

GETT-REFUSAL, JEWISH DIVORCE AND FAMILY LAW:

A submission to the Australian Law Reform Commission

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on behalf of

Unchain My Heart Incorporated Inc and

National Council of Jewish Women of Australia Ltd

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EXECUTIVE SUMMARY

1. Australian Jewish couples usually marry according to both Australian and Jewish Law. When their marriages breakdown, they similarly have to divorce according to Australian and Jewish Law¹.
2. Parties to a failed marriage cannot move on with their lives unless they obtain a divorce under both Australian and Jewish Law.
3. Unless the parties obtain a divorce under Jewish Law, they cannot remarry under Jewish Law. Any child of a woman who has not been divorced according to Jewish Law is classified as a '*Mamzer*' (usually incorrectly translated as 'a bastard') and is subject to severe stigma and a compromised social status.
4. Under Australian Law, marriage and divorce is governed by legislation of the Commonwealth of Australia, which confers the relevant status on the parties.
5. Under Australian Law, divorce is gender neutral and procedural. Neither party can control or manipulate the process. Once the conditions for divorce are satisfied, the divorce is granted by the Commonwealth of Australia.
6. Under Jewish Law, a Rabbinical Court generally cannot confer a divorce or order that a divorce be granted. The power of the Rabbinical Court is limited to ensuring that the procedural requirements of the Jewish divorce are satisfied.
7. Under Jewish Law, divorce is a contractual arrangement, which generally requires the voluntary agreement of the parties to the marriage. Once the agreement to divorce is reached, the husband delivers the Bill of Divorce to the wife who accepts it.
8. The Jewish Bill of Divorce is known in the Jewish Community by its Aramaic name, "*the Gett*".
9. The process of a Jewish Divorce is generally simple and procedural. Parenting and property matters are determined separately according to Australian Family Law. Only the Australian Family Courts can make enforceable orders regarding property and parenting arrangements.

¹ Jewish Law throughout this submission refers to Orthodox Jewish Law

10. Although many Jewish divorces are resolved procedurally, there are a growing number in which the process is controlled or manipulated by one party, mainly the husband, to extract property or parenting concessions or to torment and harass the other party.
11. In these cases, the husband controls or manipulates the divorce process by refusing to give his wife a Gett and thereby preventing her from remarrying according to Jewish Law and from having children who can fully participate in the Jewish community.
12. This act of control or manipulation is called 'Gett refusal' or 'Gett recalcitrance'.
13. Wives affected by Gett refusal are known in the Jewish community as 'Agunot' (plural) or 'Agunah' (singular). 'Agunah' means chained or anchored in Hebrew. An *Agunah* is chained to an unwanted marriage because her husband refuses to relinquish his control over her. These women complain of feeling powerless, manipulated and coerced.
14. A primary method for Jewish women seeking redress to Gett refusal has been by way of application to the Family Court of Australia. The relief has been facilitated through the inclusion of "Gett-clauses in orders imposed by the Court² or made by consent.
15. The approach by Family Court judges to this issue has been inconsistent and Jewish women seeking relief have little certainty about their prospects of successfully obtaining relief in this jurisdiction.
16. The Family Law Council submitted a report to the Attorney General in August 2001³ proposing to clarify the law by amending the *Family Law Act 1975* to give Family Court judges discretionary powers to take into account separate systems of divorce in the Australian community. The recommendations were not adopted.
17. Recalcitrance in religious divorce proceedings is experienced by other cultural-communities in Australia.⁴
18. The Commonwealth of Australia recognises and has enacted laws encompassing religious marriage: s45 *Marriage Act 1961*. It is submitted that the Commonwealth of Australia should similarly legislate for religious divorce.

² For example in the case of *Gwiazda v Ber* (Unreported, Family Court of Australia, Emery J23 February 1982) in which the Family Court ordered the recalcitrant wife to appear before the Melbourne Beth Din

³ *Family Law Council, Cultural-Community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law* (2001). This Report was compiled in consultation with the Executive Council of Australian Jewry.

⁴ Talya Faigenbaum and Nussen Ainsworth, *The Complex World of Religious Divorce*, LIJ 2017 91 p23

19. The Commonwealth of Australia has recognised that⁵:
- (a) family violence is a fundamental violation of human rights and is unacceptable in any form, in any community and in any culture; and
 - (b) family violence is a gendered phenomenon, which overwhelmingly effects women and children.
20. Gett refusal is an example of family violence which operates within the Jewish community of Australia.
21. Gett refusal may be described as emotionally or psychologically abusive; economically abusive; threatening; coercive; controlling or dominating in a way that it affects the wellbeing of the spouse, children living with her and any future children.
22. In 2011 the Commonwealth Government enacted amendments to the *Family Law Act 1975* (“the Act”) to maximise safety for children and adults who have experienced family violence, to prevent and reduce family violence to the greatest extent possible and to promote the accountability of perpetrators of family violence for their actions.
23. Gett refusal falls within the definition of “family violence” in sections 4AB(1) and (2) of the Act.
24. It is submitted that in order:
- (a) to recognize the greater diversity of traditions, cultures and religions in Australian family structures;
 - (b) to implement the Commonwealth Government’s desire to rid all communities and cultures of family violence;
 - (c) to ensure that the Commonwealth Government’s laws are effective in meeting the contemporary needs of Australian families in resolving the legal problems faced by different community members; and
 - (d) to achieve finality in the resolution of family disputes thereby instilling confidence in the family law system

⁵ *The National Plan to Reduce Violence against Women and their Children 2010-2022*

the Commonwealth Government adopt the recommendations of the Family Law Council in its 2001 Report, *Cultural-Community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law* .

1. Jewish Divorce - An Introduction

- 1.1. A major issue confronting Australian Jewish families today is that of coercive, manipulative and abuse behaviour, perpetuated primarily by men against women and which occurs after the marriage has in reality come to an end.
- 1.2. Under Jewish Law, the final dissolution of a marriage is brought about either through the death of a spouse or in the formal delivery by a husband to a wife of a divorce document, known by its Aramaic name as a 'Gett'. To be valid, the document must be given freely by the husband and willingly accepted by the wife, under the supervision of a Jewish Rabbinical Court (also known in Hebrew as a '*Beth Din*').
- 1.3. According to Jewish Law, a civil divorce document cannot dissolve the marriage.
- 1.4. In the event that a Jewish divorce is not finalised in the above manner, the wife may not re-marry and any children born to another partner will be classified as '*Mamzarim*'. They are the offspring of an adulterous union and subject to severe stigma and a compromised social status under Jewish law.
- 1.5. A husband's ability to re-marry according to Jewish law is similarly curtailed, although exceptions can be made. The husband's future children are not classified as '*Mamzarim*' and they will not suffer the same social stigma within the Jewish Community.
- 1.6. Gett refusal is often used by husbands to coerce, control and manipulate their spouses. As a result, women who are not living with their husbands, but whose husbands refuse to give them a Gett and release them from their marriage are known in the Jewish Community as '*Agunot*' (plural) or '*Agunah*' (singular). '*Agunah*' means chained or anchored in Hebrew. An Agunah is chained to an unwanted marriage because her husband refuses to relinquish his control over her.

2. The Jewish Divorce Process

- 2.1 Jewish divorce is a contractual arrangement between the parties to the marriage. The consent of both parties to the divorce is nearly always required.
- 2.2 Although the Jewish Rabbinical Court can make recommendations or directions regarding a divorce, it cannot order either party to grant a divorce.
- 2.3 This is unlike divorce under Australian Law, where the Commonwealth of Australia determines the matrimonial status of the parties under the *Family Law Act (1975)*.
- 2.4 In a Jewish divorce, the role of the Jewish Rabbinical Court is to supervise the proceedings of the divorce ceremony and to ensure that all the religious elements are complied with.
- 2.5 The main element of the Jewish divorce ceremony is the Bill of Divorce or 'Gett'.
- 2.6 The Gett itself is a relatively short document written in Aramaic which severs the matrimonial bond between the couple and permits each spouse to remarry according to Jewish Law.
- 2.7 The Jewish Divorce ceremony involves the Gett being reviewed and signed by two authorised witnesses.
- 2.8 The ceremony takes place under the supervision of a Jewish Rabbinical Court, with the Gett being physically given by the husband to the wife.
- 2.9 After receipt of the Gett, the wife exits the room with it in her hand and then returns, displaying the Gett to those present. This act symbolizes the severance of the relationship between the couple and demonstrates that the wife is no longer constrained by her former marriage.
- 2.10 In instances of impracticality, such as when the parties reside in different locations, or undesirability, such as the existence of a Family Violence Intervention Order, the ceremony can be performed through a proxy with a power of attorney.
- 2.11 The Jewish divorce ceremony is simple and usually takes about 15 minutes to complete.
- 2.12 Generally the Jewish Divorce process runs smoothly, as there are no parenting or property issues to be resolved.
- 2.13 Problems arise when one of the spouses refuses to cooperate in the divorce proceedings.

3. Gett Recalcitrance and the Role of a Rabbinical Court

- 3.1. Throughout Jewish history, Rabbinical Courts have had varying degrees of authority to resolve end of marriage conflicts. Their power and influence have depended on a range of factors including location, the level of autonomy granted by the governing authority and the degree of insularity or assimilation of the Jewish community at the time.
- 3.2. These factors remain relevant today in explaining the diversity in modern Rabbinical Courts, particularly the differences between Rabbinical Courts operating in Israel and those operating in Jewish communities throughout the world.

4. Australian Rabbinical Courts: The Melbourne and Sydney Beth Dins

- 4.1. The orthodox Rabbinical Courts of Australia, comprise Beth Dins in Melbourne and Sydney.
- 4.2. The Melbourne Beth Din has jurisdiction in Victoria. The Sydney Beth Din has jurisdiction in New South Wales. Both the Sydney and Melbourne Beth Dins can preside over matters arising in other states with small Jewish communities
- 4.3. The Sydney Beth Din presides over issues of divorce as well as conversion, commercial disputes, financial and communal conflicts. The Melbourne Beth Din presides only over issues of divorce and conversion. However, neither Beth Dins resolves issues relating to property or parenting on breakdown of a marriage.
- 4.4. The Australian Rabbinical Courts ensure that a Gett is properly executed and that all formalities and technical religious requirements relating to the Jewish Divorce ceremony are complied with. They cannot order the parties to divorce.

5. Gett Recalcitrance and Australian Rabbinical Courts

- 5.1. Gett recalcitrance or refusal is generally abhorred in the Jewish community. It is seen as vindictive, coercive and exploitative.
- 5.2. As the Australian Rabbinical Courts do not have the power to order the parties to divorce, they adopt other methods to persuade the recalcitrant spouse to divorce.
- 5.3. Initially these methods include mediation by the Australian Rabbinical Courts, community rabbis or spiritual leaders.

- 5.4. Where these attempts of persuasion prove unsuccessful, a Rabbinical Court or Beth Din may issue a summons or a series of summonses (in Hebrew '*a hazmanah*' (single) or '*hazmanot*' (plural)), requiring the recalcitrant party to attend at the Beth Din.
- 5.5. Persistent failure to attend enables the Beth Din to make a contempt order or in Hebrew a '*seruv*', against the recalcitrant spouse.
- 5.6. The contempt order indicates the seriousness with which Gett refusal is viewed by the Beth Din. However, the contempt order is unenforceable and no disciplinary consequences flow from it.
- 5.7. The contempt order enables further and more robust efforts to persuade recalcitrant husbands to attend at the Beth Din. These efforts may include withholding privileges associated with performing religious ceremonial rites and ostracism by the community.
- 5.8. Such efforts will not be seen as abrogating the recalcitrant party's religious autonomy.
- 5.9. Historically, the methods of persuasion were more successful than they are today.

6. Gett Refusal in Australia

- 6.1. The Melbourne Beth Din has indicated that the rate of divorce applications is increasing.
- 6.2. While many of the divorce applications are resolved procedurally, there are a growing number of cases in which Gett refusal features.
- 6.3. It is difficult to ascertain numbers of Gett refusals because a Gett refusal may last for a few days or multiple decades and is often not reported.
- 6.4. The period of Gett refusal is likely to be short, if the spouse capitulates to her husband's coercion and foregoes her rights and yields to his demands for additional property or more favourable parenting arrangements.
- 6.5. It may be indefinite, if the motivation of the recalcitrant husband is perpetual control. A woman currently living in Victoria endured Gett refusal for 37 years.

7. Examples of Gett Refusal

7.1. Described below are two cases of Gett refusal that have come before the Melbourne Beth Din in recent times.

7.1.1. *Deborah and Nathan*

7.1.1.1. Deborah and Nathan were married for over ten years and had two children.

7.1.1.2. The marriage was characterised by acts of family violence. Nathan would constantly check Deborah's phone messages and emails, interrogate her as to her whereabouts and threaten to take the children away from her if she ever left.

7.1.1.3. Nathan made minimal contributions to the family's finances, but would make use of Deborah's earnings in a manner that excluded her and would repeatedly tell her that she was lazy and needed to work harder.

7.1.1.4. On several occasions, Nathan was physically violent and would repeatedly lock Deborah out of the house at night where she would have to wait until the morning or seek shelter at a friend's home.

7.1.1.5. When Deborah finally left, Nathan found her and urged her to return home, promising to change. However, when his behaviour continued, Deborah fled the house and obtained a Family Violence Intervention Order against him.

7.1.1.6. Over the next three years, Deborah attended at least six Family Violence Intervention Order hearings and multiple Family Court hearings, as Nathan repeatedly abused the legal process by seeking adjournments and using other procedural tactics to force delays.

7.1.1.7. Nathan has been charged with multiple contraventions of Family Violence Intervention Orders and has been found guilty of three contraventions, resulting in the imposition of fines of around \$2,000.

7.1.1.8. It has now been more than one year since the Family Court made its final parenting and property orders, over 18 months since the civil divorce decree issued and almost three and a half years since final separation of the parties.

7.1.1.9. Nathan has promised and then retracted his promise to give Deborah a Gett. He has still not given Deborah a Gett.

7.1.1.10. Nathan's refusal to release Deborah from the failed marriage is a clear extension of the abuse and control that he exerted over her during the relationship.

7.1.2. *Esther and Simon*

7.1.2.1. Esther and Simon were married overseas before moving to Australia 25 years ago. The couple has three children.

7.1.2.2. After about ten years, the marriage ran into trouble and for the next four years Esther made various attempts to repair the relationship and seek the assistance of marriage counsellors. Simon rebuffed these attempts and continued to verbally abuse Esther calling her 'stupid' and 'crazy'.

7.1.2.3. Finally, Esther felt that she had no choice but to end the marriage and relocate with her children to a different state. This she did.

7.1.2.4. Esther has obtained a civil divorce from Simon, but she has not been able to obtain her Jewish Divorce from him.

7.1.2.5. Even though eight years has elapsed since separation and there has been no contact between Esther and Simon in that time, Simon still refuses to give Esther a Gett. Simon has told those who have attempted to intercede on Esther's behalf, including their children, that 'Esther will get her Jewish divorce over my dead body'.

7.1.2.6. Simon's refusal is his final attempt to assert power over Esther in the wake of her decision to break free. He is clearly motivated by a desire to control, humiliate and hurt her.

8 Gett Refusal as a Form of Family Violence

- 8.1 The examples above reveal how some Jewish men use Gett refusal as a tool to inflict punishment, retribution and emotional pain on their wives.
- 8.2 Jewish men can use Gett refusal to dominate and perpetuate control over their spouses' lives, by preventing them from remarrying under Jewish Law and from having children who can fully participate in the Jewish community.
- 8.3 They can also use Gett refusal during separation as leverage to extract property or parenting concessions in Australian Family Law proceedings.
- 8.4 Women affected by Gett refusal feel powerless, manipulated and coerced. Their wellbeing is compromised by their inability to move forward and seek new relationships within the Jewish community.
- 8.5 Women interviewed for the purpose of this submission have described their lives while being unable to get a Gett as 'being in a prison without the bars', 'being in limbo' and as 'being forced to remain connected to a person that only wants to hurt me'.
- 8.6 One woman, when asked why she continued to adhere to her faith replied that she did so, 'because he took everything else from me...my faith is the last thing I have left'.
- 8.7 It is submitted that Gett refusal falls within the definition of 'family violence' under sections 4AB(1) and (2) of the Act in that:
 - (a) it is threatening behaviour designed to coerce or control the family member: s4AB(1);
 - (b) it is threatening behaviour designed to cause the family member to be fearful: s4AB(1);
 - (c) it is designed to coerce the other party to relinquish or forego financial assets and therefore unreasonably denies that party their financial autonomy: s4AB(2)(g);
 - (d) it unlawfully deprives a party from keeping connections with their culture: s4AB(2)(i);

- 8.8 The Gett was never intended under Jewish Law to be wielded as a tool by the husband to torment his wife and/or extract property or parenting concessions from her.
- 8.9 The controlling, coercive and manipulating behaviour expressed as Gett refusal is abhorrent to the Jewish community and to the wider Australian community.
- 8.10 The Commonwealth Government has recognised that family violence is a fundamental violation of human rights and is unacceptable in any form, in any community and in any culture.⁶
- 8.11 The Commonwealth Government has recognised that people from culturally diverse backgrounds who experience family violence face additional barriers in accessing family law services because of the lack of understanding by family law system professionals about culturally specific instances of family violence.⁷
- 8.12 The Commonwealth Government is determined to prevent and reduce family violence to the greatest extent possible and to promote the accountability of perpetrators of family violence for their actions⁸.

9 Recent Case Law

- 9.1 It has been noted that “one of the purposes of the Family Law Act is to free the parties to a marriage that has broken down irretrievably, both in law and in fact”.⁹
- 9.2 There is a trend evidenced by recent case law in which Family Court judges are declining to make orders that would provide relief to a party experiencing Gett-refusal¹⁰.
- 9.3 This trend has meant that aggrieved parties have been unable to remarry in accordance with the traditions of their religion as recognised by s 45 Marriage Act 1961.

⁶ *The National Plan to Reduce Violence against Women and their Children 2010-2022*

⁷ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 11, 241–8; InTouch Multicultural Centre Against Family Violence, ‘Barriers to the Justice System Faced by CALD Women Experiencing Family Violence’ (2010)

⁸ *Family Law Amendment (Family Violence and other Measures) Act 2011 (Cth)*

⁹ Andrew Strum, *Getting a Gett in Australian Courts*, Jewish Law <www.jlaw.cin/Articles/getaus.html>

¹⁰ *Jochim v Jochim* (Unreported, Family Court of Australia, Hase J, 13 September 1996); *Ferro & Koppel* [2016] FamCA 398; *Idelsohn & Idelsohn* [2017] FamCA 398

- 9.4 The Family Law system is presently denying women affected by Gett refusal and family violence a less punitive and more dignified resolution of their divorce process.
- 9.5 The Family Law system by failing to address Gett refusal and culturally specific instances of family violence risks becoming ineffectual in resolving with finality family law issues of cultural communities.

10 Recommendations

- 10.1 It is respectfully submitted that Recommendations 1 and 2 of the *Family Law Council's 2001 Report; Cultural-Community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law* be wholly adopted.
- 10.2 Specifically, it is recommended that the Act be amended to include the following provisions:
- (1) *The Court shall have the power, on application of either party, to make such of the Orders set out in sub-section (2) as it deems appropriate to encourage the other party to take all steps reasonably within his or her power to remove all barriers to the re-marriage of the applicant in accordance with the customs and usages of the religious, ethnic or ethno-religious group to which the applicant claims affiliation.*
 - (2) *The Orders which the Court may make at its discretion are the following:*
 - (a) *An Order that the Decree Nisi shall not become absolute until the Court has been satisfied that both parties have taken all steps reasonably within their power to ensure that all barriers to such re-marriage have been removed.*
 - (b) *An Order requiring a party to appear before a recognised tribunal of the said group and a further Order that both parties may take reasonable steps to remove barriers to such re-marriage as that tribunal shall recommend by notice in writing to the Court.*
 - (c) *An Order that any application, defence, pleading or affidavit by a party in respect of any proposed Order for the payment of maintenance by or to that party be adjourned or struck out, if in the opinion of the Court that party has wilfully refused to remove any barrier to such remarriage which it is within the power of that party to remove.*

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

(3) In this section

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

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

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

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

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

10.3 It is noted that the Family Law Council recommended that the proposed legislative amendment could be enacted in one of two ways. Either by:

(a) inserting a new provision into the Act; or

(b) amending existing provisions in the Act so that 2(a), 2(b) and 2(d) become new paragraphs in s114 and 2(c) becomes a new paragraph s75(2)(q) with appropriate definitions inserted into the Regulations.

10.4 It is respectfully submitted that Recommendation 2 of the *Family Law Council’s 2001 report; Cultural-Community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law* be wholly adopted.

10.5 Specifically it is recommended that *service provision be enhanced in matters involving cultural-community divorce to ensure culturally and linguistically appropriate mediation and counselling.*

We look forward to assisting the Commission in relation to the matters set out in this submission as may be required.

7 May 2018