



Intersections between the Law,
Religion
and Human Rights Project

**Literature Review prepared by Schofield King Lawyers
for the Australian Human Rights Commission**

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Introduction

Schofield King Lawyers (SKL) was contracted by the Australian Human Rights Commission (the Commission) to investigate intersections between the law, religion and human rights focusing on:

- *The practice of Alternative Dispute Resolution (ADR) processes in religious communities (with a focus on Islamic communities) in Australia, particularly in respect of family law issues.*
- *Education:*
 - *Education on the intersection of human rights, religion and culture (with a focus on Islamic communities) in the context of ADR processes for the judiciary, court staff, lawyers, police, and the broader community including religious communities (with a focus on Islamic communities);*
 - *Education for members of Australia's religious communities (with a focus on Islamic communities) who engage in or support ADR processes in family disputes about rights and obligations that apply to all members of the community in Australia's legal system and the intersection of human rights, religion and culture in the context of ADR processes;*
 - *Education for the members of Australia's religious communities (with a focus on Islamic communities) and the broader community about the role of the court, legal advice and opportunities for ADR already available and how the current systems can accommodate difference where appropriate;*
 - *Training for religious leaders (with a focus on Islamic communities) to be able to identify situations of family violence and refer the parties individually appropriately; and*
 - *Creating space for dialogue between judges, police and religious leaders (with a focus on Islamic communities) (Australian Human Rights Commission 2010: 3-4).*

As contracted with the Commission, this review reports on collated and analysed “research from the States and Territories on the Two Themes of the Project, in particular from Queensland and Western Australia” (Australian Human Rights Commission 2010:13). The review concludes that comprehensive and systematic Australian research is required to investigate the topics raised by the “two themes.”

Australian Research on Practice, Education and Training in Alternative Dispute Resolution Related to Family Law Issues in Islamic Communities

The Australian literature on this subject, in terms of published, high-quality research (that is, systematic and comprehensive investigation undertaken with public funding, either through research higher degrees or competitive, peer-reviewed grants), is sparse indeed. There are published critical commentaries and opinion pieces, and there is online material describing recent developments related to the subject. However, the research required to identify and analyse the patterns and dynamics of alternative dispute resolution related to family law matters in Islamic communities in Australia does not yet exist.

Much of what is published in relation to alternative dispute resolution related to divorce and family matters in Islamic communities in Australia claims that the prevailing system of Australian family law and its provisions for managing marital breakdown, divorce, child custody and parenting arrangements does not adequately address the rights and interests of Islamic Australian citizens, providing reasons and argument in support of it. What is notably absent however is published empirical research – both quantitative and qualitative – that demonstrates:

- how and why current family law and mediation provisions are failing Australian Islamic communities;
- the extent to which members of Australian Islamic communities engage in and support alternative dispute resolution processes related to divorce and family matters;
- the extent to which members of Australian Islamic communities eschew and reject alternative dispute resolution processes related to divorce and family matters; and
- how and why the existing operation of alternative dispute resolution processes related to divorce and family matters in Islamic communities do or do not serve their rights and interests.

The following outlines and critically discusses the existing published commentaries that engage with alternative dispute resolution, divorce and related family matters among Australian Islamic communities.

1. Australian family law does not accommodate the requirements of Islamic divorce, child custody and parenting arrangements

One of the most influential contributions to the commentaries on family law issues in Islamic communities in Australia is Jamila Hussain's book, *Islam: Its Law and Society* (2004). Hussain addresses the issue of alternative dispute resolution in relation to family law issues within Islamic communities in the context of divorce, child custody, and parenting plans and consent orders. She prefaces her discussion by explaining that there is little conflict between Sharia or Islamic law and Australian Family Law regarding the issue of marriage. She notes that Imams are registered as Marriage Celebrants and all elements of Islamic marriage such as the consent of a *Wali* (guardian for marriage), *Mahr* (dowry), offer and acceptance, may all be complied with within the terms of Australian law. At the same time, all requirements

of Australian law towards marriage, such as notice, consent, witnesses and registration, are readily acceptable to Muslim couples. The only issue of Muslim marriage which conflicts with Australian law, Hussain notes is that of polygamy which is criminalised in Australia as bigamy.

Nevertheless, Hussain proposes that there is a major conflict facing Muslim compliance with Australian Family Law in relation to *divorce*. Religious divorce, unlike religious marriage, is not recognised at all by Australian law. Hussain argues that this is a problem for Islamic communities in Australia for a number of reasons. First, by contrast with the Australian Family Law Act 1975 (Cth) (cited in Hussain 2004:218), Islamic divorce customarily takes three months, not twelve. Second, while the Australian Family Law Act 1975 does not acknowledge “fault” in divorce, some Muslims prefer to have fault included in the divorce process. Third, Australian law pertaining to child custody arrangements, parenting plans and consent orders (which take into account a child’s social and familial background, and the time spent with each parent) fail to address the Islamic law that children must live with their mother and should remain with their ethnic/religious community. Hussain concludes, “the result is that some Muslims have decided to disregard Australian laws entirely in family matters and have simply married and divorced under religious law” (Hussain 2004:219). Furthermore, Hussain continues, when Muslim women in Australia want a religious divorce, they must return to a Muslim country in which there is a Muslim court or seek the assistance of a group of local Sheikhs who have established an informal tribunal to deal with these matters. She comments that “the Family Law Council has recently conducted an inquiry into this problem” (Hussain 2004:219).

In response, Hussain (2004:219) proposes a specific alternative dispute resolution process as her following comment outlines:

“Since mediation has become the desired method of settling disputes between divorcing parties concerning children and even property, and since mediation and arbitration are the recommended means of settling marital differences under Islamic law, there is a need for the Muslim community to set up their own family mediation service. At present, Muslim couples referred to mediation must attend upon non-Muslim mediators who cannot be expected to understand fully the cultural and religious issues involved. Normally, Muslims are reluctant to seek help from sources outside the community and will use Australian Courts only as a last resort and even then the Court’s judgment will not necessarily resolve underlying problems which are caused by different family values”.

Hussain’s assertion that Australian Muslims prefer to have fault included in the divorce process, is a significant claim that is supported by no research on how widespread this preference is and whether it is held by the vast majority of Australia’s diverse Islamic communities. The further claim that when Muslim women in Australia want a religious divorce, they must return to a Muslim country in which there is a Muslim court or seek the assistance of a group of local Sheikhs to deal with these matters, is also advanced in the absence of any evidence to demonstrate how extensive this practice is among members of Australian Islamic communities. And while there is strong evidence that immigrant communities from non-Anglo ethnicities are significantly under-represented in their use of family mediation services associated with the Australian Family Court (see Armstrong 2009:4), further research is needed to establish whether people from Islamic communities are over-represented among this group.

2. Australia is “not ready for legal recognition” of Sharia law in interpersonal disputes, especially related to divorce and family matters

In Queensland, the legal researcher, Ann Black (2008), comments on alternative dispute resolution processes and family law issues in Australian Islamic communities in her *Alternative Law Journal* article, “Accommodating Sharia law in the Australian legal system: Can we? should we?” Like Hussain, she claims that Australia’s 350,000 Muslims have a “preference to have disputes (including those related divorce, child custody and parenting) settled by persons with Islamic credentials” (Black 2008:216). Black reiterates many of Hussain’s comments on Australian Islamic practice related to divorce. She states, “the reality is that for Muslims generally in Australia, marriage, including polygynist ones, divorce and custody can and do occur without resort to the Australian legal system” (Black 2008:216). And like Hussain, she cites no research to substantiate this. An important and useful conceptualisation of the issue of religious divorce among Australian Islamic communities proposed by Black (2008:216), however, is that it “operates in the realm of the unofficial or the extra-legal, leaving it in a sphere of *cultural practice* (emphasis added).” As a result, she comments, there are significant implications for Islamic communities. One is that the legally unregulated operation of Sharia in relation to divorce does not guarantee fairness and justice:

“As Shariah law continues as the dominant normative force in the lives of many Australian Muslims, its operation and regulation is essentially ‘underground’, in the sense that it is not subject to scrutiny by anyone other than its participants. Nor is it subject to the protection Australian laws and process could provide... Essentially, we are allowing determination of important matters like divorce, custody and maintenance to go unchecked. Islam is premised on doing justice between the parties, and in seeking fairness in terms of the Shariah. But can Muslims in this country be sure, in a totally unregulated or self-regulated environment, that this is being achieved? If the government, in conjunction with representative bodies of the Muslim community, were to agree and give formal recognition to the application of Islamic law by a Board of Imams, a Shariah Arbitration Council or Court, the opportunity for regulation and accountability becomes more likely” (Black 2008:217).

This argument lies at the heart of support for the establishment of publicly recognized alternative dispute resolution processes related to divorce, child custody and parenting arrangements in Australia. (It is one advanced in detail by Ghena Krayem, a Sydney-based PhD researcher, whose comments are discussed below.) Yet as Black also explains, such a view is by no means unanimous among and representative of Australia’s diverse Islamic communities. Citing a Family Law Council of Australia (2001) report, she claims that just as common among Australian Muslims is the view that the Australian Family Law system does provide access to fairness and justice in relation to divorce and related matters (Black 2008:218). She also reports on the widespread and organised opposition by Muslim women in Canada to the proposed introduction of legally sanctioned faith-based arbitration – or religiously based alternative dispute resolution – on the basis of its potential for the violation of women’s civil rights, especially in relation to family law matters (Black 2008:219). In the face of the pluralised character of contemporary Islamic life and views, particularly in relation to divorce, and the male dominance of Islamic religious governance in Australia, Black concludes that Australia is “not ready for legal recognition” of Sharia law and the introduction of alternative interpersonal dispute resolution mechanisms. In the absence of an Australian bill of rights, she adds, the lack of readiness is even further compounded.

3. Muslim women in Australian Islamic communities are diverse in their views and practices, including in relation to religious divorce and related family matters

Samina Yasmeen (2005, 2007, 2010), based at the Centre for Muslim States and Societies at the University of Western Australia, is a scholarly commentator on Islamic communities in Australia. Much of this commentary is based on published social research. Her sociological work on Muslim women in Western Australia is especially informative in terms of understanding the diversity of Muslim women's participation in family, social and political life, and the views they hold in the process, including those related to marriage, family and divorce. Certainly, as she proposes, "traditional Muslim womanhood" is alive and well but no more so than emergent femininities that seek to combine Islam with the rights and freedoms of democratic secularism. Despite this, as Yasmeen (2007:51) comments, there is little appreciation by public authorities of this diversity:

"The dominant society has generally focused on those who obviously look Muslim. Hijab, in this context, has emerged as the definer of Muslim women-hood. The tendency to equate those wearing hijab as the true representatives of Islam is admittedly not limited to Australia. Nevertheless, the emphasis on symbols has created a condition where the wider society and state assumes that those subscribing to traditional dress code are truly representing Muslim women. State structures inadvertently and innocently support the orthodox Muslim women groups without always exploring representation from the other end of the spectrum. The trend is slowly changing with some government agencies (for example, the Office of Multicultural Interests in Western Australia) engaging a wider network of Muslim women. But the overall picture remains one where a smaller minority of Muslim women subscribing to traditional notions of Muslim womanhood are being recognised and acknowledged by governmental institutions as representing all Muslim women."

In a recent telephone interview (6 January 2011) for this literature review, Professor Yasmeen reported that neither she nor those connected with her Centre have conducted any research into alternative dispute resolution processes related to family law matters. Professor Yasmeen did say that in 2010 the Centre held three workshops for the Muslim community in Perth for three Sundays from 2 May to introduce participants to Australian and Family Law and Family Law Dispute Resolution. Training was provided to participants in dispute resolution processes and practice in the community. Associate Professor Robyn Carroll at UWA's Law School facilitated the workshops which were designed to meet the needs of local Muslim community members, leaders, imams and advocacy organisations, and at no cost to participants (see also <http://www.cms.uwa.edu.au/>). In the same telephone interview, Yasmeen further commented that among "traditional Muslim women" in Western Australia, secular divorce as administered by the Australian legal system raises significant issues for their understanding of their status as no longer married. Yasmeen argues that Islamic religious divorce plays a profoundly constitutive role in cultural understandings at least among "traditional Muslim women" (Yasmeen 2007) of how they understand their marital status and identity. In the absence of religious divorce, they often believe and feel their marriage has not been dissolved and they are not free to re-marry.

4. Islamic family law does not oppress women: it is women's exclusion from its governance, and the absence of public support for and regulation of how it operates that is the problem

Ghena Krayem, as previously mentioned, also concurs that research to explore Australian Muslim women's views and practices in relation to divorce and related family law matters is well overdue (2008: 24). In an online paper from a recent national conference - *Challenges to Social Inclusion in Australia: The Muslim Experience* - conducted by the National Centre of Excellence for Islamic Studies Australia at the University of Melbourne, Krayem (2008:2) examines "the call for recognition of Muslim Family Law" in Australia. She argues that "what is needed is a genuine dialogue with the community, one that is not reliant on mere stereotypes and generalisations but *one that is informed by the real lived experiences of women within these minority groups* (emphasis added)." It is in this context, according to Krayem, that research is needed. Significantly, however, while she argues a passionate case for the introduction of aspects of Muslim Family Law into Australian divorce processes, *no research is presented in support of her assertions about the relationship between their operation and their impact on Australian Muslim women from the perspective of women themselves.*

Rather, Krayem argues her case with reference to a critique of an argument by some feminist commentators that "multiculturalism is bad for women". She draws on theoretical contributions by proponents of multicultural liberalism and citizenship such as Will Kymlicka (1989, 1995, 2007 cited in Krayem) and Ayelet Shachar (2007 cited in Krayem) in developing her case. Her conclusion is that, contrary to the prevailing international feminist argument that Islamic family law, especially in relation to divorce, disadvantages women and consolidates gender inequities, this is not necessarily the case. It all depends on how secular State-based family law and Islamic family law are combined as a system of governance in relation to divorce and related family matters. Fundamental to Krayem's argument here is the need to establish "genuine dialogue" and co-operation between Islamic communities and the state, including Muslim women as distinct from "the Muslim community" as a whole.

Krayem's paper suggests that state-sanctioned alternative dispute resolution processes related to family law matters in Islamic communities are fundamental to the rights of religious-ethnic communities within liberal democracies, and in particular of women within them. In the absence of such processes, in fact, Krayem proposes that the rights and interests of Muslim women are threatened. The confinement of Islamic divorce to an unofficial, cultural practice is a major challenge to gender equality in Australian Muslim communities. While Krayem's paper is not a peer-reviewed publication, it has underpinned a number of opinion pieces and commentary in the Australian media about Islamic family law and women's rights (Krayem and Farache 2008, Neighbour 2010-2011). It is for this reason that it is discussed in this review. Significantly, while Krayem's case rests heavily on what Australian Muslim women say and do in relation to Islamic divorce, the research-based evidence for this is neither presented nor cited in relevant peer-reviewed publications.

Conclusions

The establishment of alternative dispute resolution processes associated with divorce and family law matters in Islamic communities in Australia warrants further research. If policy makers and legislators are going to look at this issue systematically, then it is critical that they are informed about the arguments and reasons marshalled by proponents and opponents of Islamic ADRs associated with divorce and related family law matters. They also need to be able to draw on sound empirical research – both quantitative and qualitative – that lets us know:

- how and why the current family law and mediation provisions are failing Australian Islamic communities;
- the extent to which members of Australian Islamic communities engage in and support alternative dispute resolution processes related to divorce and family matters;
- the extent to which members of Australian Islamic communities eschew and reject alternative dispute resolution processes related to divorce and family matters; and
- how and why the existing operation of alternative dispute resolution processes related to divorce and family matters in Islamic communities do or do not serve their rights and interests.

Critical scholarship in the field has developed rapidly with publication of cogent and well-argued commentary about the pros and cons of ADRS in Islamic divorce and related family law matters in Australia. Systematic and comprehensive empirical social research, subject to critical peer review in reputable publications, is now required to furnish an evidence base that can be used in examining the claims and arguments that have been advanced.

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