Muslim Legal Network Iftar Dinner

"IS SOCIAL EXCLUSION A PROBLEM FOR MINORITIES IN AUSTRALIA AND IF SO HOW SHOULD WE DEAL WITH IT & HOW DOES THE JUDICIARY DEAL WITH IT?"
Speech by The Honourable Justice Stephen Rothman AM
Supreme Court of New South Wales

Wednesday, 14 June 2017
Doltone House, Hyde Park

Welcome to Country and Acknowledgement of Traditional Ownership

"Yaama!

Ging ella with a byan? Gumul cowarna nula, bere, walgal, yuridyuaw!"

When we gather and come together as one, we acknowledge and pay our respects to the traditional custodians of this land, the Gadigal people of the Eora nation, their elders past, present and future and we remember that this land is, was and always will be traditional aboriginal land.

RAMADAN M'BARAK

It is the high point of my life that I have children and grandchildren of which I am immensely proud and whom I love unconditionally. Their task, on the other hand, is to keep my feet firmly on the ground. When one of them learnt I was to give the keynote address here today, she said: "Why you?"; "I thought you had to be important to do that!"

So today, although I don't feel any more important, I do feel honoured to be giving this address to a body of lawyers that, as a group, has my unqualified admiration and support. Social exclusion is now studied by many. Most are social psychologists – a sub-specialty that, in my view, has much to offer law, government and criminology.

Before becoming too serious, I wish to provide two anecdotes; one from my family history.

As a child, I grew up with a story, repeated to me many times, the details of which are no doubt apocryphal. As I think everybody here would know, I am Jewish. My Great Aunt likewise was Jewish, and was born overseas; in the Ukraine. Her family nickname was Dolly, like the sheep (not as in "incapax"). She had facial features not dissimilar to mine, was about 4' 9" (only slightly taller than me!), short jet-black curly or wavy hair, and very dark olive skin. When she was in Northern New South Wales, as an adolescent, working in another relative's shop, she was herded, against her protestations, on a bus for return to the Aboriginal mission. My family had to collect her.

The second anecdote is a reiteration of an historical fact I mentioned at a Supreme Court conference some time ago. West of Gosford and west of the Sydney-Newcastle Freeway, there is an area upon which there lived Aboriginal people. Their language and culture, while similar to those in surrounding areas, was distinct. There is no living descendant of that people. There are remnants of their culture: drawings; carvings; middens and the like. This nation, this people, was exterminated. Some died from disease. Most were murdered by hunting parties, organised sometimes for sport, sometimes after church, not unlike the English hunted fox.

With great respect to many leaders of our society, with very few exceptions, in Australia, white Anglo-Saxon heterosexual males have no understanding of discrimination. Even the exceptions understand it from an observer's perspective; not from personal experience.

And discrimination is not confined to race, colour, religion, gender and sexuality. In most Western countries, discrimination on the basis of wealth and power is far more prevalent even than those matters covered by various anti-discrimination statutes. But political leaders, generally, not universally, have never experienced that kind of disempowerment. Nevertheless, this latter issue is beyond that with which I can hope to deal tonight and any or some solutions may be worse than the problem.

Australian / Islamic History

One of the few insights into my personality that I am able to reveal is that I am a News Freak. I listen to 24-hour news on the radio and, when I'm home and the television is on, it is usually, although not always, on that station. Of late, I have been regaled with the comments of politicians aimed, although rarely expressly, at the various Islamic communities in Australia and elsewhere, as if Islamic presence in Australia were a new phenomenon.

As a matter of history, Islamic traders sailed to what is now called the Indonesian archipelago in the 7th, 8th and 9th centuries and onwards. Islam was a small, but growing aspect of the archipelago and in the late 15th century, when the Moors were expelled from the Iberian Peninsula, along with Jews, the Moor traders, who sailed to what is now the Indonesian archipelago, had common cause with the local population in their resistance to the Portuguese colonial masters. It was in the late 15th and 16th century that Islam became the predominant religion on the archipelago.

From that archipelago, particularly the countryside of Macassan were constant traders and long-term visitors to Arnhem land. The evidence of their engagement is abundant. One of the most interesting pieces of evidence is a dance amongst the Warramiri people that refers to the creational being and is given the name, Walitha Walitha, which is an adaptation of the Arabic phrase Allah ta'ala (God, the exalted), who, in the Warramiri tradition, descends from heaven to re-establish order from infighting and violence between different groups in Arnhem land. [1]

Thus, Islam has had a presence in Australia long before European settlement, either Portuguese or English.

There were the Afghan cameleers from the mid-1800s through to the 1930s. Australia remains the only country that exports camels to Saudi Arabia.

But my paper tonight is not an historical overview of the presence of Islam in Australia but its relevance to social exclusion and Australia's attitude to minorities.

I have heard, on various news reports, and in various papers delivered at events such as this, how tolerant Australia is and how welcoming it has been to different cultures. There is some truth in that

[1] For a fuller discussion, see: Ian S. McIntosh, 'Islam and Australia's Aborigines? A Perspective from North-East Arnhem Land*', (1996) 20(1) The Journal of Religious History 53, and see also: Janak Rogers, 'Islam and Indigenous Australia', ABC Radio National (online), 18 July 2014 http://www.abc.net.au/radionational/programs/encounter/islam-and-indigenous-australia/5602354; Peta Stephenson, 'Long history with Islam gives Indigenous Australians pride', The Conversation (online), 14 December 2011, http://theconversation.com/long-history-with-islam-gives-indigenous-australians-pride-3521

proposition, but its accuracy is only partial. A true understanding of the issues requires an understanding of the uniqueness of Australian democracy and the uniqueness of Australian culture, whether indigenous or later colonial history.

The starting point is the land. For Indigenous Australia, land is the very essence of their culture. There is good reason for it.

Australia is, as it is said, "a land of sweeping plains"; an old, if not the oldest, continent; the largest island; with a generally temperate climate and an abundance of food and water. The water may sometimes collect in the wrong places and there are certain parts of Australia that cannot rely on such abundance, but to understand Australia as it differs from the rest of the world, one must start at that proposition.

As a consequence, in Aboriginal culture and law, land ownership was not exclusive, except in areas bearing a sacred significance. The abundance of food and water ameliorated any desire to keep such items to oneself and to overcome most expansionist ambitions. Simply, in Indigenous Australia, exclusionary land title was unnecessary.

One then must add to that the issues of the "New World" (a name with a particularly colonialist or European bias). Unlike Europe or Asia (and, oddly enough, even unlike most of Africa), all of whom, until the 1900s at least, were based upon homogeneity either of language, culture or religion, the New World was the very antithesis of such homogeneity.

The United States, Canada, South America to a lesser extent, Australia and New Zealand were immigrant countries. Most, including the United States and Canada dealt with that challenge by adopting the melting pot approach to culture, while Australia was very different. For our part, Australia did not adopt the motto or the policy of "**E pluribus Unum**" (Out of Many is One).

Largely this is due to the penal colony beginnings and the large contingent of Irish Catholic convicts who were denied fundamental rights in their former countries and the freedom to worship. Thus, New South Wales, as a Colony, in order to survive, was required to emancipate and welcome different cultures and different religions, long before the British saw fit to follow. NSW promulgated St Patrick's Day as a public holiday in 1810 and enjoyed freedom of religious services, when the British only had it in 1824.

The third aspect required to understand Australian democracy is its electoral system. Leaving aside the systemic tensions between State and Federal power, the nature of the electoral system and the importance of the electoral system in the way in which Australia has developed is unique. At the Federal level, who will exercise power is determined by the majority in the Lower House and the Lower House comprises members, one only elected from each electorate, which elects that one person by a voting system that is preferential.

Further, we have what is loosely termed compulsory voting. If you are an Australian citizen, it is illegal not to register on the electoral roll, or, when it occurs, to change your electoral address. It is illegal not to attend to vote and receive a ballot paper. Ironically, whether you actually complete the ballot paper will never be known!

As a consequence, Australia does not suffer from a silent majority. The effect of our electoral system means that each political party that desires to obtain office or obtain a majority of seats in the Lower House is required to ensure that they are fielding candidates who appeal to the majority in an

electorate either as their most preferred or least disliked candidate. As a consequence, political parties are necessarily pushed to appeal to the middle ground of political opinion in Australia.

These somewhat eclectic attributes coalesce to form a rather unique brand of democracy and brand of civil rights. It involves, first, a *laissez-faire* attitude to others; which allows an encouragement of differences where those differences do not interfere or are not perceived to interfere with the capacity of others to operate as they please and so long as it is seen as adding to the enjoyment of life in Australia. There are abundant examples.

Now I have come, somewhat circuitously, to the topic on which I am supposed to talk.

Australia has a sorry history of social exclusion of a number of groups. Surprisingly, by international standards, the social exclusion of women was less problematic in early days of the 20th Century. Of late, we do not fare as well.

The LBGTQI community is another group the members of which have been and continue to be, socially excluded. Historically the social exclusion of Indigenous Australians and the same-sex community has been, and continues to be, the major exceptions to inclusiveness in Australia.

Each deserves its own talk. But I wish to concentrate on racial or religious minorities.

I was some time ago castigated by a very conservative Rabbi because I advocated that the Jewish community should support Same-Sex Marriage under Civil Law, because we should protect minorities. If the Jewish community sought to safeguard its rights to practise and for observance, then all minorities should have their rights protected, so long as those rights do not involve illegal conduct or an interference with the rights of others. Ultimately that is an application of equal justice.

Equal Justice

The High Court in *Green v R; Quinn v R* (2011) 244 CLR 462; [2011] HCA 49 at [28] made clear that the principle of equal justice is a fundamental aspect of the exercise of judicial power. But the High Court went further. It made clear that natural justice embodies the norm expressed in the term "equality before the law" and is a fundamental aspect of the rule of law.

Equal justice requires that like should be treated alike and that the difference in treatment of different persons should be rational: see *Postiglione v R* (1997) 189 CLR 295; [1997] HCA 26. Equal justice is a principle that is fundamental to the exercise of judicial power and may also be fundamental to, and a limitation on, the exercise of legislative power in a constitutional democracy in which the implementation of the rule of law is required. In the US, it is guaranteed by a combination of the Fifth Amendment and Fourteenth Amendment: see, inter alia, *Slaughter- House Cases*, 83 U.S. 36 (1873); *United States v Virginia*, 518 U.S. 515 (1996), and in Canada by s 15 of the *Charter of Rights*: see, inter alia, *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

In *Andrews*, supra, McIntyre J recited the principle by reference to the Aristotelian principle of formal equality, namely, that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness": *Ethica Nichomacea*, trans. W. Ross, Book V3, at p. 1131a-6 (1925).

While the High Court of Australia has considered the doctrine of equal justice in relation to parity in sentencing and referred to it as a fundamental of the exercise of judicial power, its more general

application as a limitation on legislative power has not been the subject of discussion: but see, in relation to the race power, s 51(xxvi) of the Constitution, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 365-366, [40]-[42]; [1998] HCA 22 ("the Hindmarsh Bridge Case"), per Gaudron J; and see also *Western Australia v Commonwealth* (1995) 183 CLR 373 at 461; [1995] HCA 47 ("the Native Title Act Case").

Whatever be the situation as to limits on the legislature in the promulgation of legislation that irrationally differentiates between classes of persons, it cannot be doubted that the exercise of judicial power must be devoid of capriciousness and arbitrariness. It is to the lack of capriciousness and arbitrariness (and perceived capriciousness or arbitrariness) that the principle of equal justice is directed.

It is the principle of equal justice that has found expression in the principles of parity as between co-offenders and in discrimination law and is the notion that stops governments gaoling all red-haired lawyers, or killing all blue-eyed babies or all persons of Middle Eastern appearance (whatever that may mean).

If Chapter III of the Constitution were, as is suggested by the High Court, a guarantee as to the application of the rule of law, then equal justice as a fundamental and norm of the rule of law must be guaranteed by the provisions of Chapter III, at least in the application of judicial power; and in my view, well beyond.

I read today of a proposal by a law professor, no less, for mandatory sentencing. So the sentencing of persons charged with different offences arising out of the same criminal conduct, in circumstances where one offence is governed by a mandatory sentence regime and another is not, would starkly identify the difficulty associated with the application of the norms of equal justice.

Whatever be the constitutional restriction on legislative power to impose mandatory sentence in the State arena, or federally, there is no doubt that, as a matter of policy, democracy depends fundamentally on the application of the rule of law and the lack of arbitrariness and capriciousness in the sentencing of individuals. Ultimately, for democracy to flourish, society depends upon the notions of equal justice.

Democracy is defined, traditionally, as a system of government by the people, for the people and of the people, in which everyone has equal political rights. To deny people equal political rights is inconsistent with the very notion of democracy itself. In that context, a legal right is a political right.

I wish to give the instance of a person I was required to sentence early in my career as a judge. The accused was an Aboriginal man who was drinking with some friends at a pub in La Perouse. Into the pub walked a Caucasian who, upon entry into the pub and sighting a number of Indigenous Australians, spewed forth racist epithets. Some of the drinking friends of the accused wanted to "have a go" at him. The accused calmed them down; suggested that the Caucasian was just being an idiot; and ought to be left alone. That situation arose two to three times during the course of the evening.

Finally, the accused herded his drinking mates out of the pub and into transport home. The accused, who lived nearby, then commenced to walk home, was half on the road leaving the footpath, when the Caucasian made a comment relating to the accused's mother and her sexual habits; whereupon the accused turned, punched the Caucasian on the chin and the Caucasian fell back, hit his head on the pavement and died.

Should he be treated in like manner as an offender who has committed manslaughter in the circumstances often described in the press as the "one punch manslaughter" cases or is such "equal treatment" a manifest inequality and absurdity?

The best or worst example of "inequality" in this country is its first peoples. Of course, as you would know, there are others. I wish to introduce some facts relating, particularly, to Aboriginal offenders. Aboriginal and Torres Straight Islanders make up approximately 2.5% of the Australian population; these figures are from the 2011 Census and therefore relate to October 2011. In New South Wales, the figure was the same. Yet in New South Wales, Indigenous persons accounted for 24.2% of the prison population; 23.4% of the male and 33.8% of the female prisoner population.

A comparison with earlier data shows that, notwithstanding the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody, the proportion of Aboriginal prisoners is greater than it was when the Royal Commission was investigating; and the rate of incarceration has not only increased, but is increasing.

In *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38 at [53], the majority said:

> "Mitigating factors must be given appropriate weight, but they must not be allowed 'to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence.' It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in Neal 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." (Citation omitted.)

Yet, the High Court in its judgment assumed that an endemic environment of alcohol abuse and violence explains the recourse to violence and the level of frustration that may have led to it. Of this it took judicial notice. There was evidence that the individual suffered from such an environment. Otherwise the psychological affect is assumed or asserted by the courts or by experts.

I do not cavil with that approach. But with respect, what is it about the treatment of Indigenous Australians generally that militates against or precludes similar treatment? The answer lies in the fallacy of common sense and experience.

We assume that such an environment of alcohol and abuse has effects. We do not accept that discrimination, exclusion and disempowerment, have similar effects. Yet scientific evidence supports the latter proposition.

In recent studies, Professor Baumeister, a Professor of Social Psychology previously at Florida State and who this year joined Queensland University, tested the effect of social exclusion on individuals. The results are astounding. Social exclusion causes directly reduced academic performance, in speed, accuracy and comprehension; decreased self-regulation for longer term benefits, for example, food choice, understanding consequences; increased anti-social behaviour and a greater likelihood of criminal behaviour, including a reduced sensitivity to pain.

In other words, social exclusion, the effect of discrimination and disempowerment on an individual directly caused increased anti-social and criminal behaviour (what may in some circumstances be

called radicalisation); decreased health by incorrect lifestyle choices; and decreased academic and intellectual performance.

None of this was before the High Court in *Munda*; and none was considered by it.

By way of introduction I should comment that Professor Baumeister's original thesis was that rejection or social exclusion caused emotional distress, which in turn affected behaviour. This thesis was tested; and disproved. The tests disclosed that social exclusion and/or rejection directly affected behaviour, but did not affect emotion.

The effect on behaviour caused by social exclusion was statistically among the largest effects of any physical stimulant in the Professor's career. In other words, social exclusion directly affects the behaviour of individuals, but these effects do not depend on emotional distress. I will not describe the tests. It is sufficient for the purposes of this paper to note that scientific method was utilised, including a control group. I recite some of the findings:

In R.F Baumeister & C.N DeWall, "The Inner Dimension of Social Exclusion: Intelligent Thought and Self Regulation Among Rejected Persons" (2005) *Journal of Personality and Social Psychology*, 88, 589-604, the authors remarked:

> "It is easy to propose how people ideally or optimally would respond to social exclusion. They ought to redouble their efforts to secure acceptance. Toward that end, they should reduce their aggressive and antisocial tendencies and increase prosocial behaviour. They should improve self-regulation so as to perform more socially desirable actions. And even if improved social acceptance is not a promising option, they ought at least to become more thoughtful and intelligent and should avoid self-defeating behaviours, so as to fare better on their own if necessary. Yet our laboratory studies have found the opposite of all these to be close to the truth. …
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> Self-regulation and cognition, instead of emotion, have emerged from our most recent data as the most important inner processes to change in response to social exclusion. Rejected or excluded people exhibit poor self-regulation in many spheres. They also show impairments in intelligent thought, though these are limited to forms of thought that are linked to self-regulation (i.e., thinking processes that depend on effortful control by the self's executive functioning).
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> Nonetheless, the findings from this work have helped shed light on both the inner and outer responses to exclusion. They help illuminate why many troubled individuals may engage in maladaptive or seemingly self-destructive behaviours. They may also have relevance to the responses of groups to perceived exclusion from society as a whole. Although there are some exceptions, such as the intellectually vigorous culture maintained by Jews during the centuries of discrimination and ghettoization, many groups who felt excluded or rejected by society have shown patterns similar to those we find in our laboratory studies: high aggression, self-defeating behaviours, reduced prosocial contributions to society as a whole, poor performance in intellectual spheres, and impaired self-regulation. Our findings suggest that if modern societies can become more inclusive and tolerant, so that all groups feel they are welcome to belong, many broad social patterns of pathological and unhealthy behaviour could be reduced."

Interestingly, from my own particular background, the foregoing extract cites the Jewish experience as an exception. Professor Baumeister, who is not Jewish (at least as far as I am aware), failed to

realise that the Jewish community provides no exception, other than one that "proves the rule". The Jewish community developed, over the centuries of social exclusion, its own mechanisms, similar to those adumbrated by Professor Baumeister as a result of his studies, that according to his tests, would overcome the effects of social exclusion by empowerment and cultural self-confidence and support. Those steps include community support; a network of support against exclusion; the teaching and use of language; and, generally, the sense of community and belonging.

An examination of the programmes that have been successful in redressing some of the disadvantage of Aboriginal Australia confirms the importance of the Baumeister approach. Two of the more successful programs in New South Wales have been the programs initiated in Redfern and the programs, utilising football, implemented in north-west New South Wales.

In Redfern, Superintendent Freudenstein initiated a series of programs, in consultation with elders, that, on a helicopter view, instilled a sense of community, initiated a support system and inculcated a feeling and sense of belonging and empowerment amongst the Aboriginal community and in particular its youth. The programs implemented by Superintendent Freudenstein were, in hindsight, extraordinarily simple. It started from the proposition that the police ought not be seen only as the enforcers, gaoling offenders and very much the enemy by younger members of the Aboriginal community in Redfern.

The police instituted (with some significant resistance both at the coalface and more senior police) a program of consultation with the elders of the Aboriginal community in Redfern, which involved police recruiting younger members of the community for a fitness program in which they trained, with police, and were collected by police. The program blossomed into one of the most successful youth engagement programs ever implemented and reduced the animosity between police, on the one hand, and the younger members of the Aboriginal community, on the other.

Moreover, from a strictly policing perspective, the level of offending in Redfern dropped dramatically and, most promisingly, became lower amongst the Aboriginal community than was the average for all offending in Redfern or across New South Wales. Moreover, the time, effort and expenditure involved in the program was significantly less than the amount, prior to the program being implemented, on enforcement.

An expected corollary was higher employment participation figures within the Aboriginal community in Redfern and significantly higher levels of employment (and lower levels of unemployment). The program was such a dramatic success that it is now sought to be exported to other areas of high Aboriginal population that may have some of the same features.

The football programme was a very different one. It was aimed at the prevalence of domestic violence in north-western New South Wales. It involved a representative footballer organising a football program amongst Aboriginal youth, participation in which required a commitment not to be involved in violent offending (or other offending) and, like the program in Redfern, built a feeling of community, at least amongst those persons participating in the program. Again, after some little time, the effect was dramatic. Interestingly, in some areas where the program was implemented, the Aboriginal community opposed the program. Nevertheless, the program was successful.

I can guess at a possible explanation for the opposition of some Aboriginal communities. In some ways, the football programme replaced the feeling of belonging to the particular Aboriginal community with a feeling of belonging to the newly created "football community". In that sense, there may have been some disadvantages in the longer term for the Aboriginal community.

Nevertheless, what each of those programs, used in this paper as examples, clearly discloses is that the empowerment of members of the Aboriginal community and the implementation of programs which provide to members of the Aboriginal community a feeling of social inclusion and support, as distinct from the historical social exclusion and disempowerment, have had extraordinarily successful results.

In my view, the Aboriginal community, in that way, is not unique. Many of the studies in criminology on gang theory are in my view consistent with and support the veracity of the underlying premise, which, in my opinion, is explained best in the Baumeister studies. However the "gang" studies do not approach the issue from a social exclusion basis. [2]

While I have, to this point, used the example of the Aboriginal community, and somewhat circuitously dealt with a range of seemingly eclectic topics, each of them is relevant in understanding the discrimination against, and the social exclusion of, many who follow Islam. There can be little doubt that those of "Middle Eastern" appearance suffer discrimination (whether Muslim or Christian) and, particularly or also, those that are outwardly (or perceived to be) Islamic.

The profession is replete with anecdotal evidence, one of the better examples being the situation that arose when police questioned two persons, purportedly of Middle Eastern appearance, drinking coffee and purported to suggest that it was a suspicious situation. One of them was a solicitor and the other his footballer client. Some relates to Police discrimination in the matter of their operation. The Redfern experience addresses that issue and may explain some of the dramatic results.

Some of that discrimination is the kind of discrimination that, unfortunately, has occurred throughout Australian history in relation to the new wave of immigrants. There was initial discrimination against Italian and Greek immigrants in the post-war period, certainly discrimination against Chinese immigrants in the mid-1800s and the more recent wave and discrimination against Jewish and European immigrants. The same can be said for the Vietnamese and many other cultures that now are, on most criteria, fully accepted into Australian society and which, thankfully, have maintained their culture and distinctiveness.

Some however is occasioned by the obvious differences in conduct or appearance. That applies to some Muslims and persons of Middle Eastern appearance. The same can be said of members of the Jewish community.

The similarities between the Jewish community and Muslims is profound. Apart from the regularity of prayer each day and the processing of meat, there are many other similarities. The physical division between men and women during prayer is but one example.

Speaking personally, I experienced some significant discrimination and exclusion as a youth and in my early career. Historically, members of the Jewish community have adopted two quite distinct

[2] Some of those studies to which reference is here made are: 'Section 5: Crimes and Gangs in Sydney: The Ethnic Dimension' Ethnicity and Gangs' in Jock Collins, Greg Noble, Scott Poynting and Paul Tabar (eds), *Gangs, crime & community safety : perceptions and experiences in multicultural Sydney* (University of Technology, Sydney, 2002); JC Barnes, Kevin M Beaver and J Mitchell Millerm, 'Estimating the Effect of Gang Membership on Nonviolent and Violent Delinquency: A Counterfactual Analysis' (2010) 36 Aggressive Behaviour pp 437-451; Martin Bouchard and Andrea Spindler, 'Groups, gangs and delinquency: Does organization matter?' (2010) 38 Journal of Criminal justice pp. 921-933; Emma Alleyne and Jane L Wood, 'Gang Involvement: Psychological and Behavioural Characteristics of Gang Members, Peripheral Youth, and Nongang Youth' (2010) 36 Aggressive Behaviour pp. 423-436.

attitudes. One is to be more “Australian” or “British” than the general population. Sir Isaac Isaacs was probably in that category.

I, in my personal experience, have toyed with each attitude and have found, somewhat surprisingly at first, that acceptance and respect was obtained more by an adherence to fundamental beliefs than an attitude that eschewed such beliefs.

Fundamentally, despite the obvious similarities in philosophy (particularly the metaphysical concept of the Almighty) and in practices, be it the number of prayers per day or the processing of meat products, there are obvious differences between Judaism and Islam. Those differences are generally not religious. Obviously, because of its timing, Judaism does not recognise Mohammad as a Prophet, but the differences between Judaism and Islam are far less than the differences between Christianity, on the one hand, and either Judaism or Islam on the other.

The differences in philosophical approach stem, in my view, from the fundamental differences in the manner in which the general philosophies arose. Judaism was born of a minority and developed its major philosophical theses, some of which it did in conjunction with the Islamic scholars of the time, as a minority, first with a pagan majority, then under Islamic rule and finally under Christian rule. Its structure as a culture is born of the fact that it has predominantly existed as a minority.

On the other hand, the structure of the various Islamic communities in Australia, in particular, and throughout the world, was developed entirely, with the exception of the first 10 years, at a time when Islam was a majority. As a consequence, it is easier for the Jewish community in this country to adapt to its minority status than it is for the Islamic communities to adapt to that status.

Indeed, on one expressed view, a problem with Israeli democracy is that it has found it hard to adapt to majority status, while the difficulties with Islamic minorities is the tension between some of the philosophical tenets and its status as a minority.

Nevertheless, the circumstances of social exclusion of the Islamic communities in Australia is to a large degree that which occurred in relation to the Jewish communities in many democratic countries. Of course, I do not here refer to Nazi Germany, which has no real comparison. In short, each of us will continue to look a little different and act a little differently from the majority population.

In my experience, in order to overcome the worst effects of social exclusion, it is necessary, first, to be true to your own fundamental beliefs or attributes and, secondly, to do precisely what it is the Islamic communities are now doing and, in particular, groups such as the Muslim Legal Network are doing. That involves engagement with the broader community; education of the broader community of the needs and tenets of Islam; an explanation that those tenets will not interfere with the lives of others, but will render Australia more diverse, richer in culture and community and, most importantly, support each other.

One of the difficulties with relations between different religions is the proposition contained in most religions, including Christianity and Islam, that salvation, belief in God or true goodness can be obtained only through that particular religion. In some cases, it involves the classification of others as of lesser status or being blamed for what are perceived to be historical wrongs.

Judaism, unsurprisingly, is not in that category. This is not because it is inherently better, but because neither Christianity nor Islam existed at the time of its initial development. Thus, Judaism,

as a religion, refers to belief in the Almighty, not the manner of that belief. And even the Messianic period is referred to as a period when all proclaim that the Almighty is One; not how one does that.

The supersessionist Abrahamic religions are in a different position, because each is based on a subsequent Revelation and purports to be an improvement or perfection of that which preceded it. Historically, this has created far greater problems for Jews from Christianity than from Islam. Indeed the golden era (called that) for Judaism was under Islamic rule in Spain.

Nevertheless, in the modern era, in democracies such as Australia, in order for true peace to prevail in the community, all in the community must adopt a position of respect for all – not tolerance; but respect; in my view, a step higher than tolerance.

It is only when all of us, minorities and majority, respect each other and respect each person's differences that we apply, in society, that which, in my view, is a necessary aspect of democracy, namely, equal rights and equal obligations.

It is that approach which informed my attitude to the attempts to delete or to amend s 18C of the *Racial Discrimination Act 1975* (Cth). Ultimately, all so-called rights in a democracy must be balanced with others and freedom of speech, as important as it is, must give way to the public vilification of persons on the basis of differences to others. The blacks in the US had freedom of speech and the right to vote in the 1960s but their diminished status and public vilification prevented the exercise of those rights.

It is that approach that seems to have informed the view taken by the public leadership of the Islamic communities, which, with the leaderships of other ethnic communities and faith groups, opposed amendments to the *Racial Discrimination Act*. To the extent that one can discern an attitude of the followers of Islam, it seems to prevail throughout the vast majority.

Returning, if I might to that which was addressed at the outset, there will always be some level of social exclusion by the ignorant, the ill-informed and the insecure. Nevertheless, as a group, Islam is bringing fresh ideas and prospects; new blood and new eyes to the Australian community. Most who arrive in Australia have a deep appreciation of the opportunities that Australia has given them and that, in turn, generates a deep desire to give back and contribute. That is why, in my view, men and women who choose to come to a new country, properly managed, can be a huge asset to a nation and, in particular, to Australia.

But the issue isn't immigration or immigrants. The issue, as I have ineloquently sought to address above, is exclusion or inclusion. Those who argue against immigration on the basis of the risk of terror should recall that the Manchester bomber was born in Manchester; he was not an immigrant. And that experience is not an isolated one.

From the perspective of a minority with a different culture and/or religion, the issue is one of assimilation or integration. I argue strongly for integration and against assimilation. Australian culture and the Australian way of life has benefited greatly from the differences between our various minorities.

For First Australians that involves greater cultural education more language education, not only for members of the Aboriginal community, but for all of us. Schools now teach languages. I also believe the move for a treaty should be supported. In many ways the treaty process and the reaching of the treaty is more important that the content.

Ultimately, the task is to remember that we are a "Commonwealth" founded upon the principle that each person contributes towards the public good. You, as an organisation, and as part of the overwhelming majority of Muslims in this country, show a commitment to the public good; a commitment to the rule of law; and a commitment to the equal treatment of all under the law. In those circumstances there can be no argument against Islamic minorities being welcomed, valued, protected. The differences and individuality must be safeguarded and celebrated.

Further, the social exclusion of minorities or individuals is ultimately what leads to what we may now call radicalisation and in the case of individuals, gang membership. The answer to such conduct is not greater and more severe restrictions on conduct or immigration, but a greater effort to ensure that minorities are welcomed, included and are not vilified.

It is that process that will retain our moral standing and prevent us from simply locking people up, or throwing them out of the country, on a whim.

In the meantime, that which groups such as this are doing must continue. The network of support offered by the Muslim Legal Network is important to offering the support and inclusiveness that is necessary to overcome the effects of social exclusion. Likewise, it is important for judicial officers, at every level, to understand the effects of social exclusion; to factor it into decision-making; and for such officers, themselves, to seek to counter such effects, in part, by inclusiveness and, to the extent appropriate, support. One hopes that one day such support will be unnecessary.

It is for that reason, as earlier stated, that I was so honoured to be asked to give this address and to support the work that you as a group of lawyers, mostly young, are doing. My congratulations to you; my thanks to you and my continuing offer to be of assistance as and when I can be.

In that way all of us, each of us different in a way, can share in what our nation has to offer and contribute to what our nation has to offer; accepting our mutual obligations of care for each other and building a diverse, cohesive and, "Inshalah" (Please God), a safe society.