

Freedom of Religion and Belief in the 21st Century – Supplementary Paper

Freedom of Religion and Belief and Family Law

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Introduction

Australia is one of the most multi-faith, multi-lingual, and multi-cultural countries in the world¹. This multiplicity of cultures brings with it diversity and differences: religious beliefs form one, but arguably an increasingly important, point of distinction within Australian society today. Recent and current events – local and global – emphasise the importance of maintaining adequate means of mediating between different and divergent interests in matters of religion and faith.

In the area of family law, religious diversity has posed a number of challenges, particularly in relation to issues such as child custody arrangements, circumcision, divorce and polygamy.

For example, the *Marriage Act* permits Muslims to marry in compliance with both Australian and Islamic law at the same time. Divorce however is more

¹ See recent speech by Kamran Mofid Founder, Globalisation for the Common Good Initiative at the recent Melbourne conference International Conference in June 2008
<http://www.gcgmelbourne2008.info/>

problematical because quite different rules apply. Only fairly recently has Australian law adopted the Islamic practice of requiring mediation in family disputes. Islamic law does not recognize adoption but endorses fostering, which is similar to the newer ways of thinking about this subject in Australia.

More recently, the Australian Family Law Council, in considering the effects of denial of a religious divorce on a party who has been divorced in the civil courts, highlighted the anomalous situation arising when a person enjoys the Constitutional protection of the freedom of religious expression but seeks the assistance of Government to circumvent certain undesirable consequences of the observance of their religion.

Whilst various social and political institutions in Australia have long grappled with the implications of Australia's multicultural policies, the legal system is only just beginning to respond in any real way. It could be said that the Family Court of Australia is one of the first courts to attempt to consult with a range of diverse communities as part of the development and implementation of its *National Cultural Diversity Plan*. The Court, in partnership with the Department of Immigration and Citizenship, was also involved in national series of consultations with multicultural communities, particularly newly arrived communities resulting in the report '*Families and the law in Australia – the Family Court working together with new and emerging communities*'.²

There is no doubt that apart from the richness and benefits of Australia's multicultural communities, our cultural and religious diversity presents a challenge to the application of law. For laws to be applied justly, it is simply not possible to overlook issues of religious and cultural diversity. To do so effectively denies access to justice. However when we do consider the issues religious and cultural diversity raises, we can be easily disheartened. It can seem that we pose more questions than we resolve. This paper does not avoid unresolved issues, but

² Families and the law in Australia : the Family Court working together with new and emerging communities / Family Court of Australia, Department of Immigration and Citizenship

alongside them it hopes to offer insights into the way a Court can tackle the issues cultural and religious diversity raise.

The Family Court of Australia (FCoA) is engaging the challenge of religious and cultural diversity. Broadly speaking, the issue of cultural and religious diversity challenges the FCoA in two ways.

“An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves”.
Robert McClelland – Attorney- General³

Firstly the Court must ensure that its practices and procedures make it accessible to people from cultural, religious and linguistically diverse communities. From the translation of information to that information being received by the relevant community, the challenges to ensuring that the Court is accessible to people in diverse communities are as broad-ranging as the work of the Court itself.

The second area where cultural and religious diversity presents a major challenge to the Court is in the application of the law the Court applies. From the making of consent orders to the delivery of judgments, an awareness of cultural and religious diversity issues necessarily complicates the application of a law that was primarily designed for an Anglo-Celtic, Western society.

The work of the FCoA and Cultural and Religious Diversity

Every court in Australia is having to grapple with the notion of ‘access to justice’ in our increasingly multicultural society. Access to justice is central to the rule of law and integral to the enjoyment of basic human rights. It is an essential precondition to social inclusion and a critical element of a well-functioning democracy.

³ See: Access to Justice Taskforce, ‘A Strategic Framework for Access to Justice in the Federal Civil Justice System’ 2009

The people who approach the FCoA reflect Australia's diversity. 40 per cent of Australian couples who divorce involve one partner, and sometimes both, who was born overseas. As the Court's jurisdiction is Australia-wide, the issue of cultural diversity is faced by the FCoA every day.⁴

Cultural Diversity Plan

The Family Court of Australia has had a long interest in, and commitment to the provision of services to meet the needs of its culturally diverse clients. In order to help ensure a consistent national approach, the Court established the National Cultural Diversity Committee in 2000, conducted an extensive Audit of Court services in 2001, held a National Roundtable Conference co-hosted with the Australian Multicultural Foundation in 2003, and launched a National Cultural Diversity Plan in 2004.

With implementation of the National Cultural Diversity Plan, many opportunities have risen for further development of the Court's partnerships and relationships with other agencies, organisations and communities.

The National Cultural Diversity Committee has joined with the Federal Magistrates Court. Local Action plans for each court registry include building partnerships with the local multicultural community and celebrating Harmony Day, 21 March, each year.

'Families and the Law in Australia - The Family Court working together with new and emerging communities'

In late 2004, the Family Court of Australia received Living in Harmony Partnership funding from what is now the Department of Immigration and Citizenship, for an initiative to be known as *'Families and the law in Australia – the Family Court working together with new and emerging communities'*.

The aims of the project included:

⁴ With the exception of the state of Western Australia.

- To identify and respond to issues of a lack of trust and disharmony that may impact on the delivery of Court services to these new and emerging communities in Australia.
- To improve awareness and understanding of family law issues amongst members of new and emerging communities in Australia and to increase community understanding of how the Court operates.
- To improve awareness and understanding between the targeted communities and the Family Court of Australia so that the Court can demonstrate it understands and is able to respond to the issues associated with culture, religion, ethnicity and social arrangements of communities.

The six identified communities the Court was to seek engagement with were people from these countries of origin: Afghanistan, Eritrea, Ethiopia, Iraq, Somalia and Sudan. The project had five stages and took more than two years to complete.

Community views and family breakdown

As communities settle and integrate into broader society, their interface with the legal system, particularly areas of family law can bring with it confusion, misunderstanding and suspicion.

As a result of the consultations the Court became aware that the perception from many culturally diverse communities is that the Australian family law framework does not do enough to prevent family breakdown. Broadly, the views expressed by the communities can be grouped under the following key themes:

- Distrust in government institutions, including Courts - *Distrust of government institutions is based on previous experiences of government and based on their perceptions since settlement of the role of government agencies in further fragmenting their families*
- Lack of awareness of legal institutions and processes
- Misunderstanding of concepts
 - Rights based approaches
 - Best interests of the child

- No fault divorce and property distribution (*“No fault divorce is not acceptable according to the Koran. The Koran specifies that a party must be at fault, if they want to divorce. Reasons for divorce are usually adultery or that a wife has neglected her duties towards husband and family. It is easier for husbands to apply and have a divorce granted” Participant*)
- Mediation
- Limits of law and multiculturalism

The project raised a series of critical questions about the relationship between multiculturalism, including

- is the legal system responsive and sensitive to cultural and religious diversity, and indeed should it be?
- What does multiculturalism demand of the law, particularly family law and the legal system more generally?
- Should family law expressly provide for differentiated cultural rights in its decisions around children, property and other matters.

The flexibility of the law and cultural diversity

“As a policy that has a particular focus on access, equity, justice, respect and cross-cultural understanding, multiculturalism is a policy that is vital for present and future community harmony in Australia” (Graeme Innes, Race Discrimination Commissioner, Australian Human Rights Commission)

Our multicultural policies also affirm that all Australians have the opportunity to be active and equal participants in society, and are free to maintain their religious and cultural traditions within Australian law.

The freedom of all Australians to express and share their cultural values is dependent on their abiding by mutual civic obligations. All Australians are expected to have an overriding loyalty to Australia and its people, and to respect the basic structures and principles underwriting our democratic society. These are: the Constitution, parliamentary democracy, freedom of speech and religion, English as the national language, the rule of law, acceptance and equality.

The increase in people from new and emerging communities who come to the Court has resulted in demands being that culture and religion be taken into account, particularly in children and property matters.

Does the concept of multiculturalism allow for the law to be flexible where culturally diverse communities are concerned? And if the answer to that question is 'yes' – what are the limits of that flexibility?

Australian multiculturalism asks that people respect the rule of law, a notion that embodies the ideal that all people are equal before the law. In Australia the rule of law and human rights are regarded as synonymous or at least mutually supportive. They are supported by:

- our democratic system of responsible government
- the separation of powers between the Parliament, Executive Government and the Judiciary
- a professional judiciary whose independence is constitutionally protected and who hold all accountable for upholding the law
- an independent media
- an accountable, apolitical public service, and
- a comprehensive administrative law system.

And yet for the law to be applied equally it is arguable that the differences that exist between cultures must be considered, not ignored.

In 2000, the Family Law Council of Australia

The question for the Court, and indeed all courts in Australia, is how to respect and take into account, cultural and religious difference. Keep in mind that the very element of the culture in question may be at odds with legal principles.

The issue of cultural and religious diversity and the Court involves questions of access and equity – to the Courts and the services it offers, and to information about the law itself. But it does not end there. The Court must also consider the impact cultural differences may have on the law to be applied.

To what extent can a judge consider the cultural values of two people when deciding how to distribute their property? To what extent should traditional practices involving extended family bear upon the judge's mind? In the FCoA decision-makers are asked to consider the best interests of the child as the paramount concern in all cases which involve children. How does the court respond to the criticism that the 'best interests' test is considered to be Eurocentric – a reflection of Western individualism?

Such questions are crucial in any discussion about cultural and religious diversity and the law.

Internationally, and within the past few years, various courts have taken up the issue of religious and cultural diversity within family law settings. For example, the English Court of Appeal has ruled in a variety of cases involving disputes about the religious upbringing of children following the separation or divorce of their parents. Many of these cases have not been reported, although the most significant of them, *Re R*, is well known to family lawyers. In other jurisdictions the European Court of Human Rights in *Hoffmann* and the Supreme Court of Canada in *Young and D.P. v. C.S.* have also heard important cases in which a significant factor before the court was the influence of religious beliefs and practices on the children of those who professed them.

In Australia, cultural and religious diversity is an issue that constitutes a reason to appoint a separate representative for a child.⁵ This recognises the significance of such issues, and a preference to be appraised of the ways they impact a child.

Of course – the effectiveness of such appointment in determining any religious and cultural impact is dependant on the sensitivity of that separate representative, and the way in which a judge chooses to exercise their discretion. And it is arguable that the weighing up of cultural life in a balancing exercise to consider the 'best interests' of a child is manifestly inadequate – treating a person's culture as though it was extrinsic to them. But it demonstrates the Court's awareness of cultural issues.

⁵ *Re K* 17 FamLR 537.

Marriage, and consequently divorce, is a complex institution with legal, financial, social, and sometimes religious and cultural implications

Laws concerning marriage within our society exist at both civil and religious levels and for many people may be governed not only by the Family Law Act, but also the laws and customs of the parties' relevant religion. The separation of church and state within our jurisdiction has created a problem for some religious groups in Australia whereby religious marriages are recognised under the Family Law Act, yet divorce according to personal ethnic or religious traditions is not. The civil law is therefore unable to place parties bound by such religious marriages in a position where they are free to remarry according to their personal beliefs upon the dissolution of their civil marriage.^[4] This may have severe consequences for members of certain religious and cultural groups within the community. Currently, the main problem arises where one party is placed in a position of disadvantage as a result of another party withholding a cultural or religious divorce upon the dissolution of their civil marriage.

The issue of divorce has been one that has regularly intersected with issues related to cultural and religious diversity. For example, for some members of various religions within Australia, a civil divorce will not leave them in a position where they are free to remarry according to their personal religious preferences. This is due to the additional divorce requirements of some religions. In these cases, as the religious divorce requirements are not met by divorce under the civil system, one party may have the power to withhold a cultural or religious divorce against another spouse's will, sometimes utilising such things as contact with children and financial arrangements as bargaining tools to barter for the religious divorce⁶.

The FCoA has considered cultural and religious issues as they pertain to Jewish divorce requirements. In certain circumstances Jewish law requires that a husband grant a Gett to his wife. Jewish spouses, although divorced at civil law, remain married at Jewish law until a Gett has been granted and accepted. Without a Gett, a woman will be unable to remarry at Jewish law,

⁶ *Legislation proposed by the Family Law Council in 2001 to resolve this situation was rejected in 2004 by the Attorney-General.*

It has been held 'contrary to all notions of justice' that a wife be left unable to marry after having received a legal divorce 'and to say that the court can do nothing' after a husband's reluctance to grant a Gett.⁷ This decision considered the impact of religious and cultural issues, but ultimately thought they should bow to notions of justice inherent in the Australian legal system.

In the Federal Magistrates Court two parents came before a federal magistrate over the question of their child's formal education. The parents were of different faiths. One parent wanted the child educated in a faith-based school, the other in a secular state school. The latter approach was preferred by the Court, which recognised that:

*"(the) diversity of family life and structures in Australia has often raised concerns of how family law can accommodate this diversity when determining outcomes that affect families."*⁸

Limits to accommodation:

As with many fundamental rights, the right to freedom of religion is not an absolute one in any society. This fact is recognised in the ICCPR. In the case of freedom of religion, a distinction is often drawn between the right to hold religious beliefs and the right to manifest, or demonstrate, those beliefs.

Any approach to accommodating diversity must meet the objectives of respect for cultural diversity on the one hand, and the guarantee of equality on the other. The cultural practices of minorities should be respected in the interests of liberal democracy and individual freedoms. Cultural tolerance, however, must not be allowed to become a mask for injustice. There must be protection for the rights of individuals who may be harmed by, or may not wish to participate in, certain traditional practices.

A claim that the refusal to recognise marriage with an underage girl as permitted by Islamic law involved an interference with manifestation of belief was deemed

⁷ *Shulsinger* (1977) 13 ALR 537 at 542.

⁸ *In the Marriage of H* (2003) 198 ALR 383 at 398.

not to fall within the scope of Article9 but rather Article12. Khan v. the United Kingdom,

Conclusion

Can family law accommodate the diversity of family life in Australia? The question is a very real one in Australia today. As more and more people from diverse communities come to the Court to resolve their family breakdown, the Court recognises the challenge with which it is faced. It is a challenge that must be dealt with at two levels. There are practical issues such as the need for people to understand the family law framework, to be able to read information about the law in their own languages, and be greeted upon arrival at the Court by a person who understands the complexities of applying the family law system to a culturally and religiously diverse community.

And there are legal issues to be considered such as the way our governing legislation is framed, the flexibility it allows decision-makers to assess the importance cultural issues, and the willingness of those decision-makers to engage with cultural and religious issues and be informed of them.

No doubt there is a long way to go before the FCoA resolves many of the issues that cultural and religious diversity raises. But it has certainly begun the journey. It has been and remains willing to examine and improve its own processes. It is already in the process of meeting with communities – the first step in its desire to build ongoing relationships with them. The next challenge is for the Court to explain to communities unfamiliar with the Australia system that it is not in the business of encouraging families to break down – but that it aims to make the process less painful when they do.

The Honourable Justice Nahum Mushin (BJuris 1967, LLB 1971) Justice of the Family Court of Australia

After completing his studies at Monash University, Nahum Mushin worked as a solicitor in Melbourne from his admission to practice in 1972 until he went to the bar in 1980. As a barrister, he practised in commercial, industrial and common law and developed a growing interest in family law.

In 1990, his Honour was appointed to the Bench of the Family Court of Australia, and in doing so was the first Monash Law graduate to become a judge of any jurisdiction. He has served on a number of Court committees, including his current role as Chair of the Family Court's National Cultural Diversity Committee.



He is presently the Court's Regional Coordinating Judge for Victoria and Tasmania and is a Presidential Member of the Administrative Appeals Tribunal. He has particular interest in continuing legal education and cultural diversity.

In addition to his Family Court commitments, Justice Mushin is Co-Patron of Chances for Children (Mildura), a programme offering educational opportunities to children; and lectures at Monash University's Law School.

Maria Dimopoulos (BA/LLB)

Maria Dimopoulos has a legal background, and incorporates her legal knowledge as a human rights and diversity trainer. Maria has had extensive experience in policy formulation for the Government sector, research for social planning and in community education. She has also successfully undertaken sensitive consultations with diverse cultural and religious communities on a range of issues including care for aged, skilled migration and employment, health, domestic violence and the law.

Recently, she was appointed by the Federal government to the newly formed National Council to Reduce Violence Against Women and their Children. The Council provides expert advice to Government on ways of reducing the incidence and impact of domestic and family violence and sexual assault on women and their children and has been tasked with the development and distribution of a National Plan of Action.

Maria is currently enrolled at RMIT in a PhD program examining concepts of 'culture', the legal system, and judicial education programs.