

# DIVORCE IN AUSTRALIAN & JEWISH LAW

## *GETT* REFUSAL & BARRIERS TO REMARRIAGE

NGO Shadow Report on Australia's 8<sup>th</sup> Periodic Report  
CEDAW Article 16: Marriage & Family Relationships



Prepared by Melinda Jones\*

On behalf of the National Council of Jewish Women of Australia Ltd  
June 2018

---

\* Melinda Jones is an independent human rights lawyer & scholar and member of the National Board of the National Council of Jewish Women of Australia. The National Council of Jewish Women of Australia works for social justice and equality for all women and opposes discrimination in all its manifestations. This Report draws heavily on Faigenbaum Talya & Wollner Ann (2018) [Gett-Refusal, Jewish Divorce And Family Law](#) and on Melinda Jones & Peta Jones-Pellach [Jewish Women & Religious Freedom In Australia](#) (2011) Human Rights & Equal Opportunity Commission of Australia.

# Executive Summary

1. This Report is concerned with CEDAW Article 16.1 “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (c) The same rights and responsibilities during marriage and at its dissolution”.
2. Australia maintains legal recognition of Jewish and other religious laws which parallel Australian law with respect to marriage and divorce.<sup>1</sup>
3. Jewish women in Australia are usually married according to both Australian and Orthodox Jewish Law. When their marriages breakdown, they similarly need to divorce according to Australian and Jewish Law in order to be free from the married relationship.
4. Under Australian law, the process of divorce is straight-forward and gender-neutral. Neither party can control or manipulate the process. Once the conditions for divorce are satisfied, the divorce is granted by the Commonwealth of Australia.
5. Under Jewish law, divorce is a contractual arrangement between the parties to the marriage. This is not governed by the Rabbinic (Jewish) Courts but is left in the hands of the individuals involved. Divorce, under Jewish law, requires that the man voluntarily delivers the Bill of Divorce to the wife who accepts it. The Jewish Bill of Divorce is known in the Jewish Community by its Aramaic name, “*the Gett*”.
6. Unless the parties obtain a *Gett* – a divorce under Jewish Law - they cannot remarry under Jewish Law. The consequences of this barrier to remarriage are substantial for a woman. Any sexual relationship outside the original marriage is considered adulterous – even involving civil marriage. Further any child of a woman who has not been divorced according to Jewish Law is classified as a ‘*Mamzer*’ and is subject to severe stigma and a compromised social status. This is not the case for the children of men who are not divorced under Jewish law.
7. Divorce at Jewish law is gendered and allows the man to control proceedings. Every year, a percentage of Jewish men use the *Gett* as an instrument of power.<sup>2</sup> This act of control or manipulation is called ‘*Gett*

---

<sup>1</sup> Faigenbaum, Talya & Ainsworth, Nussen *The Complex World of Religious Divorce*, LIJ 2017 91 p23.

<sup>2</sup> Faigenbaum & Wollner (2018) *ibid*.

refusal' or 'Gett recalcitrance'. Women 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.

8. Women may also become *Agunot* when their husband is unable to issue a *Gett*, either because he cannot be located or because he has become incompetent to issue a *Gett*.
9. 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 Court<sup>3</sup> or made by consent. 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.
10. Another approach has been preventative - to encourage couples to sign a prenuptial agreement promising the smooth delivery of a *Gett* should the marriage dissolve. However, these are not binding under Australian law, which only recognizes prenuptial agreements relating to financial matters.<sup>4</sup>
11. Despite the fact that there have been a number of Government inquiries on this subject recommending change in the law,<sup>5</sup> the Australian Government has failed to adopt any of the proposed changes to the law.
12. The Commonwealth of Australia has recognized that family violence is a fundamental violation of human rights and is unacceptable in any form, in any community and in any culture; and that family violence is a gendered phenomenon, which overwhelmingly effects women and children<sup>6</sup>. *Gett* refusal is an example of family violence which operates within the Jewish community of Australia.<sup>7</sup>

---

<sup>3</sup> For example in *Gwiazda v Ber* (Unreported, Family Court of Australia, Emery J 23 February 1982) the Family Court ordered the recalcitrant wife to appear before the Melbourne Beth Din.

<sup>4</sup> *Family Law Act 1975* (Cth) Part VIIA - Financial Agreements ss.90A-90Q.

<sup>5</sup> Australian Law Reform Commission (1992) Report No 57 *Multiculturalism and the Law at 5.32*; Family Law Council (2001) [Cultural-Community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law.](#)

<sup>6</sup> *The National Plan to Reduce Violence against Women and their Children 2010-2022*.

<sup>7</sup> In its *Concluding observations on the sixth periodic report of Israel*, 17 November 2017, the Committee on the Elimination of Discrimination against Women recognised that *Gett* abuse constituted gender-based violence: Para 28 (c) and 29 (b).

13. *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, the children living with her and any future children.
14. In 2011 the Commonwealth Government enacted amendments to the *Family Law Act 1975* to maximize 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. *Gett* refusal falls within the definition of “family violence” in sections 4AB(1) and (2) of the Act.
15. It is submitted that the Australian Government should, consistent with CEDAW Article 2 (b) “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women” including Australian Jewish women who have become *Agunot*.
16. It is further submitted that appropriate legislative changes can be found in 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*.<sup>8</sup> Enacting the proposed changes to the *Family Law Act 1975* would provide certainty for Jewish women and would protect Jewish women and children from the family violence which arises in the context of *Gett* refusal.

---

<sup>8</sup> Family Law Council Ibid note 5.

## TABLE OF CONTENTS

1. Jewish Divorce: The Imposition of Barriers to Remarriage	5
2. Family Violence	7
3. Extortion	7
4. Statistics	8
5. Recent Examples of <i>Gett</i> Refusal in Australia	8
6. The Role of Civil Society in Preventing Violence Against Women	10
7. Questions for the Committee	11

## JEWISH DIVORCE & THE IMPOSITION OF BARRIERS TO REMARRIAGE

- Under Jewish Law, the dissolution of a marriage can occur through the death of a spouse or through the formal delivery of a divorce document (*'Gett'*) by a husband to a wife. To be valid, the *Gett* must be freely given by the husband and willingly accepted by the wife, under the supervision of the Jewish Rabbinical Court (*'Beth Din'*). It must also be reviewed and signed by two authorized witnesses.<sup>9</sup>
- In Australia, parenting and property matters are determined separately to Jewish divorce,<sup>10</sup> so the Jewish divorce process can be quite simple. However, if one party refuses to give or receive the *Gett*, an abusive process will arise. Whilst the *Beth Din* can merely give directions and recommendations, it cannot force consent or order the divorce. Therefore, the spouses ultimately hold the power.
- While Jewish law accepts the jurisdiction of the Australian Family Courts to make binding decisions in relation to parenting and property, Jewish law does not consider a civil divorce enough to sever the marital relationship.

---

<sup>9</sup> Wijkander, S, 2002, "*Agunah: Problems and Solutions in Israeli-Jewish Divorce Law*", Master Thesis, *Faculty of Law University of Lund*, pp.1-90.

<sup>10</sup> Faigenbaum & Wollner *ibid*.

- Jewish Law only recognizes that a marriage has ended when a *Gett*, a writ of divorce has been granted.
- Under Jewish law, a *Gett* must be delivered by the husband/man to the woman/wife. This must be both issued and accepted voluntarily.
- If a woman does not accept a *Gett* from an ex-husband:
  - A man cannot remarry under Jewish law unless his ex-wife has accepted the *Gett* or the signature of 100 rabbis has been obtained.
  - The man can remarry under domestic law with no significant consequences for his Jewish life.
  - There is no stigma attached to children that he parents who are born outside the original marriage.
- If a man does not deliver a *Gett* to his ex-wife:
  - The woman is unable to remarry within the Jewish community or remarry in a Jewish religious ceremony.<sup>11</sup>
  - The woman is impeded from remarrying under domestic law, because this will nonetheless have significant consequences for the Jewish life of both her and her children.
  - The woman is impeded in the development of new relationships. Should she engage sexually with a man other than her (ex)husband, the relationship is deemed in Jewish law to be adulterous. She may then be precluded from marrying this man by the terms of the *Gett*.
  - Any children the woman bears other than with her (ex)husband are deemed to be born from an adulterous relationship (a relation between a married woman and a man other than her husband). Such children are stigmatized as ‘mamzerim’ a category of ostracism that is said to affect the child’s marriage options for 10 generations.<sup>12</sup> The stigma of *mamzerut* is passed down through the generations; *mamzerim* can only marry other *mamzerim*.<sup>13</sup>
  - Many non-religious Jewish women are concerned that their actions could cause significant problems for future generations, and do not wish to put their future children

---

<sup>11</sup> Rosenberg, L, 1996, “Determination/ Despair: *Agunot* Speak About Their Chains”, *Canadian Woman Studies: les cahiers de la femme*, vol. 16, no. 4, pp.69-74.

<sup>12</sup> Jones, A, 2015, ‘In Orthodox Jewish Divorce, Men Hold All the Cards’, *Newsweek*, 8 April.

<sup>13</sup> Fournier, P, 2012, “Halacha, The ‘Jewish State’ and the Canadian *Agunah*: Comparative Law at the Intersection of Religious and Secular Orders”, *Journal of Legal Pluralism*, No. 65, pp.165-204.

at jeopardy. While they may not feel connected with the Jewish community, they are often not prepared to make that decision on behalf of future children.

## FAMILY VIOLENCE

Withholding a *Gett* is an abusive act. Rabbi Avrohom Jacks, an associate judge at the Melbourne *Beth Din*, the rabbinical court that oversees divorces and conversions, acknowledges that withholding a *Gett* is ‘an extension of psychological and emotional abuse that he [the husband] perpetrated within the marriage.’ However, Rabbi Jacks does not consider that there should be any changes to the Jewish law.<sup>14</sup> Furthermore, in a landmark case in the Magistrate’s Court of Victoria in 2015, it was successfully argued that *Gett* refusal constituted ‘emotional and psychological abuse’ within the meaning of the Family Violence Protection Act 2008 (Vic).<sup>15</sup> The Magistrate held that the husband’s refusal to release his wife from a violent marriage was ‘the ultimate form of dominance and control’.<sup>16</sup>

The Act defines family violence more broadly than other states. It contains a clause stating that preventing your partner from keeping connections with his or her spiritual beliefs or practices constitutes abuse. The magistrate agreed that *Gett* refusal prevented an individual from moving on with their Jewish life.<sup>17</sup>

However, the case related to an application for an extension of a family violence intervention order against a physically violent husband who refused to grant his wife a *Gett*.<sup>18</sup> Therefore, the scope of the judgment is unclear.

## EXTORTION

A husband may utilise his ability to withhold a *Gett* as a bargaining tool to force his wife to agree to his set of terms for the divorce.<sup>19</sup> In this way, he may extort money from his wife or even custody of the children as a price (or condition) for the *Gett*.<sup>20</sup>

---

<sup>14</sup> Safran, J, 2015, “Breaking the Chains”, *The Sydney Morning Herald*, 14 May.

<sup>15</sup> Gleeson, H, 2018, “Chained Women: The Jewish wives being held hostage in abusive marriages”, *ABC News*, 27 February.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Wijkander, S, 2002, “*Agunah*: Problems and Solutions in Israeli-Jewish Divorce Law”, Master Thesis, *Faculty of Law University of Lund*, pp.1-90.

<sup>20</sup> *Ibid.*

Extortion may also occur through indemnification contracts.<sup>21</sup> That is, the husband may coerce his wife to enter into a contract with him in which she agrees to reimburse him for any future support, such as child support, that the court orders him to pay.

## STATISTICS

There is minimal research on the prevalence of *Agunot* and *Gett* refusal. Furthermore, statistics tend to be extremely varied. This is largely caused by discrepancies in the way that different organisations define an *Agunah*.<sup>22</sup> Some statistics exclude inactive cases that have been closed by the courts. Some statistics exclude cases where the husband made the initial divorce claim but refuses to grant his wife a *Gett*. Some statistics, such as those estimated by the rabbinical courts, do not consider a woman an *Agunah* if the husband shows up to the hearings, regardless of whether he grants her a *Gett*. These factors should be kept in mind when considering publications of statistics.

In Australia, no statistics have been collected on the incidence of *Agunot*.<sup>23</sup> Talya Faigenbaum, principal lawyer and legal director at Faigenbaum Family Lawyers in Melbourne, says there has been an upsurge in recent years in the number and severity of cases of *Gett* refusal in Australia and overseas. She has worked on about 12 cases in the past 12 months.<sup>24</sup>

## RECENT EXAMPLES OF *GETT* REFUSAL IN AUSTRALIA<sup>25</sup>

### The Case of *Deborah and Nathan*<sup>26</sup>

- Deborah and Nathan were married for over ten years and had two children.
- The marriage was characterized 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.
- 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.
- 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.

---

<sup>21</sup> *Ibid.*

<sup>22</sup> Danan, D, 2012, "It isn't over until the husband says 'I do'", *The Jerusalem Post*, 1 March.

<sup>23</sup> Gleeson, H, 2018, "Chained Women: The Jewish wives being held hostage in abusive marriages", *ABC News*, 27 February.

<sup>24</sup> *Ibid.*

<sup>25</sup> These 2 cases of *Gett* refusal are ones that have come before the Melbourne Beth Din in recent times.

<sup>26</sup> This example is drawn directly taken from Faigenbaum & Wollner *ibid* p10

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

### **The Case of *Esther and Simon*<sup>27</sup>**

- Esther and Simon were married overseas before moving to Australia 25 years ago. The couple has three children.
- 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'.
- 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.
- Esther has obtained a civil divorce from Simon, but she has not been able to obtain her Jewish Divorce from him.
- 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'.

---

<sup>27</sup> Faigenbaum & Wollner *ibid* p11

- 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.

## The Role of Civil Society

One could argue that this is a religious problem and its resolution should be left in the hands of religious authorities. This is the argument that has been used in the past by successive governments in their decisions not to implement the proposals of the Australian Law Reform Commission and of the Family Law Council.<sup>28</sup> Further, the order of a civil court that a man issue a *Gett* would be counter-productive. Such an order may potentially vitiate the voluntary requirement of Jewish law. The plight of *Agunot* has been on the agenda of Rabbinic authorities for more than 50 years, yet women remain subject to violence and abuse.

The Australian state should not abandon Jewish women who are subjected to violence and abuse, whatever the justification that is given in its defence. Just as there is increasing evidence of the domestic violence experienced by *Agunot*, there appears to be a trend among Family Court judges rejecting orders that would grant relief to aggrieved parties in *Gett* refusal cases.<sup>29</sup>

The proposals of the *Family Law Council in their 2001 Report, [Cultural-Community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law](#)* were developed with members of the Jewish Community. These proposals will go a long way to resolving the issues faced by Jewish women trapped in abusive relationships and will allow women to move on with their lives at the dissolution of a failed marriage. The Family Law Council recommended specifically that “the Family Law Act be amended to ... provide courts exercising jurisdiction under the Act with a range of discretionary powers to assist in matters involving cultural-community divorce” and that “service provision be enhanced in matters involving cultural-community divorce to ensure culturally and linguistically appropriate mediation and counselling”.

---

<sup>28</sup> Jones & Jones-Pellach *ibid*.

<sup>29</sup> *Jochim v Jochim* (Unreported, Family Court of Australia, Hase J, 13 September 1996); *Ferro & Koppel* [2016] FamCA 398; *Idelsohn & Idelsohn* [2017] FamCA 398.

## Proposal for Legislative Reform<sup>30</sup>

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

## Question for the Committee

We respectfully request that the Committee on the Elimination of Discrimination Against Women ask why the Australian government has failed to implement the recommendations made to it by the Family Law Council, in order to limit the violence and violation experienced by Jewish *Agunot*, women chained to abusive ex-husbands.

---

<sup>30</sup> *Family Law Council* ibid p28ff.