CULTURAL EXPERTISE IN AUSTRALIA: COLONIAL LAWS, CUSTOMS, AND EMERGENT LEGAL PLURALISM

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ABSTRACT

British colonization of Australia had lasting consequences for Australia’s legal system. Although designed as a “one law for all system” based on the English common law, the reality was, and is, that there have always been people regulating their lives according to their own distinctive culture and religion. Recognition of de facto legal pluralism, has only recently given rise to instances of de jure legal recognition. The latter necessitated a role for cultural expertise in a range of legal cases. The first considered is how social science expertise was employed in redressing the dispossession of the continent’s first peoples: indigenous Australians and Torres Strait Islanders. The landmark case of Mabo No 2 laid the legal ground for native title land ownership which fueled a demand for cultural experts in indigenous traditions, laws, and customs. The second aspect is Australia’s response to recent immigration from non-European nations, including from Muslim countries. Many Muslims continue to regulate their interpersonal relationships exclusively, or partially, by principles of Islamic law and their “homeland” culture. This is particularly evident in family matters and the prism for exploring the nascent role for cultural expertise is through post-divorce parenting orders. The third issue is the extent to which a court can accept an accused’s cultural practice or religious belief as a defense to a criminal act or omission. In all three, who is a “cultural expert” can be contentious. While cultural expertise in
indigenous matters is well established, the role for cultural experts in the resolution of family disputes and criminal cases is just emerging.

Keywords: Australia; cultural expertise; native title; parenting orders; cultural defense; family law

INTRODUCTION

Australia is a country of paradox. Australia is situated on the opposite side of the globe to Europe proximate to Asia and the South Pacific yet is categorized as a European, not an Asian, nation. Australia is considered a new nation but is an ancient land where its first peoples settled over 50,000 years ago. Today, their descendants comprise less than 3% of the Australian population (ABS, 2017). The other 97% is made up of comparatively recent immigrants, initially from Europe but in recent decades also from Asia, the Middle East, Africa, and the Americas. The 2016 census found 6.8 million (35% of the Australian population) were born overseas (ABS, 2017). As an immigrant nation Australia can be distinguished from the many emigrant European countries: Portugal, Greece, Ireland, and Italy, for example (see, for Portugal, Lopes & Ferro, 2016). The result of two centuries of migration is that today Australia is one of the most ethnically diverse nations in the world.

Australians have come from over 200 different countries of birth; speak over 400 different languages; and follow more than 100 different religions. Therein lies another paradox. Australia’s cultural and religious pluralism has not translated to legal pluralism. There is one formal legal system whose courts apply the English-derived common law of Australia. Yet, citizens and residents do have considerable freedom to enter in and out of relationships according to their own laws, customs, religion or traditions with the proviso that state criminal law is not violated. For example, according to s. 270 of the Criminal Code Act 1995 (Cth) and s. 23B(1)(e) of the Marriage Act 1961 (Cth), underage and forced marriages are a violation of federal law with imprisonment for citizens and deportation for non-citizens. Female Genital Mutilation is also a criminal offense in all States and Territories of Australia, and can operate extra-territorially to criminalize FGM on Australian children, under the age of 18 years, performed overseas. Excluding criminalized conduct, informal or unofficial legal pluralism can operate freely. Many recent migrants and also members of established ethnic or religious minorities choose to live by religious or cultural norms and resolve differences within their communities, but when matters between parties are unresolved and agreement cannot be reached, they can, without prejudice, take the matter to the secular courts of law.

It is against this backdrop that the emerging role for cultural expertise in Australian courts is considered. Cultural expertise plays a role to varying degrees in several aspects of law. One is in regard to indigenous Australians in particular how belated special legal recognition has drawn on social science expertise in indigenous culture and traditions to determine legal rights and
outcomes, especially, in deciding questions of native title. The second role for cultural expertise is in the family law courts and is a vehicle by which to evaluate the extent to which the Australian legal system accommodates recent immigrants, in particular Muslim Australians seeking to have family and other matters decided in accordance with their “homeland” culture and the norms of Islam. The chapter looks specifically at parenting orders where pt. VII of the Family Law Act 1975 (Cth) directs the court to take into account the “culture” and “background” of the parties when making the orders for the care of children. The third is more general and considers to the extent to which a “cultural” defense in criminal trials can be brought into play. Each is in some way a consequence of the political and legal ideology of colonialism and the distinctive form of colonization which occurred in Australia differentiating Australia from other European colonies in Asia and the South Pacific. The consequences live on and still impact on the nature of court processes today.

It should be added at the outset that culture can also play a role in other legal matters which are not considered in this chapter. For example, Coroners Courts take expert advice on whether there are cultural or religious norms against performing an autopsy or delaying a body for burial (see generally, Arnold & Bonython, 2016, p. 27). This is important for Indigenous and other ethnoreligious communities, including Muslims and Jews, but where there are compelling reasons why it is in the public interest for an autopsy to be performed, the cultural and religious considerations will take second place (Evans v. Northern Territory Coroner, 2011).

INDIGENOUS PEOPLES OF AUSTRALIA: NATIVE TITLE CLAIMS AND THE ROLE FOR CULTURAL EXPERTS

The main distinguishing feature of colonialism applied in Australia was the application of the international law concept of terra nullius: land belonging to no one. It was employed because the Aboriginal people were considered so “uncivilized” that the land could be categorized as uninhabited. Hence, there was no need for any treaty, for legal recognition of prior ownership, or for acceptance of indigenous customs, languages, laws, or religion. This is quite different from the colonization in neighboring Malaya, Singapore or Borneo where treaties were negotiated, rulers retained titles and a role (even if their power was significantly reduced), where the local language was retained (but not for official matters which was English) and where Islam was legally recognized as the religion of the people and separate religious Kadi Courts were funded and developed by the colonial Governors and Residents (Black, 2009). Chinese and Indian minorities were also able to regulate their interpersonal laws for marriage, divorce, family, inheritance, and so on. In these colonies, legal pluralism was endorsed. This did not occur in Australia. No treaty, no land rights, no acceptance of indigenous languages, customs, or spirituality was accorded—everything English was transplanted. The aim was to fully assimilate the indigenous peoples and extinguish their “uncivilized” way of life. From the moment Captain Arthur Phillip hoisted the British flag in 1788 marking the start of the
penal colony in New South Wales, all land became Crown land, the sovereign
was King George III, and all laws were English. That did not change until the
1970s when a form of statutory native title — *Aboriginal Land Rights (Northern
Territory) Act 1976* (Cth) — was first introduced in Australia’s Northern
Territory. This created a demand for anthropologists and other social scientists
to work with Indigenous Australians and the courts in claims for legal title to
land and waters.

However, *terra nullius* was not fully rejected as legal fiction until the 1992
landmark case of *Mabo v. Queensland (No. 2) (1992)*, when addressing or
redressing its consequences — the dispossession of indigenous peoples — became
a national priority. The High Court of Australia held (6:1) that native title could
be legally recognized by the common law of Australia. Legislation was quickly
enacted the following year to allow for native title across the whole continent.
To assist claimants and the courts, cultural experts in Indigenous culture and
traditions, past and present, were needed. This was due to the fact that s. 223(1)
of the *Native Title Act (1993) (Cth)* required proof that the traditional law and
the customs observed by Indigenous claimants which connected them to land or
waters were the substantially the same customs and laws of their ancestors at the
time of British settlement. The law also recognized that certain acts and events\(^2\)
could extinguish the continued existence of native title. In *Members of the Yorta
Yorta Community v Victoria (2002)* the trial judge found that the “tide of his-
tory” had washed away any native title because by 1881, the Aboriginal claim-
ants’ ancestors were no longer in possession of their tribal lands and had
ceased to observe their traditional laws and customs. By majority, the Full
Federal Court and the High Court of Australia agreed.

Many native title cases were and are negotiated through consent determina-
tions and by mediation from which agreed native title outcomes are ratified by
the Federal Court. However, the focus in this chapter is on litigated claims
involving cultural experts.

The legal process requires Indigenous applicants/claimants for native title to
give evidence about themselves and their knowledge of custom and connection
to place, with supporting expert evidence. In *Sampi v. Western Australia (2010)*,
French J stated at [48] that the Aboriginal witnesses’ evidence regarding the
laws and customs of the claim group was of the highest importance and all other
evidence was second order. The claimants have the persuasive burden to prove
the existence of native title in accordance with the rules of evidence. The stan-
dard of proof is the civil standard — on the balance of probabilities. Experts can
be instructed by the claimants, their lawyers, the court, or the respondent gov-
ernment parties. Expert evidence (as is outlined in more detail in the section that
follows) is necessary to overcome the inherent forensic difficulties in proving the
content of pre-sovereignty laws and customs and their continued observance.
Cultural experts are mainly anthropologists but linguists, historians, ethnomusi-
cologists, and archeologists also play a role. Asche and Trigger note that not
only are anthropologists with expertise in native title in high demand but
demand well exceeds supply (*Asche & Trigger, 2011; Palmer, 2011*).
The management of native title cases now lies with the Federal Court of Australia, whereas the original *Native Title Act 1993* (Cth) provided that applications were to be filed in the National Native Title Tribunal. Such a scheme was held to be unconstitutional and from 1998, applications were filed in the Federal Court. Cases proceed slowly (potentially taking 15 years or more for a determination): the matters involve large areas of land or water; there are many parties; complex issues of law and fact arise; there are numerous interlocutory steps, including a requirement for mediation which can be a lengthy process; there is the cross-cultural context; intra-Aboriginal disputes over membership of claimant groups and areas; concerns over sufficiency of funding when all parties are publically funded (Edwards, Anderson, & McKeering, 2006); and the adversarial nature of the proceedings in which witnesses giving evidence can be examined, cross-examined, and reexamined. The examination and cross-examination of anthropology experts in *De Rose v. State of South Australia* (2002) took 24 hearing days (Edwards et al., 2006). To overcome this impost, expert conferences and concurrent evidence in litigation have gained momentum allowing the court, the lawyers, and the parties to hear all of the experts discussing the same issues at the same time.

The complexity of the issues and evidence can be seen in the *Wongatha* case, where there were eight claimant groups with the Wongatha people’s claim being for more than 160,000 square kilometers of Goldfields land in Western Australia. The native title claim was first lodged in 1994, and the judgment, dismissing the claim, was not delivered until 2007. There were 149 witnesses. Lindgren J notes the evidence is recorded in approximately 17,000 pages of transcript, with 100 extended hearing days (in various locations), 34 volumes of experts’ reports comprising 2,817 pages, and 97 volumes of submissions comprising 8,087 pages (*Wongatha People v. Western Australia (No. 9)*, 2007). Cultural experts in the case included nine anthropologists, two historians, two linguists, one archeologist, and one ethno-botanist. Experts had the opportunity in the witness box to question each other and to make statements on any areas of disagreement and there was the opportunity to conference as well. Each expert was also cross-examined and reexamined in a conventional manner. Like many native title cases, it consumed considerable resources of people, time, money, and emotion. For example, Bauman (2010, p. 124) estimates that connectivity reports are estimated between A$50,000 and A$350,000.

**Role for Cultural Experts in Native Title Cases**

In native title cases, anthropologists conduct fieldwork to record informants’ statements about how a person may rightfully belong to a place (*ngurra*), “the rights that flow from one’s traditional connection to a place, and how one should behave according to customary rules to do with interests in sites” (Sutton, 2005, p. 122). Published manuscripts of early ethnographers, diarists, and archival records of the relevant ethnographic area are used to go beyond living memory and oral history. Anthropologists’ knowledge of comparable Aboriginal societies and theoretical and practical understanding of Aboriginal
and Torres Strait societies generally can be used for context and to fill in gaps. In these ways, anthropological evidence is drawn on to establish the nature of the pre-European Indigenous society in that location and whether the required uninterrupted connection to the contemporary indigenous claimants still exists. Palmer describes this as “reconstructive anthropology” noting it needs to be treated with caution, as it depends on “interpretations of interpretations” (Palmer, 2011).

Other cultural experts help complete the picture for native title claims. Linguists give evidence on the cultural difference in communication styles of Indigenous witnesses when giving evidence and being cross-examined in English in a culturally very European formal legal hearing. They also can explain words and phrases which have special meanings for land, kinship, and spiritual connections between the people and the place (Sutton, 2005) and interpret earlier historical records where there can be an array of spellings and uncertainty of meaning. Historians provide a social history of an area which is the subject of the claim. Their reports are seen as providing a “broad brush approach” rather than what Sutton refers to as “probative evidence as to the history of these particular people in relation to these specific forms of occupation over these particular lands and waters” (Sutton, 2005). Archeologists also are engaged as experts to provide evidence regarding the use of sites which claimants assert have cultural significance, perhaps as a ritual site, fishing or camping area.

Several issues arise in relation to anthropological and other cultural expert evidence in common law court proceedings. One is the strict rules on admissibility of evidence which is a hallmark of the common law method. The admissibility rules require all experts, including cultural experts, not to exceed their area of expert knowledge and to identify the facts on which their opinion is derived. Proof may also be needed for any underlying assumptions on which their opinion is derived (Jango v. Northern Territory (No. 4), 2004). Otherwise, expert evidence will be given little weight (Edwards et al., 2006). It is the judge who makes the factual and legal decision as to whether native title exists or not, and expert evidence from anthropologists or others is but one consideration. In Wongatha, where the native title claim was dismissed, Lindgren J found substantial parts of the expert reports: “can be described as undifferentiated combinations of speculation, summary description of facts, opinion (including opinion beyond the witness’s field of specialised knowledge), hearsay, unsourced assertion and sweeping generalisation” (Edwards et al., 2006, p. 155).

The discordance arises from the difference between legal method and social science methodology. Young (2014, p. 244) sees incongruity in the “purposes, priorities, languages, protocols and processes” as factors at play in the “troubled relationship” between law and anthropology especially in the adversarial context. Cross-examination by barristers which is the standard means for testing the accuracy and veracity of evidence in any adversarial setting is misunderstood by some social scientists as lawyers acting to discredit or undermine the anthropologist’s evidence. Burke (2011, p. 25) writes that anthropologists “wounded from humiliating cross-examination, swear, yet again, never to be involved in a native title claim.” The rule against hearsay means that evidence of what an informant
may have said to an anthropologist has no weight and is inadmissible, unless the informant comes to court and gives his or her account. This is necessary for verification, which may involve cross-examination. In addition, the legal method requires facts to be verified. Accordingly field notes are discoverable.

Inferences drawn from facts need to be highlighted as opinions. Palmer (2011, p. 11) recommends an “introductory phrase such as, ‘in my view’ or ‘in my opinion’” be used. Edwards et al. note that anthropological reports tend to be ‘lengthy, written in the form of an essay’, ‘may use terminology not familiar to judges’ and ‘consider various aspects not directly related to the land tenure issues’ (Edwards et al., 2006, p. 160). They suggest that lawyers assist social scientists with report-writing, and Lindgren J advocated lawyers be involved with the writing of reports by experts, not to the substance of the reports but in relation to aspects of admissibility (Harrington-Smith v. Western Australia (No. 7), 2003, [19], approved by Sackville J in Jango v. Northern Territory (No. 2), 2004, [9]). There are of course natural concerns this could compromise the independence and professionalism of the anthropologist as cultural expert. However, Morton (2010, p. 19) believes anthropologists would agree that many judges do not understand anthropology, and “probably see no requirement to understand it,” which is unreasonable given the importance of anthropological evidence.

Related difficulties arise from differences in language and concepts used in law and social science. Young (2014, p. 236) advises lawyers of the need for caution in handling anthropological terms and concepts as anthropology is a “sophisticated and dynamic field of study that is an equal partner in collaboration.” Palmer concludes that “the relationship between anthropological concepts of ‘society’ or ‘community’ and the legal requirements of the native title legislation is complex especially as these terms may not command the same meaning in anthropology as they do in law” (Morton, 2010; Palmer, 2011, p. 25).

Anthropologist Paul Burke (2010, pp. 60–67) explores in some detail the differing emphases given to the core concept of “society” in both legal and anthropological discourse, while Bauman notes that other terms such as “customs acknowledged and observed,” “occupancy,” and “continuing connection” remain elusive and judges themselves accord meanings that are inconsistent (Bauman, 2010, p. 129).

A second issue is that in the common law system cultural experts, like lawyers, have an overriding duty to the court, above their duty to their client. As experts they must be professional and impartial, and not biased to give only evidence favorable to their client. However, Palmer as an anthropologist notes an ethical dissonance as anthropologists believe they should not knowingly allow information gained on a basis of trust from Indigenous people to be used against their interests by those he calls “hostile third parties” (Palmer, 2011, p. 8). This aggravates the concern that anthropological evidence given in native title cases is particularly vulnerable to bias (Jango v. Northern Territory, 2006, [315]-[338]). Anthropologists Ron Brunton and Lee Sackett (2003) have suggested that anthropology allows more room for interpretation than other disciplines and that friendships develop between the anthropologist and members of indigenous groups especially when there are periods of fieldwork. The danger is that
claimants may also come to depend on the “anthropologist for advice and see them as a mediator on their behalf with the European system of government and justice” (Brunton & Sackett, 2003, p. 86). In this way, they become advocates rather than expert witnesses on which the court can rely, thereby tainting the credibility of their evidence. Justice Rangiah (2016) warned that “when an expert is no longer objective and has become an advocate, it quickly becomes apparent to the judge. There is nothing that more readily undermines a judge’s confidence in the expert.” There are cases, however, where this close relationship between expert and claimants has been approved by the court. In Neowarra v. State of Western Australia (2003, [112]–[119]), the anthropologist’s objectivity was challenged in court and he did acknowledge his close association with the claimants over a period of years yet Sundberg J accepted that the evidence given was at all times professional.

A related concern is where anthropologists assist the claimants in drafting their claims and then present themselves to the court as independent objective experts. Sackville J in Jango v. Northern Territory (No. 2) (2004) at [322] was critical of the anthropologist taking an “active part in formulating and preparing the applicants’ case” and then giving evidence in the court to accord with it, and preparing the witness statements. When such assistance is given to claimants, the expert should not also submit a report or give evidence as an independent expert.

The third issue lies within the discipline of anthropology where native title research is said to be denigrated by some in the academy who assert that applied research, particularly native title work, is not “real anthropology” (Asche & Trigger, 2011, p. 222). This may make anthropologists less likely to take on native title cases, despite the demand for them. However, given the scrutiny on expert evidence in the court process, not only in cross-examination, the questions, and challenges from other anthropologists and the judge, one can conclude it is as rigorous and academically defensible process (Asche & Trigger, 2011) as any peer-reviewed chapter. Related to this, Brunton (1992, pp. 2–5) is concerned there is a “lack of candor and objectivity” in applied anthropology in the postmodern setting as “moves to atone for the sins of the past […] are] jeopardizing standards of scholarship.”

Lastly, there is the issue of inconsistency and differences between expert reports. This is discussed below as there are new ways courts are adopting to better manage this.

Refinements in the Cultural Expert Process

Native title claims have cemented an important niche for cultural expertise in Australian courts. Refining the process to increase effectiveness and reduce complexity, time, and costs has resulted in some changes to standard adversarial practice, as permitted under the court rules (Federal Court Rules 2011 (Cth) r. 23.15). One is for a single court-appointed cultural expert. This has occurred in a number of cases, and is helpful when the court needs necessary or specific factual information (see, e.g., Australian Law Reform Commission, 2015) or as an
aid for an impasse in mediation. The case of *Djabera-Djabera* (1998) clarified that a report of a single expert would not be used in the trial unless the author was available for cross-examination, and the parties were free to call other evidence.

Other methods gaining favor in native title claims are concurrent evidence, and expert conferral or conference. In concurrent evidence, cultural experts present their views in the same sitting where each gives his or her findings and reasoning and respond to questions from counsel, the court, and colleagues. Unlike in the adversarial system, the experts can ask questions of each other and hopefully reach a consensus. This is also the aim of conferring and conference. Rather than appearing in the adversarial court room, anthropologists meet to determine issues of agreement and disagreement. The issues on which there is agreement are accepted by the court and only issues of difference go to court for examination and cross-examination (*Edwards et al.*, 2006). Conferral and conferencing techniques have been successful in narrowing, clarifying and, in some cases, resolving issues in dispute between expert witnesses (*Ngadju v. Western Australia*, 2012; *Banjima People v Western Australia (No. 2)*, 2013; *Clara George (Badimia) v Western Australia*, 1998; *Wyman on behalf of the Bidjara People v Queensland (No. 2)*, 2013; *Hughston & Jowett*, 2014).

An added advantage is that a collegiate environment allows the experts to “see their role more clearly as one of assisting the court rather than advocating a party’s case” (*Hughston & Jowett*, 2014, p. 4). The process has been labeled a “hot tub” and has been used in a range of native title cases with varying degrees of success (see explanation and evaluation of “hot tubbing” in *Farrell*, 2007). In *Wongatha*, it was not successful as only four of the nine anthropologists took part in the conferencing, but in other cases, it has been used successfully. Selway, J in *Gumana v. Northern Territory* (2005) at [173] described how an agreement reached between the senior anthropologists:

significantly reduced the extent of the factual disputes between the parties and the time involved in hearing the witnesses. Before any pleadings were filed in these proceedings procedural orders were made for the exchange by the parties of draft anthropological reports. Orders were then made for a “hot tub” involving each senior anthropologist for each party under the supervision of the Deputy Registrar. The purpose of the “hot tub” was to enable the experts to identify the issues and principles about which they agreed or disagreed.

Hughston and Jowett (2014, p. 1) found that since 2012 “most, if not all, native title proceedings heard over the last two years have incorporated expert conferences and concurrent evidence” which benefits the courts, counsel, parties, and expert witness.

**COMMON LAW COURTS, CULTURAL EXPERTS, AND PARENTING ORDERS**

Given the cultural and religious mix in immigré Australia and the rise in interfaith intercultural marriages, it is not surprising that another area of law in which culture comes into the courts is decisions regarding the care of children
post-divorce or after separation of their parents. When a relationship ends, a child’s religious upbringing and cultural identity can be important to both parents. To adjudicate between competing parents, the Family Law Courts in Australia (i.e., the Federal Circuit Court and the Family Court of Australia) apply the “best interests of the child” test in accordance with Family Law Act 1975 (Cth) s. 60 CA. The Family Law Reform Act 1995 (Cth) introduced this principle from the United Nations Convention on the Rights of the Child (1989) ratified by Australia in 1990. In any parenting order, this must be the “paramount consideration” (Family Law Act 1975 (Cth) s. 43C). To determine the best interests, the judge must decide “in light of the particular facts and circumstances of the case” and not “from the viewpoint of the standards of particular parents or of one section of society” (Harland, Cooper, Rathus, & Alexander, 2015, p. 146). The Family Law Act 1975 (hereafter the Act) in s. 60 B sets out the principles and factors to guide the court in determining the best interests of the child, one of which is:

s 60 B (2)(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Right to culture is only one consideration. Others include the child’s views, whether there has been any family violence against the child, and “the lifestyle and background (including lifestyle, culture, and traditions) of the child and of either of the parents” (see Family Law Act 1975 (Cth) ss. 60 CC (3)(a), (g), (j)).

Parenting Orders for Indigenous Children

When the child is Aboriginal or Torres Strait Islander the Act in ss. 60 CC (3) (h) and (6) goes further than s60 B (2)(e) as it adds that this right extends to:

(1) to maintain a connection with that culture; and
(2) to have the support, opportunity, and encouragement necessary:
   • to explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s views; and
   • to develop a positive appreciation of that culture.

Section 61F which was introduced in 2006 adds that the court must have regard to any kinship obligations, and child-rearing practices, of the child’s Aboriginal or Torres Strait Islander culture.

Although the legislation requires courts to take into account Indigenous culture, the judges may still unconsciously construct the notion of “family” as is understood as the nuclear family of European culture. There are marked differences between Indigenous and non-indigenous people relating to the concept of family with Anglo-European kinship based on a narrow range of relations centered around biological parenthood while Indigenous systems are much broader. In many Aboriginal cultures the term “mother” can be given to more than just the biological mother (Dewar, 1997), and similarly, the term “aunty” is not predicated on an antecedent relationship. The Bringing Them Home Report found, “by privileging parents and relegating the rights of other family
members, the Australian law conflicts with Aboriginal child-rearing values” (Human Rights & Equal Opportunity Commission, 1997, p. 286). Ruska and Rathus (2010, p. 8) point out that the law still “struggles to deal with Indigenous concepts of kinship and a multiple child-rearing practices.” Ralph (1998) also has found that Aboriginal people accept that children have the ability to effectively attach themselves to many carers in the course of their “growing up” and that unlike the Anglo-Celtic nuclear model, multiple serial attachments are the norm and are not regarded as necessarily harmful to the child’s development and long-term adjustment. The 2006 amendments to the Act were to address such issues and do allow for parenting orders to be made in favor of non-parents and for applications to be made by anyone “concerned with the care, welfare or development of the child” (see ss. 64 B(2), 65 C).

Aboriginal communities are not homogenous or uniform (Donnell v. Dovey, 2010, [321]), which gives rise to another concern that the “inter-distinctiveness of Aboriginal cultures” (Nicholes, 2008) is not fully understood. Ruska and Rathus (2010, p. 9) found that expert evidence of cultural issues was “not always presented” or was not presented equally for both parties which made it difficult for judges to make culturally appropriate decisions. In Re CP (1997), the distinctive aspects of two Indigenous cultures, the Tiwi culture and the Torres Strait Islander culture were not appreciated by the court. Similarly, in Donnell v. Dovey (2010), the Appeal Court found the Aboriginal (Wakka Wakka) culture of the mother and Torres Strait Islander culture of the father were not equally presented in the expert report. A ground in the appeal was that the magistrate did not seek anthropological expert evidence on the child-rearing practices of Wakka Wakka culture. The court held that it was not necessary for there to only be expert evidence from an anthropologist if “an elder or such other person within the indigenous community who is accepted by the community as being able to speak with authority on its customs” gave evidence (Donnell v. Dovey, 2010, [228]).

Parenting Orders for Children of a Muslim Parent(s)

Comprising of 3% of the population, Muslim Australians are numerically similar to (ABS, 2017 & Department of Parliamentary Services, 2010), possibly a little larger than, Aboriginal and Torres Strait Islanders. Muslims did come at the time of first settlement, but the majority is recent immigrants, through skilled migration, family reunion, and via Humanitarian and Refugee visas. Although the Muslim minority is a religious, not an ethnic minority in that the Muslim community is comprised of over 100 different ethnicities in Australia, Islam unites its adherents (the ummah) in a Sharia-informed culture with shared practices and traditions. Islam acts as a marker for identity, one that binds Muslims together to form a religious boundary, described as a “ring fence” within the territorial boundary of the nation state (concept by Maznah binte Mohammad, National University of Singapore).

Some Muslim groups (i.e., Australian Muslim Mission and Islamic Friendship Association of Australia) have been vocal in their support for legal
pluralism and have put this on the national agenda. The Australian Federation of Islamic Councils in a submission to government titled “Embracing Australian Values and Maintaining the Rights to be Different” drew on the notion of “Twin Tolerations” (Stepan, 2012). Their case is that as Australia is a multicultural, multireligious society then legal pluralism should logically follow. Conflicts should be resolved according to the law and traditions of a person’s religion and multiple legal regimes should replace the “one law for all” and “the rule of law” (AFIC Submission). A 2013 Enquiry into Multiculturalism rejected any change to the Australian common law system, but did highlight the need for greater, or better, accommodation of Islam in the society as a whole and in the legal system.

The Australian government (Strategic Framework for Access to Justice 2009) set out a reform agenda for improving access to justice, acknowledging the diversity of people seeking legal assistance. The Family Law Council of Australia (2012) acknowledged the need to reduce barriers that may be encountered by people from “culturally and linguistically diverse backgrounds.” Barriers identified by the Council included lack of knowledge about Australian law; insufficient awareness of available legal and counseling services; language and literacy barriers, cultural, and religious barriers that inhibit seeking help outside the community; preexisting negative perceptions of the courts and family relationship services; lack of responsive culturally responsive services and bilingual personnel; social isolation; fear of government agencies; and cost and resources issues. The focus is on addressing these issues rather than supporting a parallel system of religious courts. I have written elsewhere on the reasons for why Australia endorses a secular and neutral one-law system (Black, 2012) and these include historical, philosophical, constitutional, and practical factors. One of the practical factors is the intra-plurality of Australian Muslims regarding ethnicity, language, school of law, and the level of adherence to Islam. Just as occurs in indigenous communities, Muslim Australians are heterogeneous. In this way, they differ from Muslims Europe, where there are concentrations of ethnicities and schools of law; for example, in England, where 80% of Muslims are from South Asia, Sunni, and Hanafi sect.

Not all parenting cases are resolved in the Family Court. Some members of Muslim communities will choose an Imam or a community-based tribunal of Muslim clerics to resolve disputes using Islamic principles and bypass the Australian legal system. Others will proceed to mediation using the government-funded Family Dispute Resolution Program where culturally and ethnically diverse mediators who speak a range of languages aid couples to reach agreements and avoid court, but have their agreements registered. Muslim mediators are accessible in the Program. The intractable nature of some disputes, however, results in litigation. Muslims like Indigenous Australians have a right to have their case adjudicated by a judge and the aim of the legal system is to make this a realistic and accessible option for all. The courts will not apply Shari’a law but will take into account the culture, religion, and customs of the parties as a factor to be considered when making parenting orders.
By not applying Shari’a law, legal outcomes and process are quite different, even perplexing, for Muslims in Australian courts. In Islamic law, there is predictability that a Muslim father will get guardianship of the children and be financially responsible for them while the mother (with some provisos going to her conduct and religiosity) will have custody of young children, usually until they are pubescent or old enough to decide with whom they wish to reside. (For the concept of hadhanah, see Black, Esmaeili, & Hosen, 2013, p. 141.) Concepts of custody, access, and guardianship no longer exist in Australian law. They have been replaced by parenting orders which set out parental responsibilities, place of residence, and contact permitted. This is to emphasize duties and responsibilities parents have to their children and to negate any concepts of parental rights over children. It is at variance with the Islamic model which is fixed and predictable while the outcomes of the “best interests” of the child are on a case by case basis.

As Muslims see transition of Islamic values and practice to their children as crucial, the application of the neutral “best interests” of the child test can seem baffling. This is especially in cases where a parent has left Islam as an apostate, or where a mother has remarried or is deemed musyuz (disobedient to her husband). In a Shari’a law, setting each would be relevant and most likely fatal for the mother’s chances to gain custody. In Australian law, none of these considerations is relevant. Similarly, whether one parent drinks alcohol, remarries, is socializing with members of the opposite sex, or whether children are “illegitimate” are irrelevant considerations in Australian family law but can be crucial in Islamic law (see, e.g., Mohammed Salah v. Gastana, 2011). Similarly, who was “at fault” in the marriage, and who is lax in his/her adherence to Islam has no bearing on the decision. This was a significant issue in Heiden v. Kaufman (2011). The mother unilaterally left the marriage after four years, took the two children, and renounced Islam. As an apostate, and one who also failed to follow her husband’s dictates, she would automatically lose custody of those children in an Islamic court. Evidence of this was given in court and also the father’s concern that as an apostate she would not “bring up these children in the faith” (Heiden v. Kaufman, 2011, [132]). However, continuing adherence to culture and religion is just one consideration for the court. In this case, there was also a record of violence towards his wife and children and concerns about the father’s “extremist views” of Islam including his membership of an extremist Islamist organization. During the marriage, he had required his wife to wear a burqa, be segregated from males and not to leave or have guests in the home without his permission. The Federal Magistrate was additionally concerned for the children’s welfare as the father had pronounced du’as (prayers of supplication) that his children die “as martyrs in the cause of Islam” (Heiden v. Kaufman, 2011, [54]). Harman FM was conscious that their safety must outweigh the benefit the children would potentially gain from their father’s rich Palestinian culture. He found it was in the “best interests” of the children to reside solely with their mother.

Best interests of the child can include stability of lifestyle, so when the father in W v. W (2001) later converted to Islam and took on a new Islamic lifestyle
and a new Muslim wife, that break in continuity was held as detrimental to their child’s development. Ryan F.M., in *H v. H* (2011, [29]) affirmed that “it is not the judicial role to prefer one religion over another” and while cases involving religion often involve one of the parents arguing that being brought up in a particular faith is fundamental to a child’s best interests, courts are reluctant to make value judgments as to the merits of differing cultures, religions, and ethnic heritage. In a case where a Muslim mother and a Maronite Catholic father were in dispute about the school their child should attend, the court decided that it was in the best interests of the child to go to a secular government school, rather than a religious one. Religious holidays are usually allotted to the parent of that faith, but, in *Eriksson v. Tinkham* (2011) Monahan FM found that the importance the Christian mother gave to Christmas was cultural, not religious, so the order was for her to have the children only for every second Christmas and in the alternate year, the children would be with their Muslim father.

*Role for Cultural Experts: Report Writers for the Family Court*

The Act does not specify how information on religion and culture is to be provided to the Court. Cultural experts, such as anthropologists who were integral to native title cases have played a minimal role, to date, in family law cases. These disputes are about children and family, not rights to land and resources, so the expertise sought in the family law system is for child psychologists, psychiatrists, psychotherapists, social workers, and family relationship counselors. They provide the courts with reports in which factors of culture may be included. According to s. 62G of the *Family Law Act 1975* (Cth), these report writers are family consultants, not cultural experts per se, who are appointed by the Family Court to provide an assessment of the main issues in relation to the child and parents for the first court hearing after which the judge may seek a more detailed family report. If the judge wants a particular issue covered in the report, he or she can order it; alternatively, if the judge knows that a report writer has special expertise in a particular area, such as Aboriginal customs or in Muslim family relationship, the judge can have that writer prepare the report. If the judge does not know a consultant report writer with the requisite expertise, it will be left the head of the family consultants to do the allocation. Essentially, the court has latitude to be able to get the information required to determine the best interests (Personal communication with Federal Circuit Court judges, 22.2.2017). The report writer interviews the parties individually including any children, visits the homes, observes children interacting with each parent and provides the court with an overall assessment of family dynamics and relationships. They may give formal recommendations to the court and be called to give oral testimony and be cross-examined. These reports are at no cost to the parties, but parties can pay to have a private professional of their choosing undertake another family report assessment admitted into evidence. Just as with native title and all expert evidence, the findings and recommendations of report writers need not be accepted by the court. In *Andrew v. Delaine* (2009, [72]), a case where the trial judge rejected the recommendations in a Family Report, the
Full Court on appeal held a report can never usurp the role of the court as the report writer does not have the opportunity to weigh and test all evidence.

Given there is considerable variation across cultures about marriage, divorce, gender, and spousal roles and responsibilities and child-rearing practices, family report writers are required to recognize a person’s perspective on family and child issues, especially when it is shaped by cultural factors while avoiding cultural stereotyping. How well culture is understood and evaluated has been questioned and recommendations made that the cultural knowledge or expertise component needs to be strengthened (Family Law Council of Australia, 2012, p. 90 recommendation). The recommendations of the Council were for “Cultural Advisors” to be appointed to deliver cultural awareness training to staff including report writers and for a system-wide cultural competency policy to be implemented (Family Law Council of Australia, recommendation 5:2).

The recommendation did not spell out who would qualify as a cultural adviser; the nature, form or duration of any training program; nor monitoring or evaluation of the program’s effectiveness. It was telling that the Report went on to admit that “there is no clear and common understanding of what effective cultural competency training should involve” and therefore there was “a need for a more sophisticated understanding of what constitutes concepts such as cultural competency” (Family Law Council of Australia 2012, p. 91).

Furlong and Wight (2011, p. 38, 39, 54) while noting the popularity of “cultural competence” as an add-on to professional training or a “tick-the-box” for staff development have criticized the construct as “narrow and tokenistic” especially given all the ethnic groups in Australia, and also it lacked conceptual coherence. While it is “hard to fault as a slogan,” Furlong and Wight (2011, p. 39) argue it is “impossible to work cross-culturally without reflective self-scrutiny.”

In a review of 177 judgments involving families of diverse cultural and religious backgrounds, some of which were Muslim parties, the Family Law Council of Australia (2012, pp. 75–77) found that cultural background is mentioned in some judgments but rarely dealt with in any detail. This may be because culture was not raised by the parties or seen by them as important; lawyers may not have alerted the court to the need for engagement with the child’s culture; or the court may not have seen its relevance. In some cases, both parents would be from the same cultural community so maintaining a child’s connection with culture was not contentious, but there may be different levels of adherence to Islam and different schools followed, and as noted already with Indigenous children, there can be significant intra-cultural difference. A case in point is Nouhra v. Clements (2010) where the father was a Muslim of Lebanese descent and the mother was Scottish and an adult convert to Islam. Also in Mohammed Salah v. Gastana (2011) where both parents were Sunni Muslim, but the religiously devout father was born in Kuwait, of Kuwaiti ethnicity and the mother was born in Australia of Lebanese ethnicity but identified herself as culturally Australian and less religious.

A further concern is that the family assessment undertaken by the report writers is “steeped in the traditions of western psychology, with its emphasis upon the individual, and based upon modern Anglo-European notions of social and
family organisation” (Ralph, 1998, p. 4). Ralph (1998, p. 4) argues that the prominence of psychological theory in their training and clinical practice with individuals in small family groups runs counter to an effective understanding of the collectivist nature of other cultures. In a collectivist concept of family, the responsibility for bringing up children is invested in many people. If the report writers have limited knowledge or experience in working with collective cultures, they may produce reports that do not adequately address the issue of the child’s cultural identity and consequently the report may fail to attend to vital cultural issues affecting the child’s best interests. This is not just for Indigenous communities. Extended families and polygamous relationships add complexity in to Muslim families. Marriage may have been entered on the brokerage between families giving both sides an interest in outcomes, including for children (Abela & Borg, 1998). In these cases, it may be helpful for counseling and parenting orders have the input of the extended family members.

In addition to the consultants who are the report writers the court can take expert evidence from members within the community who have cultural or religious knowledge and authority. The role of elders was noted in the case of Donell v. Dovey and Imams also fulfill this expert role. In the case of Mohammed Salah v. Gastana (2011) where the court had to decide for registration of birth whether the name given to a Muslim baby by her mother was blasphemous in Islamic law, as claimed by the father. An Imam gave expert evidence that it was not.

To overcome concerns are sufficiency of cultural expertise, a proposal is that in addition to a routine independent expert report, that in cases where cultural and religious issues are important, the Court needs power to appoint a cultural adviser to assist judges in its understanding of cultural issues. Alternatively, a cultural adviser could be permitted to sit with the judge hearing a case to give advice on cultural and religious issues to ensure that the best interests of the child is not simply rhetoric. Another proposal is for the more specific wording in s60 CC which is just for Indigenous children be replicated for children of all cultures (Black & Sadiq, 2011, p. 94; Chew, 2007, p. 190). Chew (2007, p. 188) used sociological research to argue that exposure to cultural beliefs and traditions gives children a “narrative of community identity” from which “self-worth and personal value” develop.

THE CULTURAL DEFENSE

In a multicultural society, it is inevitable that there will be two forces pulling toward and against a role for culture to mitigate or negate criminal responsibility when acts are committed in the belief that it was either acceptable, even required, in the accused’s own ethnic or religious tradition. In Australia, the cultural defense is raised for Indigenous Australians whose traditions predate British colonization and for more recent immigrants from a non-Anglo-Saxon background whose religious and cultural practices and attitudes have migrated with them to Australia. Although there have been periods in which the cultural defense had support in the courts, in academia, and with minority groups today
in practice, its role is curtailed by legislation (see Crimes Amendment (Bail and Sentencing) Act 2006 (Cth)), by decisions of the High Court (see Stingel v. R, 1990) and public distrust of differential treatment in criminal law of Australians on the basis of ethnicity, religion, or traditions.

The Reasonable and Ordinary Person Test

The “reasonable person” and “ordinary person” have a long history in the common law as the yardstick by which the conduct and the mental state of an accused can be objectively determined. It has been used in a range of defenses, including self-defense, provocation, duress, and criminal negligence. The question has been whether it is the “ordinary person” is of the dominant Anglo-Saxon ethnicity or an “ordinary person” with the very same characteristics of gender, race, religion, and age as the accused. The later was employed in provocation which operates as a partial defense to reduce murder to manslaughter, and a lighter sentence. In R v. Dincer (1983), a Turkish Muslim immigrant was partially excused for killing his daughter because of a cultural belief that he had a duty to ensure her virginity until marriage. Drawing on the tradition of honor killing and his duty as a father in his Turkish culture, a defense of provocation was accepted. In Moffa v. R (1977), an Italian immigrant husband was also partially excused for the killing of his wife because of his ethnically-linked hot bloodedness. He lost control when he learnt of her adultery and killed her, by implication just as an “ordinary (volatile) Italian” husband would do.

Murphy J in Moffa argued an objective test of the reasonable or ordinary person “is not suitable even for a superficially homogeneous society and the more heterogeneous our society becomes, the more inappropriate the test is.” Essentially, there should be different standards of self-control for different groups in society. But not only does such an approach embed ethnic stereotypes into the justice system, but gender disparity as overwhelmingly male perpetrators used the “cultural” defense and their victims were female. Eventually, the High Court of Australia clarified the law of provocation. In Stingel v. R (1990), the High Court held that the cultural background of an accused is relevant only in determining the gravity of the provocation. The standard of self-control that an accused must exercise in response to the provocation is that of an ordinary person devoid of culture or background. The ordinary person the court decided is not the reasonable person of the law of torts, or the average person. It is a hypothetical ordinary person who does not share any of the idiosyncrasies of the accused, with the exception of age (Stingel [327]). For determining the minimum standard of conduct, the ordinary person is not to be invested with the ethnicity, religion, gender, physical attributes or disability of the accused. Therefore, it is no longer the control expected of the “hot-blooded Italian male” as in Moffa or the “Turkish Muslim father” as in Dincer but the self-control expected of ordinary Australian regardless of ethnicity or culture.

The recurrent use of provocation in cases of femicide induced three Australian states, Western Australia, Tasmania and Victoria, to remove provocation altogether as a partial excuse or defense to murder. Although Victoria
abolished provocation as a partial defense able to reduce murder to manslaughter, provocation remained an independent consideration in sentencing, along with remorse, age, prospects for rehabilitation, and future risk (Sentencing Advisory Council, 2009).

**Cultural Defense in Indigenous Communities**

After *Mabo* and the recognition of native title, a case was mounted that that British settlement had not extinguished Aboriginal customary criminal law. This was rejected by the High Court of Australia. Mason CJ affirmed that there was no analogy with native title law and that Australian criminal law does not “accommodate an alternative body of law operating alongside it” (*Walker v. New South Wales*, 1994, p. 50).

Although cultural defense did flourish in many Australian state and territory courts to excuse or justify Aboriginal criminal conduct on grounds of an Indigenous customary law or cultural practice this now has now been modified by legislation. An amendment in 2006 to the *Crimes Act* (Cth) removed cultural background as one of the matters a judge could consider when making sentencing and bail decisions. The Act at s. 16A(2A) expressly states that a court must not take into account any form of customary law or cultural practice as a reason for:

- excusing, justifying, authorizing, requiring, or lessening the seriousness of the criminal behavior to which the offence relates.

A similar provision came into force in the Northern Territory (see *Northern Territory Emergency Response Act 2007* (Cth) s. 91). Although this precludes the judge from taking into account customary law in deciding the objective seriousness of the crime committed, expert evidence on culture can be given to aid with general sentencing provisions. In *R v. Wunungmurra* (2009 [24]), a Yolngu man from Central Australia stabbed his wife multiple times. At [8], a Yolngu law expert (a member of his clan) gave evidence to the effect that as Wunungmurra was a leader in his community it was his cultural duty to stab his errant wife and thereby enforce traditional Aboriginal law. Southwood J acknowledged the recent legal amendment but still accepted the expert’s evidence on culture for subjective sentencing considerations going to the likelihood of rehabilitation and lack of propensity.

This finding has been praised and criticized. The criticism is that the decision gives a misogynistic view of Aboriginal women and leave unchallenged male privilege. In the Northern Territory, an Aboriginal woman is 80 times more likely to be hospitalized for violence against her than a non-Aboriginal woman (Finnane, 2016) and betrays “Aboriginal women’s scathing criticism of the use made of such evidence in criminal courts” (Howe, 2009, p. 166). By excusing Aboriginal violence and sexual assaults against women, it sends a message that sexual violence and physical abuse is tolerated in Indigenous communities while, in fact, it is rejected by most Aboriginal women (Howe, 2009). Aboriginal women object to “cultural defenses offered by white lawyers on behalf of
Aboriginal men who have assaulted women or children” (Howe, 2009, p. 167). Support has come from the National Aboriginal and Torres Strait Islander Legal Service that restricting a court from taking into account a “person’s cultural obligations and his society’s cultural practices runs counter […] to the protection of equality under the rule of law” (National Aboriginal & Torres Strait Islander Legal Services, 2012, p. 7). The service also argues that it is unworkable to distinguish between objective and subjective considerations of culture.

The High Court in another case of spousal killing by an Aboriginal man recently opined that

Aboriginal offending should not be viewed as less serious than offending by persons of other ethnicities […] to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour would be wrong […] just as it would be to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide (Munda v. Western Australia, 2013, [63]).

In the same appeal, the High Court rejected an argument Munda’s sentence be reduced on the basis that he may face corporal punishment by way of payback when released from goal. The justices warned that courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice. Punishment for crime is to be meted out by the state, and even if the offender would accept “payback,” as Munda indicated he would, the choice as to the mode of punishment is not his to make (Munda v. Western Australia, 2013, [61]).

CONCLUSION

Legal pluralism comes in different forms. Rather than establishing separate or parallel religious or ethnic courts, the diversity of Australia’s people has been recognized through policies and strategies to make Australian courts and legal services more culturally nuanced. The aim is to reduce barriers for Indigenous Australians and ethno-religious minorities to facilitate access to law, legal services and the courts. The intersection of customary, cultural and religious practice in judicial decision-making will be strengthened when accurate information on prevails. Herein is the role for cultural experts.

This chapter has highlighted a spectrum of approaches to cultural expertise from high demand to minimal. For indigenous Australians seeking legal recognition of native title claims, cultural expertise, particularly from anthropologists, is indispensable. While there are a many tensions between the legal and anthropological methodologies, the refining of giving expert evidence in the court for native title is underway through less adversarial mechanisms of concurrent evidence, expert conferral and conferencing. In the family courts, the main mode for obtaining expert evidence for parenting orders is through the court’s report writers who are considered experts in child and family dynamics. Cultural expertise is tacked onto their remit when the child is indigenous or from an ethnic or religious minority. In some cases their evidence is supplemented by other experts
including Aboriginal elders or Muslim Imams. Although anthropologists currently have minimal input, a greater role has been foreshadowed especially when kinship and child-rearing practices are at the heart of a parenting order. The third dimension was the criminal courts and the decreasing role for cultural defenses. A series of court decisions on the “ordinary person” in the common law, legislation removing culture as a mitigating factor in sentencing, and also feminist critiques that such defenses perpetuate cultural stereotypes and elevate masculine versions of ethnicity and religion into the legal system have seen a decline in culture employed as a defense.

The search for genuine equality in a multicultural, multireligious society remains a work in progress. Despite opposition and a lack of political will to formalize legal pluralism, unofficial, informal, and extra-judicial pluralism does operate throughout Australia and importantly, the courts are now encouraged to be more culturally nuanced in adjudicating outcomes for the nation’s many and diverse ethnic and religious minorities.

NOTES

1. South Australia and Victoria are currently reviewing the possibility of introducing a treaty with their indigenous populations with compensation to be paid by the relevant state government.

2. Wik v Queensland (1996) 187 CLR 1 held that native title could coexist with interests gained under pastoral leases; but Fejo v Northern Territory (1998) 195 CLR 96 held that the grant of freehold totally extinguished native title.

3. The claim failed for several reasons including that the Wongatha applicants were not authorized to make the application as required by s 61(1) of the Act.

4. Ground 8 of the Appeal: “the s 60 CC factors, including s 60 CC(3)(h) and (6), His Honour erred in failing to inform himself of any anthropological evidence and/or ‘well recognised peer-reviewed research’ concerning the parties respective Aboriginal and Torres Strait Islander cultures.”

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