Court to revisit its decision. The future decision should take into account the behaviour of the spouse, and its impact not only on his ex-wife but also on the children and the remaining family unit. The state should also consider the introduction of a specific (criminal?) offense, in no way linked to the delivery of the *get*, but for unlawful inducement of contract.

## 5.2. Damages

Just as courts can impose financial pressure to encourage delivery of the *get* at the point of civil divorce, it is equally possible for a court to be approached at any later time for the damages accruing as a result of *get-refusal*. That this is possible was clarified by the 2009 Canadian Supreme Court decision, *Bruker v. Marcovitz*.<sup>117</sup> In that case, the Court awarded damages to a woman, years after the civil divorce. Bruker's ex-husband, Marcovitz, had made an undertaking to the court that he would provide a *get* at that time of the divorce (1981). Although Bruker continually sought a resolution of the problem, Marcovitz was determined to refuse her the *get*. Until 15 years after the divorce, when Bruker was 47 years old and, for all intent, passed childbearing age and unlikely to remarry, Marcovitz had held out, enjoying the pain he could inflict thereby. Prior to the delivery of the *get*, Bruker commenced an action for damages. The application was not tied to a request for action relating to the *get*. Rather, it asked the state for relief for the suffering caused by the *get-refusal*. Damages were awarded -\$2,500 per year for each year Marcovitz refused her the *get* and a nominal sum of \$10,000 for his preventing the birth of legitimate children (a total of \$47,500) - as were costs. Having dealt with the claim regarding freedom of religion (discussed above), the majority of the Supreme Court reinstated the original decision. Actions for damages for breach of contract, or even in tort, could offer some relief to an *agunah*. More importantly, knowledge that courts are prepared to recognise the harm of *get-refusal* may send a message to those men that they are answerable to civil authorities for their behaviour. The acceptance of similar actions in Australia would therefore help existing *agunot*, and may of valuable symbolic effect.

## 6. Proposals for Law Reform

While Section 5 of Part IV of this paper demonstrates the potential availability of a range of remedies for *agunot* at law, the use of these solutions has been ad hoc and minimal. Only a small number of women (and a disproportionate number of men) have, to date, received justice through the courts. Where applications have been made to Australian courts, the results have not always been consistent with the removal of inequality between Jewish men and Jewish women. As one could not, at present, be confident that an application to the court would be successful, *agunot* may be discouraged from seeking a remedy at law. As such, state intervention remains desirable. This section proposes a range of law reform strategies, some of which have stood the test of time elsewhere, and which both avoid the problems of freedom of religion and can stand consistently with Jewish law.

### 6.1. Conditions of Successful Reform

There are a number of potential pitfalls in drafting legislation or using other law to assist *agunot* to become free. If the law is to be of help at all, the following matters must be taken into account:

- The law must acknowledge the serious hardship and emotional abuse experienced by *agunot*. The law must seek to do justice between the parties, and in so doing must be cognisant of the power inequality at play.

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<sup>117</sup> 2007 SCC 54, [2007] 3 S.C.R. 607

- The final terms of the law must be a result of dialogue, such that all stakeholders are willing to accept the role of the law in *get-refusal*, to endorse its legitimacy, and to ensure that achieving equality for women is not at the expense of denying equality to men.
- The law must not be, and must not be able to be construed as, a means of coercing a party to deliver or accept a *get*. Any *get* that is not voluntarily given or received is not valid according to Jewish law.
- The law must be seen as, at best, a temporary measure. The law must not be able to be used as an excuse available to halachic authorities to deny the urgency of a solution being found within Jewish law. *get-refusal get-refusal*
- An educative process must be initiated in parallel with law reform efforts. The education must not only reach Jewish women, Jewish men and other Jewish stakeholders (anyone who at any time has participated in a Jewish wedding). It must include judges and court officials, family lawyers and mediators.

## **6.2. Amendment to Family Law Act: Prenuptial Agreements**

The law relating to prenuptial agreements should be amended either:

- to recognise the *Ketubah* and any other agreement made at the time of marriage as an enforceable prenuptial agreement, the terms of which are binding on the parties to the contract. It may be appropriate to specify that by signing a *Ketubah*, parties have agreed to dissolve the marriage ‘according to the laws of Moses’, which requires that a *get* be voluntarily given and received at the time when there is a breakdown of the marriage; or
- to require any party married according to religious law or custom, to sign a prenuptial agreement to the effect that all steps will be taken to remove any barriers to remarriage consequent on that religious or cultural marriage should the marriage irretrievably breakdown.

## **6.3. Amendment to Family Law Act: Barriers to Remarriage<sup>118</sup>**

Bearing in mind the conditions of successful law reform in this area, the section of the Family Law Act dealing with divorce should be amended:

- To require that each party to a marriage remove any barriers to remarriage that are within their power to remove;
- To regulate the process of communication between the parties and the court, such that the matter is dealt with in a timely fashion;
- For communication with the court to be accompanied by a statutory declaration that steps taken to remove barriers to remarriage were undertaken voluntarily;
- To specify that should a party fail to remove such barrier to remarriage, any pleadings or claims by that party will be struck out (or that there be other consequences for a recalcitrant party); and
- That where, at a future date, the barriers to remarriage are removed, the court will be open to reconsider the pleadings or claims which had previously been struck out.

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<sup>118</sup> This proposal is based on the Canadian legislation which appears to be well-received and successful in reducing the rate of *get-refusal*. See Shachar A (2009) “Entangled: State, Religion, and the Family” 49 *Harvard ILJ Online* 132-145 Kleefeld J & Kennedy A (2008) “A Delicate Necessity”: *Bruker v. Marcovitz* and the Problem of Jewish Divorce 24 *Canadian Journal of Family Law* 205-82; and Fishbayn, Lisa (2008) “Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce” 21 *The Canadian Journal of Law and Jurisprudence* 71-96

#### **6.4. Amendment to Family Law Act: Abuse of Process**

The Family Law Act should be amended to provide a remedy for existing *agunot*:

- A section should be added to the Family Law Act which allows an action for damages for abuse of process to be brought at any time
- The section will authorise *agunot* to apply to the court, to provide evidence of any inducement or blackmail they experienced in negotiating for a *get* either at the time of civil divorce or thereafter. The Court should be given discretion to award damages & costs in favour of a blackmailed *agunah* – set at a minimum – and be able to reopen divorce settlements no matter how long ago they were made.
- The section should provide damages & costs to an *agunah* in recognition of the abuse she has received at the hands of a recalcitrant husband. The damages should be discretionary, but a minimum lump sum and a minimum quantum should be specified for each year that a *get* was denied. These damages should be available equally to men and women, though the rate a payment should take into account the differential effect of *get*-refusal on women and on men.

#### **6.5. Education & Training of Judges, Mediators, Family Lawyers and Court Personnel**

Many of the judicial decisions that have denied remedies relating to *agunot* or refused to enforce *Ketubot*, have done so on the basis of misinformation about the nature of Jewish marriage and divorce. It is particularly important that it is understood that although governed by *Halacha*, the Jewish legal system deals with many matters that are better understood as civil matters than as religious matters. Laws relating to marriage and divorce are in the former category, and as such do not have religious elements as the term religious is generally understood. Any state official dealing with a divorce involving anyone who has had a Jewish marriage, must be aware of the serious consequence of *get-refusal* and that *agunot* are seriously handicapped. Education should also take into account the impact on children born of *agunot*, who are seriously disadvantaged by their status as *mamzerim*. The state or its officials should not be implicated in the abuse, indignity and inequality experienced by *agunot*. Rather, it is appropriate for the state to take action to intervene and to close the disjuncture caused by the concurrence of state and religious rights and obligations imposed by marriage, on the one hand, and on the split between state and religious rights and obligations involved in divorce, on the other.

### **Part V: Conclusion & Recommendations**

#### **Recommendations with respect to Equality**

The most significant issue for equality of Jewish women with men is the matter of the *get*, where women suffer significant disadvantage. Our proposal is that a strategy be put in place at three stages as the only comprehensive solution to the problem.

**Recommendation 1 (a):** Legislation should be enacted to require that where a marriage has a religious or cultural component (as it will whenever a Minister of any religion is the marriage celebrant for the purposes of Australian law) agreement must be made prior to the marriage about the removal of any barrier to remarriage in the circumstances of a divorce. This should take the form of a legally enforceable pre-nuptial agreement. And/or

**Recommendation 1 (b):** Legislation should be enacted which clarifies that any contract made by the parties prior to a marriage which pertains to the marriage itself or to arrangements consequential to the breakdown of the marriage, constitutes a binding prenuptial agreement. Such contracts would include

the *Ketuba*, which can be read as a voluntarily entered into agreement on the part of the husband to provide a *get* at the point of divorce.

**Recommendation 2:** At the point of civil divorce, the Family Court should intervene to enforce the terms of the pre-nuptial agreements (including the *Ketuba*). Courts should exercise their authority to issue an injunction requiring the '*get* refuser' to act consistently with his stated commitments. Failing this, courts should not hesitate to hold a party who does not appear before the *Beth Din* in contempt of court.

**Recommendation 3:** Where the *get* has not been provided at the point of civil divorce, such that a woman is left chained to her ex-husbands, there should be provision for the courts to take action such as the award of to compensatory damages for failure to provide a *get*, as well as punitive damages.

**Recommendation 4:** An educative process must be initiated in parallel with law reform efforts. The education must not only reach Jewish women, who need to be informed of their rights and the ways to enforce them. It needs to reach Jewish men and other Jewish stakeholders (anyone who at any time has participated in a Jewish wedding). It must include judges and court officials, family lawyers and mediators.

## Recommendations with respect to Dignity and Respect & Inclusion

Inclusion and participation of Jewish women depends on a commitment to treat all women with dignity & respect. Neither is possible without knowledge of fundamental issues of concern to Orthodox Jewish women & and a willingness to address unmet needs.

**Recommendation 5:** All state bodies and public instrumentalities be issued with calendars noting all days of religious observance; be educated about these events and their meaning for adherents; and be advised that care must be taken to avoid discrimination.

**Recommendation 6:** No state or public function targeting or servicing the entire community should be reposed in the hands of a religious body or religious organisation. This includes State provided services such as those for domestic violence and rape counselling, which should be available in venues and with personnel appropriate to women within their faith communities.

**Recommendation 7:** Local governments should be advised about issues of concern to Orthodox Jewish women and be counselled to undertake changes to facilitate inclusion in society, particularly where there is little or no cost involved. For example, in municipalities where Jews reside, councils should be made aware of the difficulties for Sabbath observing Jews crossing major roads on Shabbat and should be encouraged to set pedestrian traffic lights to automatic settings at the relevant times.

**Recommendation 8:** In order to ensure progress is made with respect to the inclusion of people from minority cultures and religions in any given local government area, councils should encouraged to carry out a *Cultural & Religious Sensitivity Audit* to provide a baseline of the profile of constituents and the extent to which current legislative instruments and council activities pose a problem for members of minority communities.

**Recommendation 9:** In order to ensure decision-makers put their minds to the impact on Jewish woman (and on all people from minority cultures and religions) of any proposed course of action, the use of a *Cultural & Religious Sensitivity Impact Statement* should be introduced.

**Recommendation 10:** All those engaged in policymaking or the provision of services be required to undertake ongoing professional development with respect to the issues for women from minority cultures and religions.

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