The position of Australian Muslim women in polygamous relationships under the Family Law Act 1975 (Cth): Still 'taking multiculturalism seriously'?*

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While committed to principles of equality and inclusive of various cultural beliefs, the Australian legal system is unitary and does not recognise Islamic law or any other legal system. However, many members of our growing Australian Muslim communities, while complying with Australian law, may regulate their personal relationships, notably marriage, according to the legal system of Islam. Under the Australian family law system rules of Islamic law may be considered as matters of fact where relevant to the parties. Islamic family law contains both similarities and differences to Australian law with respect to marriage. One key difference is in the status of polygamous marriages, which are invalid under Australian law but valid under the religious law of Islam. This difference leaves the status of many Muslim women who are a subsequent spouse in a polygamous relationship as potentially that of a de facto partner. However, the recent transfer of de facto property jurisdiction to the family court system may not include all women in this form of relationship.

I Introduction

Recent years have seen significant legislative changes to the way in which family relationships are addressed by the family law system. In 2008 the family court system's property jurisdiction was extended to include most de facto couples[1] on relationship breakdown, in the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth). In particular, this entailed a broad definition of 'de facto relationship' which includes persons who are in more than one de facto relationship simultaneously; or in a de facto relationship and a legal marriage simultaneously.[2]

The goal of this provision seems to be to ensure that as many family units as possible fall within the jurisdiction of the Family Court for their property division and maintenance, to provide consistency and attendant certainty of

* This phrase is borrowed from Patrick Parkinson's article 'Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities' (1994) 16 *SydLR* 473.

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1 The changes extend to couples whose relationship falls within the definition of 'de facto relationship' and who meet other threshold jurisdictional requirements such as location and length of relationship: see, eg, *Jonah & White* (2011) 258 FLR 236; 45 Fam LR 460; [2011] FamCA 221; BC201150244.

2 Family Law Act 1975 (Cth) (Family Law Act) s 4AA(5).

rights and responsibilities following the breakdown of intimate partnerships irrespective of the marital status of the parties involved.[3] The inclusion of people with multiple relationships represents a marked shift in policy in light of traditional concepts of 'family' and the nature of intimate partnerships recognised in family law legislation. It stands in stark contrast to the legal definition of marriage which retains its monogamous character.[4]

Although it was not intended to extend to polygamous relationships generally,[5] this shift in definition of de facto relationship may clarify and better provide for the proprietary interests of a minority group within Australia: Muslim women in polygamous relationships which, although valid under Islamic law, are not recognised as legal marriages under Australian law.

Islamic law occupies a central place within the religion of Islam and the practical religious observance of Muslims in Australia, particularly in the ordering of their personal relationships.[6] For a minority of Muslims, this includes entering into polygamous relationships which are valid marriages under Islamic law. Until now, these relationships have either been entirely unrecognised or at most categorised as 'de facto relationships' under Australian law, depending on the jurisdiction and area of law in question.

Although Australia is a culturally diverse nation, there is only one legal system: any suggestions of legal pluralism, either for Indigenous customary law,[7] or more recently for *sharia* law, have been emphatically and continually rejected.[8] Any inclusion of polygamous de facto partnerships within the meaning of de facto relationships would not change this position. Additionally, it seems likely that legal marriage in Australia is to retain its monogamous nature. Neither changing the definition of legal marriage nor recognising partners to a polygamous religious marriage as de factos would amount to recognition of *sharia* law. However, the nature of marriage law and

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3 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, pp 5823–4 (Robert McClelland, Attorney-General).

4 Marriage Act 1961 (Cth) s 5.

5 Commonwealth Parliamentary Debates, House of Representatives, 28 August 2008, pp 6541–3 (Robert McClelland, Attorney-General), p 6543.

6 In a recent survey, the majority of Muslims (71%) surveyed support having regard for their religious identity, while favouring integration at all levels of engagement into the wider Australian society: H Rane et al, 'Towards Understanding What Australia's Muslims Really Think' (2011) 47 *Jnl of Sociology* 1 at 9.

7 'To date, recognition of Aboriginal law in the legal system and its processes has been piecemeal and haphazard and most Australian legislatures have been reluctant to formally recognise Aboriginal law': M Davis and H McGlade, 'International Human Rights Law and the Recognition of Aboriginal Customary Law', Background Paper No 10, Law Reform Commission of Western Australia, 2005, p 382.

8 C Merritt, 'No place in legal system for *Sharia*: Jim Spigelman', *The Australian* (online), 2 June 2011, at <http://www.theaustralian.com.au/business/legal-affairs/no-place-in-legal-system-for-sharia-spigelman/story-e6frg97x-1226067487968> (accessed 10 August 2012); P Karvelas, 'Imam wants *Sharia* law here, but A–G says no way', *The Australian* (online), 18 May 2011, at <http://www.theaustralian.com.au/national-affairs/imam-wants-sharia-law-here-but-a-g-says-no-way/story-fn59niix-1226057823890> (accessed 10 August 2012); P Costello, 'Worth promoting, worth defending — Australian citizenship, what it means and how to defend it', Speech delivered at the Sydney Institute, 23 February 2006, at <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=speeches/2006/004.htm&min=phc> (accessed 10 August 2012); C Merritt, 'Local Islamists draw on British Success in Bid for Sharia Law', *The Australian*, (Sydney), 7 October 2011, p 29.

the new de facto property provisions both raise issues of the legal status of, and extent to which Australian family law provides remedies for, Muslim women who are the subsequent spouse within a polygamous relationship.

In order to investigate this issue which influences the status of some Muslim women, this article will briefly discuss some of the similarities and differences between Islamic and Australian law in the area of marriage which are practically relevant in family law cases in Australia. It will also examine the potential legal status of Muslim women in a polygamous relationship, particularly in light of the new definition of de facto relationship in s 4AA(5) of the Family Law Act. It will then consider whether the operation of the new provisions, in combination with existing marriage law, represents a law which can be said to 'take multiculturalism seriously' for this minority group. Ultimately, the new de facto provisions may not adequately provide for and protect those Muslim women who are in a polygamous relationship which breaks down.[9]

II Background

Australia is a pluralistic society in terms of culture, religion and ethnicity, yet utilises a unified secular legal system.[10] Within this system, aspects of different cultures and religions may at times be relevant to cases involving marriage, divorce, and parenting arrangements for children, at least as matters of fact.[11] While the majority of Muslims in Australia do not seek the recognition of *sharia* law within the Australian legal system,[12] many still

9 On the question of why these women may be particularly vulnerable if their interests are not provided for and appropriately protected, see below, Pt IV(B).

10 P Parkinson, *Tradition and Change in Australian Law*, 4th ed, Lawbook, Sydney, 2010, p 7.

11 Although issues of the application of Islamic law in Western countries with a sizeable Muslim population are occasionally raised in the media and by some politicians, our focus is on the recognition of certain Muslim personal law as matters of fact in Australian courts. For example, see *Wold & Kleppir* [2009] FamCA 178; *Oltman & Harper (No 2)* [2009] FamCA 1360; BC200951327 (3 September 2009); *Between: Imre Lengyel and Anisjah Rasad* [1990] FamCA 29 (19 March 1990); *Simpson-Morgan & Burreket* [2009] FamCA 138; BC200950121 (25 February 2009); *Najjarin & Houlayce* (1991) 14 Fam LR 889; 104 FLR 403; FLC 92-246; [1991] FamCA 57 (12 August 1991); *Rabab & Rashad* [2009] FamCA 69 (9 February 2009); *Ihab & Aarif* [2008] FamCA 443; BC200850913 (24 June 2008); *Woodhead & Woodhead* [1997] FamCA 42 (22 September 1997); *Dinal & Tohim (No 2)* [2009] FamCA 540; BC20095045 (12 June 2009); *RK & SK* [2008] FamCA 465; BC200850791 (4 June 2008); *RK & SK (aka Kaleb & Kaleb) (No 2)* [2007] FamCA 1047; BC200750163 (29 August 2007); *Kasun-Stojanovic & Kasun* [2007] FamCA 877; BC200750524 (15 August 2007); *In the Marriage Of Osman & Mourrali* (1989) 13 Fam LR 444; 96 FLR 362; (1990) FLC 92-111; [1989] FamCA 78 (17 November 1989); *JL & PTL* (2006) 35 Fam LR 686; 201 FLR 1; FLC 93-292; [2006] FamCA 445 (1 June 2006); *State Central Authority & Fouadi* [2010] FamCA 12; BC201050023 (22 January 2010); *Wadmal & Amrita (No 2)* [2008] FamCA 1062; BC200850218 (5 December 2008); *Maider & Carrigan* [2008] FamCA 862; BC200850355 (9 October 2008); *Taffa & Taffa* [2009] FamCA 85; BC200950068 (21 January 2009).

12 While it is portrayed at times that Muslims in Australia may be willing to see *sharia* as part of the Australian legal system, the truth is that the overwhelming majority of Muslims in Australia and in the Muslim countries do not support a comprehensive *sharia* law system. For example, Indonesia, Egypt and Turkey and the majority of other Muslim nations have secular modern legal systems within which certain personal law matters, such as marriage and divorce, are based on modified versions Islamic law. Saudi Arabia and Iran are the only

practice principles of their religion which, in some instances, may involve establishing relationships which are legal according to *sharia* law. The most common example of such relationships would be marriage. This is done with reference to cultural, religious and community considerations. In most of these cases there are no inconsistencies with Australian law, as marriages which are valid under *sharia* law may well be valid under Australian law also, depending on the formalities and ceremonies used. If not, they may be classified as de facto relationships instead.[13] This raises the question of the extent to which Australian law currently provides for and protects these people and relationships.[14] This is particularly so given the status of Australia as a multicultural and multi-faith society and our obligations at international law to uphold human rights, including the right to religious freedom, the right to marry and the equal status of women and men.[15]

Although the Muslim population in Australia is very diverse, many Muslims in Australia tend to follow certain legal principles as part of their religious observance. This occurs primarily for two reasons: that religion and law are significantly blended in Islam[16] and in almost all 56 Muslim countries

countries with *sharia* as their main system of law. A recent study shows that the majority of Muslims in Australia seek to integrate into Australian society: See Rane, above n 6, at 17; See also, J Hussain, *Islam, Its Law and Society*, 3rd ed, The Federation Press, Annandale, 2011, p 16; Monash University Centre for Muslim Minorities and Islam Political Studies, *Muslim Voices: Hopes and Aspirations of Muslim Australians*, September 2009, at <http://www.immi.gov.au/living-in-australia/a-multicultural-australia/national-action-plan/_attach/muslim-voices-report.pdf> (accessed 10 August 2012).

13 This reference to Islamic religious marriages includes a form of temporary marriage under *Shia* jurisprudence called *Mutah*. These marriages can be for a short or long period. It legitimises a sexual relationship and recognises the status of children from that marriage. Although the majority of Muslims in Australia are *Sunni* and do not recognise *Mutah*, a sizeable percentage of Muslims in Australia are *Shia*. The authors of this article know of examples of polygamous *Mutah* marriages practiced in Australia, where married men have entered into a *Mutah* as their second religious marriage. On temporary marriage, see J J A Nasir, *The Islamic Law of Personal Status*, 3rd ed, Beril, Leiden, (2009) 59–61; Hussain, above n 12, p 256; S Haeri, *Law of Desire, Temporary Marriage in Iran*, I B Tauris & Co Ltd, London, 1989.

14 This is not a unique question. For example, the Family Law Council had terms of reference into the family law system and clients from culturally and linguistically diverse backgrounds through addressing ways in which the family law system meets client needs, can better meet client needs, and 'what considerations are taken into account when applying the Family Law Act to clients of these communities' (Attorney General's Terms of Reference 3). The Family Law Council delivered its report on 27 February 2012.

15 See, eg, *The Convention on Consent to Marriage, Minimum age for Marriage and Registration for Marriage*, opened for signature on 10 December 1962, 521 UNTS 231 (entered into force 9 December 1964). *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 27; *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature on 21 December 1965, 660 UNTS 195 (entered into force on 4 January 1969); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force on 2 September 1990).

16 B Weiss, *The Spirit of Islamic Law*, University of Georgia Press, Athens, CA, 2006, pp 1–23; S H Nasr, *The Heart of Islam, Enduring Values for Humanity*, HarperCollins, San Francisco, 2002, pp 118–120; H Esmaeili and J Gans, 'Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials' (2000) 28 *Denver Jnl of*

and a number of non-Muslim countries,[17] such as India, Thailand and Israel, Muslims have autonomy in regulating their personal relations (such as marriage) according to Islamic law.[18]

Muslims have been arriving in Australia in large numbers as migrants for more than 30 years.[19] Islam is a growing religion in Australia. The majority of Muslims in Australia abide by the dominant and practical version of Islam with an emphasis on the main tenets of the religion, which consists of a belief in one God, prayer, worship and the humanitarian message of Islam.[20] Many Muslims, whether recent migrants, second generation Muslims or recent converts, follow Islamic personal law as part of practicing their religion, particularly in relation to family relationships.[21]

It is notable that Islam and its legal system are not monolithic. Hence, Muslims in Australia come from various cultural and social backgrounds. There are significant cultural differences between, for example, Muslims coming to Australia from Brunei Darussalam, and Indonesia with Muslims from Ethiopia and Iran. While they all can be considered as having the same

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International Law & Policy 145 at 147–8; H Esmaeili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26 *Arizona Jnl of International and Comparative Law* 1 at 7.

17 See T Mahmoud, *Islamic Law in Modern India*, N M Tripathi, Bombay, 1972; T L Loos, *Subject Siam: Family, Law, and Colonial Modernity in Thailand*, Cornell University Press, Ithiaca, 2006; A Layish, *Women and Islamic Law in a Non-Muslim State: A Study Based on Decisions of the Sharia Courts in Israel, Studies in Islamic Culture and History*, Transaction Publishers, New Brunswick, NJ, 2006).

18 'The four terms 'religion of Islam' (*din*), Islamic jurisprudence (*fiqh*), 'Islamic law' and *sharia* have different meanings. Islam generally refers to the entire religion, including beliefs, rituals, morality, ethics and law. *Fiqh* is the study of Islam in order to infer legal and religious principles, and *sharia* (known in English literature as Islamic Law) is divided into principles of beliefs (*aqayid*), transactions (*muamilat*), rituals (*ibadat*) and punishments (*uqubat*). *Sharia* is a system of religious norms which includes many non-legal elements from cultures, tribal systems and moral norms of various Muslim societies. Therefore, modern concepts of law in Islam may be different from traditional or pure theoretical *sharia* or Islamic law. Further, definitions of Islam may be different according to the various juristic schools of law. Nevertheless, a body of diverse legal principles originated with the advance of Islam and applicable in parts of various Muslim societies may well be identifiable. For most Muslims around the world, whether as a minority group in the West or as a majority elsewhere, *sharia* defines the beliefs, rituals and personal law (marriage, divorce, inheritance etc) to be observed. The public aspects of *sharia* (punishments, public law, and international relations) are more of academic interest or concern to political parties in some Muslim countries and not relevant to Australian Muslims': H Esmaeili, 'Islamic Law (Sharia) in Modern Democratic Nation States' (2011) 7(2) *Jnl of Islamic State Practice in International Law* 23 at 28.

19 See A Saeed, *Islam in Australia*, Allen & Unwin, Sydney, 2003; N Kabir, *Muslims in Australia: Immigration, Race Relations and Cultural History*, Kegan Paul, London, 2005; H Deen, *Caravanserai: Journey among Australian Muslims*, Allen & Unwin, Sydney, 1995; W Omar and K Allen, *The Muslims in Australia*, Australian Government Publishing Service, 1996; S Yasmeen, 'Muslim Women as Citizens in Australia, Diverse Notions and Practice' (2007) 42 *Australian Jnl of Social Issues* 41.

20 H Esmaeili, 'Australian Muslims and Citizenship: Sharia Law and the Democratic Nation-State' (2011) 36(4) *AltLJ* 258 at 262.

21 C Merritt, '*Sharia* Law at Work in Australia', *The Australian* (Sydney), 20 July 2011, p 1; A Black, 'Accommodating *Sharia* Law in Australia's Legal System. Can We? Should We?' 33(4) *AltLJ* 214; A Black and K Sadiq, 'Good and Bad *Sharia*: Australia's Mixed Response to Islamic Law' (2011) 34(1) *UNSWLJ* 383.

religion, their social, cultural, racial, and linguistic backgrounds are completely different. As a result, their approach to religion, and thus the legal system of Islam, is different. Islam originated in the Middle East in the seventh century Arabian society. The language used in the Quran and the Prophet of Islam is Arabic. Nevertheless, today only 18% of Muslims are Arab. Within the Arab world there are *Sunni*, *Shia*, and other sects of Islam. There are 22 Arab nations and each have their own specific cultural backgrounds. Therefore, there are diverse Muslim communities in Australia from over 100 countries.[22] However, many Muslims follow Islamic personal law and, generally, principles of Islamic personal law in areas such as marriage, divorce, and custody of children, are to a great extent the same.

The Family Court of Australia has occasionally considered issues of the nature of Islamic marriage customs and their compliance with the formalities of marriage under the Marriage Act 1961 (Cth) (Marriage Act). Recently, the Family Court has considered the status of potentially polygamous marriages under the Family Law Act also.

Two recent cases highlight the ongoing tension between the reality of Australia's unitary legal system and corresponding recognition and protection of each individual's right to religious belief and observance. *Wold v Kleppir*[23] and *Oltman v Harper (No 2)*[24] demonstrate the acceptance of Islamic marriage law formalities for the purposes of the Marriage Act insofar as they accord with existing Australian marriage law. In combination with the new de facto property provisions of the Family Law Act these cases bring to the fore the question of the extent to which the interests of Muslim women in polygamous religious marriages are adequately provided for under Australian family law.

Wold & Kleppir[25] is a single Judge decision of the Family Court concerning the validity of a marriage between the parties. The husband had defended an earlier property settlement application by the wife by asserting that they were not actually married and that the court therefore would need to dismiss the wife's application for want of jurisdiction.[26] The wife then sought a declaration from the Family Court that they were validly married, under s 113 of the Family Law Act.

The husband argued that the marriage was not valid for two reasons: first, because he was mistaken as to the nature of the ceremony and therefore had

22 For Islam and Muslims, see J Esposito, *Islam: The Straight Path*, 4th ed, Oxford University Press, USA, 2010; and M Sedgwick, *Islam & Muslims*, *A Guide to Diverse Experience in a Modern World*, Intercultural Press, Boston, 2006. For Islam and Muslims in Australia, see A Saeed, *Islam in Australia*, Allen & Unwin, Sydney, 2003; S Akbarzadeh and S Yasmeen (Eds), *Islam and the West, Reflections from Australia*, University of New South Wales Press, Sydney, 2005; A Saeed and S Akbarzadeh (Eds), *Muslim Communities in Australia*, University of New South Wales Press, Sydney, 2001; S Yasmeen (Ed), *Muslims in Australia, The Dynamics of Exclusion and Inclusion*, Melbourne University Press, Melbourne, 2010; J Hussain, *Islam Its Law and Society*, Federation Press, Annandale, 2011; and, W Omar and K Allen, *The Muslims in Australia*, Australian Government Publishing Service, 1996.

23 [2009] FamCA 178.

24 [2009] FamCA 1360; BC200951327.

25 [2009] FamCA 178.

26 Although Queensland is a 'referring State', this case predates the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth). Any property division between the couple would have been a state matter had they not been validly married.

not actually consented to the marriage, and second, because the marriage was 'potentially polygamous'. He argued that either of these grounds would render the marriage void under s 23B or s 5(1) of the Marriage Act. In dealing with the husband's second argument the court considered the position of both actual and potentially polygamous marriages under Australian law. This case is discussed further below.[27]

In the same year, and with very similar facts, *Oltman v Harper (No 2)* raised the issue of validity of marriage of a Muslim couple.[28] The Family Court had to decide whether a Muslim man and a woman who married in an Islamic ceremony in Melbourne underwent a valid ceremony of marriage even though some formalities were not complied with and their celebrant was not authorised under the Act. Also in issue was whether the presumption of marriage under *Jacombe v Jacombe* applied.[29]

In both cases, the court found the marriages to be valid under Australian law.[30] These cases highlight two important issues for current Australian family law both directly and indirectly. First, the legal effect of Islamic marriage and ceremonies of marriage under the Marriage Act. Second, given that legal marriage is to retain its monogamous character, the recent changes to de facto property provision raise new questions as to the possible protection afforded by the Family Law Act to Muslim women in polygamous relationships which are considered to be marriages only under Islamic law.

III Validity of marriage in Australian Law and Islamic Law: A comparison

A Definition of marriage

The Marriage Act was amended in 2004 to provide a legislative definition of marriage for the first time in s 5(1): '*marriage* means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life', which adopts the historical definition of marriage. The definition of marriage developed at common law reflected the understanding of marriage in the western Christian tradition.[31] Marriage was seen as 'the voluntary union for life of one man and one woman, to the exclusion of all others'.[32] This incorporated key elements of the doctrine of marriage from within

27 See below, Section F.
28 *Oltman v Harper (No 2)* [2009] FamCA 1360; BC200951327.
29 (1961) 105 CLR 355; [1961] ALR 788; (1961) 35 ALJR 61; BC6100770.
30 See below, Sections D and F.
31 See, eg, Parkinson, above n 10, p 29, in which he comments 'Christianity was to the western legal tradition as the womb is to human life'.
32 *Hyde v Hyde and Woodmansee* [1861–73] All ER Rep 175; [1866] WN 126d; (1866) LR 1 PD 130, 130.

Christianity[33] of a consensual heterosexual permanent relationship which was by nature exclusively monogamous. This understanding of marriage is also shared with modern Judaism.[34]

Marriage in Islam is similar to the Christian and Jewish traditions save as to recognition of polygamy. Under Islamic law it is a union of a man and a woman, within a marriage contract, known as *nikah* or *al-zewaj*.[35] The marriage or *nikah* in Islam is a social, religious and legal institution.[36] The Civil Codes of Syria, Iraq and Jordan define marriage as 'a contract between a man and a woman who is lawfully eligible to be his wife with the objective of joint life and procreation'.[37] Marriage is a highly regarded institution in Islam. It is a legal contract, as well as a sacred[38] relationship.[39] In an Indian case, *Anis Begam v Muhammad Istafa*, it was observed that in Islam 'a marriage is not regarded as a mere civil contract, but a religious sacrament'.[40] Noting this, Fyzee rightly comments that 'marriage partakes of the nature of both *ibadat* (worship) and *muamalat* (worldly affairs)'.[41] This characterisation may influence the approach taken by many Muslims to the institution and the legal recognition of marriage. While some other religions hold a comparable view of marriage[42] Australian law does not, due to its secular nature.

B The essential elements of marriage under Australian and Islamic Law

The restrictions on who may marry are very similar in Australian law to those of Islamic law in relation to prohibitions based on relationships. Prohibited relationships are defined in s 23B(2) of the Marriage Act 1961 (Cth) as being ancestors or descendants and siblings including half and adopted siblings. Under Islamic law, a man cannot marry his close female relatives, but can

33 While there are differences in understanding and doctrine between denominations within Christianity on issues such as grounds for divorce, remarriage and formalities required for marriage, the definition of marriage itself is held in common for Roman Catholic, Protestant and Orthodox denominations.

34 On Jewish marriage law see generally L M Epstein, *The Jewish Marriage Contract, A Study of the Status of Women in Jewish Law*, Law Book Exchange, Clark, NJ, 2004.

35 A Al-Jaziri, *Kitab Al-Figh al al-Mazahi al-Arba'a [the Book of Jurisprudence According to Four Schools of Thought]*, Darelfikr, Beirut, 1999, Vol 4, p 3. For an English source see K Ali, 'Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines' in A Quraishi and F E Vogel (Eds), *The Islamic Marriage Contract, Case Studies in Islamic Family*, Islamic Legal Studies Program, Harvard Law School, Cambridge, Massachusetts, 2008, p 11.

36 Ali, above n 35, p 11.

37 Syrian Civil Code Art 1; Iraqi Civil Code Article 3/1; Jordanian Civil Code Art 2. Marriage in Kuwait, Algeria, Oman, and Iran is defined in similar terms also; see Kuwait Law No 51-1984 Art 1; Family Law No 84-11/1984 Art 4 (Algeria).

38 The sacred nature of marriage in Islam is seen in the *hadith* of the Prophet of Islam, stating '*al nikah al sunnati man raqaba min sunnati fa lisa minni*' ('marriage is my tradition, and whoever avoids it is not part of my community'); see also The Quran 24:32.

39 A Fyzee, *Outlines of Muhammadean Law*, Tahir Mahmood (Ed), New Delhi, Oxford, 2008, p 70.

40 ILR [1933] 55 All, 743, 756.

41 Fyzee, above n 39.

42 For example, Judaism, Christianity, Hinduism. See M A Yarhouse and S Nowacki, 'The Many Meanings of Marriage: Divergent Perspectives Seeking Common Ground' (2007) 15(1) *Family LJ* 36.

marry his cousins.[43] Furthermore, a man is prohibited from marrying ascendants or descendents of his wife, or the wife of any ascendant or descendant.[44] Islamic law also prohibits marriage between children and foster or surrogate parents.[45] Also, Islam further limits marriage for other reasons, such as religion.[46] Under Islamic law a person is not allowed to marry an adulterous person, except if he or she has repented.[47]

The fundamental element of marriage under Islamic law is the consent of the parties. Generally, according to all schools[48] of Islamic law, consent of both parties is required for a valid marriage contract.[49] The principle that consent of parties is necessary for a marriage is based on a number of hadith (sayings of the Prophet), and the practice of the Prophet.[50] However, under certain schools, parents, in consideration of what they believe to be the best interests of their infant children, may consent to a marriage on behalf of their children. In most cases, when these children reach the age of puberty, the children have the option to reject the marriage.[51] Nevertheless, according to the majority of Islamic schools, the marriage will be validated only if consent is given by the child in question once they have attained maturity.[52] In practice, it is only in a few countries, such as Pakistan and Afghanistan, and in regional and rural areas, that the marriage of children occurs, and then only occasionally.

In Australia, generally, the marriage of children does not occur and is illegal under the age of 18 without permission of the court.[53] However, there have been recent cases of the forced marriage of children who have been taken

43 Fyzee, above n 39, p 80.

44 Fyzee, ibid.

45 For further details on prohibited marriage, see D F Mullah, *Principles of Mahomedan Law*, 16th ed, Bombay Thacker, Bombay, 1968 and Sheikh Sayyed Sabiq, *Fiqh al-Sunna [Sunni Jurisprudence]*, vol 2, 2nd ed, Dar al-Fiker, Beirut, 1998, pp 48–61.

46 A Muslim woman is prohibited from marrying a non-Muslim, and a Muslim man may only marry a Christian or Jew, but not followers of any other religion: Nasir, above n 13, p 82.

47 Sheikh Sayyed Sabiq, above n 45, p 64; 'The adulterer should marry an adulteress or an idolatress; and an adulteress should marry an adulterer or an idolater only; and it is forbidden to the believers otherwise.' The Quran, 24:3.

48 Generally, there are two major branches of Islam, which are *Sunni* and *Shia*. Within *Sunni* Islam, there are four schools of law: the Hanafi, the Shafei, the Maliki, and the Hambali. These jurisprudential schools of Islamic law generally follow the same legal principles in major legal issues, but there are differences in some areas, such as the age of marriage, the distribution of inheritance, and the performance of marriage ceremonies. On different schools of Islamic law, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd rev ed, Islamic Texts Society, Cambridge, UK, 2003.

49 Sheikh Sayyed Sabiq, above n 45, pp 89–90.

50 On the question of consent in marriage under Islamic law see Ali, above n 35; J Tucker, 'Questions of Consent: Contracting a Marriage in Ottoman Syria and Palestine' in A Quraishi and F E Vogel (Eds), *The Islamic Marriage Contract, Case Studies in Islamic Family*, Islamic Legal Studies Program, Harvard Law School, Cambridge, Massachusetts, 2008, p 122.

51 See *Abdullah Al-Shatiri v Shariffa Salmah* [1959] 2 MLJ 137; A Quraishi and F Vogel, *The Islamic Marriage Contract, Case Studies in Islamic Family Law*, Islamic Legal Studies Program, Harvard Law School, Harvard, 2008, pp 17–18.

52 Sheikh Sayyed Sabiq, above n 45, pp 90–1.

53 Marriage Act 1961 (Cth) ss 11 and 12.

overseas to be married. In *Department of Human Services & Brouker*,[54] Mushin J held that a 14 year old child should not be taken out of Australia for the purpose of marriage. According to Mushin J, 'the fact that marriage could not be celebrated in Australia is, in itself, a reason for not permitting a child who is resident in Australia and subject to this Court's jurisdiction, to be taken out of the country for the purpose of marriage'.[55] It seems that forced marriage and the marriage of children is not a major issue in Australia, but despite the legal prohibition, there is evidence that the practice of solemnising marriages of Australian children overseas may occur occasionally.[56]

Consent of both parties is likewise central to marriage under Australian law, which is by definition a voluntary union. Any purported marriage will be void for lack of consent, which may occur for several reasons.[57] There is no provision for the consent of anyone else to be substituted for the consent of the parties to the marriage. The court must provide consent to a marriage if one of the parties is over 16 but not yet 18 years of age[58] and in addition parental consent is required for the minor, though this may be dispensed with by the court;[59] but these are additional requirements and consent to the marriage itself must still be provided by the parties to it. Further, the lack of consent of a party to the marriage will render it void. The absence of consent of a parent to the marriage of a minor will not.[60]

Other important aspects of marriage from an Islamic perspective are the marriage contract itself and the mahr (dowry) — these need to be considered to give some context to the Islamic laws of marriage.[61]

C Formalities required for a valid marriage by authorised celebrants under the Marriage Act 1961 (Cth)

The exact formalities required for a marriage officiated by an authorised celebrant to be legally valid in Australia are found in ss 40–48 of the Marriage Act 1961 (Cth). There are formal requirements for notice to be given, and consent of both parties. An authorised celebrant must officiate at the ceremony, which requires two adult witnesses.

The exact form of the marriage ceremony itself is in part dependent on who solemnises the marriage. Distinctions are drawn between authorised celebrants who are also ministers of religion, including Imams,[62] and those who are not. Section 45 prescribes the form of the ceremony to be whatever the particular religion of the minister officiating requires. A religious ceremony is also sufficient if a minister of religion who is an authorised

54 (2010) 44 Fam LR 486; FLC 93-446; [2010] FamCA 742; BC201050835.

55 *Department of Human Services & Brouker* (2010) 44 Fam LR 486; FLC 93-446; [2010] FamCA 742; BC201050835 at [21].

56 For a report on the forced marriage of Australian children overseas, see C Overington, 'The Wedding Vow' *The Weekend Australian (Australian Magazine)* (Sydney) 11–12 February 2012.

57 See Marriage Act s 23B(1)(d).

58 Ibid, s 12. Thus, two minors may not marry.

59 Ibid, s 13.

60 Ibid, s 48(2)(f).

61 See the discussion in section E below.

62 Ibid, s 5.

celebrant is present but does not officiate personally (s 45(1)). If the celebrant is not a minister, then particular words of commitment to a marriage relationship must be said by the couple to each other in the presence of the celebrant and witnesses.[63] Under s 46(2), ministers of religion are also able to impose additional conditions on prospective couples before solemnising their marriage. A certificate of marriage is prepared by the celebrant and provides 'conclusive evidence' that the formal requirements of s 45 have been met.[64] Thus, marriages conducted according to Islamic law in Australia (discussed below) will be valid under the Marriage Act 1961 (Cth) as long as it is a first marriage for both parties and not otherwise void under the Act. This provides a measure of recognition for the religious requirements of Islam, although not for polygamous relationships.

D Void marriages under the Marriage Act 1961 (Cth)

Most grounds on which marriages will be taken to be void are understandably reflective of the legal definition of marriage.[65] Section 48 provides that the formalities in Div 2 (referred to above) must be complied with for a marriage to be valid. However, failure to comply with some of those formalities will not render a marriage void.[66]

Given the legal emphasis on the consensual nature of marriage, it is unsurprising that consent will be considered to be invalid if there is a mistake as to the nature of the ceremony (as was argued in *Wold & Kleppir*).[67] Where more than one religious ceremony occurs in the course of a couple becoming validly married in their tradition, this kind of mistake is not unheard of. For example, in *Rabab & Rashad*,[68] the purported marriage was held to be invalid under s 23B(1)(d)(ii) for lack of consent of both parties. They had each been under the impression that the ceremony performed was an Islamic ceremony of commitment signifying betrothal, and not the actual marriage ceremony itself.

E Formalities of marriage under Islamic Law

For many Muslim communities it is customary for a period of betrothal to take place under Islamic law prior to the marriage ceremony of a couple. Similarly to the historical status of engagement in Christianity and older British law,[69] this betrothal forms a promise to marry in the future but is not an actual marriage contract itself.[70]

It is also customary in Islamic law for a dowry (*sadaq*) to be given to the wife upon request. In the Indian case of *Abdul Kadir v Salima*[71] Justice Mahmood defines dowry as 'a sum of money or other property promised by

63 Ibid, s 45(2).
64 Ibid, s 50.
65 Within the Marriage Act these are contained in s 23B.
66 Marriage Act 1961 (Cth) ss 48(2) and 48(3).
67 [2009] FamCA 178 at [40]–[42].
68 [2009] FamCA 69.
69 See, eg, *Cohen v Sellar* [1926] 1 KB 536.
70 See J Nasir, *The Status of Women under Islamic and Modern Islamic Legislation*, Beril, Leiden, 2009, pp 45–8.
71 (1886) 8 All 149, 157 at [12].

the husband to be paid or delivered to the wife in consideration of the marriage'. The dowry is considered as a mark of respect by the husband for the wife. However, in our view, the institution of dowry is also provided in Islam as an important means of financial security for the wife, as her dowry is considered to be her property, separate to that of her husband. Although under Islamic law a woman's property does not pass to her husband upon marriage,[72] she nonetheless typically holds less property in comparison to her husband. This is due to the husband's traditional role as the breadwinner in the relationship in many parts of the Islamic world, which means that he provides the family home and land and owns most of the actual property of the marriage. In the event of divorce, the wife will receive her dowry. In the same way, because the wife's dowry is considered to be her property, it is not part of the husband's estate.[73] Therefore, although she would only inherit a small part of her husband's estate on his death, (one quarter of the estate if there are no children, or one eighth if there are children) she would also receive her full dowry.[74] Furthermore, under Islamic law daughters inherit half as much from their parents as male children do, so the financial security inherent in a married woman's dowry would serve as an important source of property for her for this reason also.[75] If a dowry has not been specifically arranged the marriage will still be valid, and one can be implied within the marriage contract.[76]

Like other legal contracts, there must be an offer (*ijab*) and acceptance (*qaboul*). Traditionally, to form a marriage contract (*aqd*), an oral pronouncement (*khotbah*) is necessary, in which the husband proposes to marry the wife and she states her acceptance. Marriage by proxy is valid under Islamic law, whether or not both intending husband and wife are present in the same place. Although modern Muslim countries have introduced provisions as formalities for marriage, such as the requirement of registration,[77] the traditional law of Islam only requires consent of parties and *khotbah*. According to some schools of Islamic law, such as the *Jafari Shia* school, the pronunciation can be conducted by the parties themselves, even without any witnesses.[78] This means that for some Muslims a marriage can be conducted by simple consent and bi-lateral *khotbah* of the parties. Even for those

72 This is a point of distinction from the British common law under which the property of the wife effectively became the husband's property on marriage and subject to his control due to the principle of 'unity of property': See, eg, L Young and G Monahan, *Family Law in Australia*, 7th ed, LexisNexis, Sydney, 2009, p 588.

73 See Sheikh Sayyed Sabiq, above n 45, p 106.

74 J Schacht, *An Introduction to Islamic Law*, Clarendon Press, Oxford, 1964, pp 167 and 171.

75 See, eg, S Al-Din Muhammad Ibn Muhammad Sajawandi, *Al Sirajiyyah [The Mohammedan Law of Inheritance]*, J Cooper, Calcutta, 1792, p vii. Inheritance rights under Islamic law have been the subject of recent dispute in Australia: see *Omari and Omari v Omari* [2012] ACTSC 33; BC201201080. The case has attracted extensive media attention, eg, C Overington, 'Daughter Disputes Muslim Will That Gave Brothers Twice as Much', *The Australian Newspaper* (Sydney) 14 March 2012, p 1.

76 See, eg, Iranian Civil Code 1928, Arts 1087 & 1091.

77 For the developments of Islamic family law in contemporary Muslim countries see A A An-Na'im, *Islamic Family Law in a Changing World*, Zed Books Ltd, London, 2002; Quraishi and Vogol, above n 35 and Nasir, above n 70.

78 M Helli, *Sharaye Al-Islam [Legal Principles of Islam]*, Persian Translation by Abu Al Ghasem bin Ahmed Yasdi, University of Tehran Press, Tehran, 1995, p 430.

Muslims who may follow an Islamic school of thought which may require witnesses, the procedure may still be very simple. For many Muslims, legitimacy of their relationship as a marriage is based on their religious convictions rather than the fact that they have followed procedural legal requirements in Australia or in any other country. This means that for some Muslims, even if the relationship is legal and permitted under Australian law, they may hesitate to enter into a marriage relationship if *sharia* law does not permit the marriage.[79] Conversely, they may be prepared to enter into a second marriage under *sharia* law even though this marriage would not enjoy legal status under Australian law.

In modern Muslim countries, there are now an additional requirement for a certificate of marriage to be signed by the parties, celebrant and witnesses, or for the marriage to be registered. These formalities vary from country to country.[80] Registration (or an Islamic marriage certificate) is taken as proof of the marriage but is *not* itself required for a valid marriage under Islamic law.[81] Likewise, *Wold & Kleppir* itself demonstrates that an Australian certificate of marriage completed pursuant to s 50 is not required for the marriage to be valid, but is rather evidence that s 45 has been complied with.[82] Compliance with the form of ceremony under s 45 is the key.

F Islamic marriage ceremonies and the Marriage Act: *Wold & Kleppir* and *Oltman & Harper (No 2)*

These two cases demonstrate that many religious marriage ceremonies conducted according to Islamic law will solemnise a marriage that is also valid under Australian law. As with most other religious marriage ceremonies in Australia, in very many instances this is due to the operation of s 45(1), as the Imam[83] is usually an authorised celebrant under the Marriage Act.

In *Wold & Kleppir*,[84] the parties had been through a purported ceremony of marriage which the wife, as applicant, sought to have declared to be a valid marriage under s 113 of the Family Law Act. The husband therefore argued that the marriage was not valid under s 23B(1)(d)(ii), on the ground that he was mistaken as to the nature of the ceremony, believing that it was not an Islamic marriage ceremony but a ceremony at which his wife was converting to Islam.

The court dealt quite quickly with the husband's argument that he was mistaken regarding the ceremony as it accepted the Imam's evidence that a

79 One of the authors of this paper has been approached in cases where Muslim women have been divorced under Australian law, but not *sharia*, and they are unwilling to remarry unless they are able to obtain permission from Muslim authorities that they follow, such as Imams.

80 See all three sources cited above n 77.

81 See, eg, D Pearl and W Menski, *Muslim Family Law*, 3rd ed, Sweet and Maxwell, London, 1991, p 151.

82 Marriage Act s 45(3).

83 In this case, 'Imam' and 'Sheikh' are used interchangeably. Under Islam, 'Imam' refers to either a religious authority or the person who leads the prayers in a mosque. The term 'Sheikh' has a very similar meaning. In some Islamic institutions, the authorities are known as Sheikhs, such as Al-Azhar University, Egypt. In *Shia* and *Sunni* schools, 'Imam' refers to a number of early religious and jurisprudential authorities of Islam, but is also used for those who lead the prayers in mosques.

84 [2009] FamCA 178.

religious ceremony of marriage was performed and that this was clear to both parties, who both signed an Islamic marriage certificate.[85] The court did not accept the husband's evidence that he believed it was a ceremony of conversion.[86] The marriage was carried out according to Islam, which satisfied the requirements of s 45, and the marriage was valid despite the lack of an Australian marriage certificate being completed pursuant to s 50.

In *Oltman & Harper (No 2)*,[87] the husband sought a declaration under s 113 that his religious marriage to the wife was *not* valid under Australian law. He conceded that the marriage was validly conducted under Islamic law, but argued that it was invalid due to non-compliance with various procedural provisions of the Marriage Act 1961 (Cth), and that he had mistakenly believed it was a commitment ceremony rather than a ceremony of marriage. None of the required paperwork had been completed, including a marriage certificate, and the Sheikh who performed the ceremony was not an authorised celebrant. The husband also argued that the marriage was invalid because he did not intend to enter into a legally valid marriage, but only a religious one.

The wife relied on ss 48(2)(a)–(e), which provide for a marriage to be valid despite procedural non-compliance. She also argued that the marriage was legally valid despite the Sheikh not being an authorised celebrant, relying on s 48(3). She stated that she believed the Sheikh was an authorised celebrant and both she and her husband had intended the marriage to be legally valid. In rejecting the husband's arguments and making a declaration that the marriage was legally valid, Young J accepted the wife's evidence as to her intention and rejected the husband's evidence on that point, as the Sheikh stated that he had never discussed civil marriage with the wife or the husband. This showed that at the time of the ceremony 'the husband made no distinction between a religious or civil ceremony of marriage'.[88] On this point Young J found that s 48(3) of the Marriage Act was satisfied, finding that both parties intended the marriage to be legally valid, and at least one party, the wife, believed that the celebrant was authorised to perform the ceremony. Section 45 was not applicable as the Sheikh was not in fact an authorised celebrant under the Act. Young J then also applied the common law presumption of marriage; there was clear evidence that a religious marriage ceremony had been performed and the parties both agreed they were known as a married couple within their community for the duration of the marriage.[89]

In neither of these cases did the court treat the relevant Islamic law as having any legal status, and nor was that argued. Instead, Islamic law was approached as all religious marriage customs are under the Marriage Act: if followed they have the potential to create a legally valid marriage even in the face of some procedural non compliance, depending on the status of the celebrant and the intentions of the parties. While the Marriage Act provides appropriate recognition of Islamic religious marriage for the majority of Muslims in Australia, a potential gap exists in the law's provision for Muslim

85 Ibid, at [32], [35].
86 Ibid, at [44].
87 [2009] FamCA 1360; BC200951327.
88 Ibid, at [25].
89 Ibid, at [80].

women who may wish to enter into a second religious marriage. The capacity of the law to provide for these women will be discussed further below.

IV Polygamy

While marriages conducted according to Islamic law will be legally valid in Australia within the parameters discussed above, they will be void if one or both of the parties are already legally married, due to the monogamous nature of legal marriage in Australia. This remains the case even if the second marriage is properly conducted under Islamic law. A Muslim woman who entered into such a marriage would not be a legal spouse under Australian law. The question of how her relationship would be classified at law could receive varying answers depending on the area of law concerned: social security, succession, property law, or indeed family law.[90] This in turn means that the law's provision for her property rights in particular may differ from those of a legally married woman. Thus, any discussion of the position of these Muslim women in Australia needs to include analysis of the new de facto property provisions in the Family Law Act and the legal status of parties to a polygamous relationship under Australian law.

A Polygamy and Australian Law

Polygamy was once permitted and practiced in many parts of the world.[91] Now, it is mainly permitted in Muslim countries.[92] Polygamy is allowed by the Quran but it is subject to ability of the husband to be just to all his wives: 'marry women of your choices two, or three, or four; but if you fear that you shall not be able to deal justly [with them] then only one . . .'.[93] However, most Muslim countries have regulated the practice and polygamy is the exception instead of the rule. In a number of Muslim countries, such as Tunisia[94] and Turkey, polygamy is illegal.[95] In many other Muslim countries, such as Iran,[96] Iraq,[97] Syria,[98] Morocco,[99] Kuwait,[100] Bangladesh,[101]

90 For a discussion of various laws affecting the legal status and entitlements of de facto partners, see D Kovacs, 'A Federal Law of De Facto Property Rights: The Dream and the Reality' (2009) 23 *AJFL* 104; J Millbank, 'De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effect of the 2008 Federal Relationship Reforms' (2009) 23 *AJFL* 1.

91 See L Mair, *Marriage*, Pelican Books, Harmondsworth, 1971, p 143.

92 See, eg, J Nasir, *The Status of Women under Islamic and Modern Islamic Legislation*, Beril, 2009, pp 25–9; An-Na'im, above n 77.

93 The Quran: 4:3; the translation of The Quran used in this article is from T Saffarzadeh, *The Holy Quran, English and Persian Translation With Commentary*, Honare Bidari, Tehran, 2001, with some adjustment by the authors.

94 'Any person who, being already married and before the marriage is lawfully dissolved, marries again, shall be liable to imprisonment for one year or for a fine of 240,000 francs, or both . . .': The Tunisian Code of Personal Status of 1956, Art 18.

95 See Nasir, above n 70, pp 26–8.

96 Protection of Family Act 1974 s 16.

97 The Civil Code 1951 Art 3.

98 The Civil Code 1949 Art 17.

99 Personal Status Law Art 31.

100 Personal Status Act 1984 Art 23.

101 *Jesmin Sultana v Mohammad Elias* (1997) 17 BLD 4.

Pakistan,[102] Egypt,[103] and Indonesia,[104] restrictions have been imposed by legislation in respect to polygamy.[105] For example, Muslim men in Pakistan must obtain written permission from an arbitration council before entering into a second marriage. The council consists of the representatives of the man, the existing wife, and an independent arbitrator.[106] Also, the man must present reasons to the council for polygamous marriage.[107] The arbitration council may permit a second marriage if it is satisfied that the second marriage is just and necessary. The term 'just and necessary' is defined by the rules laid down in pursuance of the Pakistan family law legislation. Rule 14 provides that a polygamous relationship is 'just and necessary' if the first wife is physically unfit, insane, infertile, or unwilling to continue a conjugal relationship.[108] According to Iranian family law, a man can only enter into a marriage with a second wife in several specific circumstances. These circumstances include: consent from the first wife; serious mental and psychological illness; criminal conviction of the wife resulting in imprisonment of more than 5 years; serious drug and alcohol addiction; infertility; and if the wife has gone missing for at least 4 years.[109]

In Australia, bigamy is a criminal offence.[110] In practice, there are ways for Muslims to enter into a polygamous relationship without breaching Australian law; as long as their relationship is not a legal marriage. Indeed, according to an Australian Muslim Sheikh in Sydney, he is approached to perform polygamous religious ceremonies on a regular basis (almost weekly), but refuses to perform such ceremonies.[111]

Any marriage solemnised in Australia that is *actually* polygamous would be automatically void under s 23B(1)(a). This did not apply to the parties in *Wold & Kleppir* on the facts as it was the first marriage for both parties. However, the husband argued that the court's jurisdiction under the Family Law Act does not or should not extend to marriages which are potentially polygamous. In doing so he relied on the British case of *Sowa v Sowa*.[112] The court did not accept that simply being a potentially polygamous marriage was enough to void an otherwise valid marriage. No specific reasons were given, with the court simply finding no merit in the husband's argument and 'accepting the

102 Muslim Family Laws Ordinance 1961 s 6.
103 Personal Status Provisions 1929 Art 11.
104 See generally R M Feener and M E Cormack (Eds), *Islamic Law in Contemporary Indonesia*, Islamic Legal Studies Program, Harvard Law School, 2007.
105 Pearl and Menski, above n 81, pp 240–1.
106 Muslim Family Laws Ordinance 1961 (Pakistan) s 6.
107 Ibid, s 6.
108 Rule 14 of the Muslim Family Laws Ordinance 1961 (Pakistan); For further discussion on the nature of restrictions put on polygamy in Pakistan, see J Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21(1) *International Jnl of Law, Policy and the Family* 108 at 116–17.
109 Iranian Family Protection Act 1975 Arts 8, 16; See also the Civil Code of Iran 1928 s 1029.
110 Marriage Act (Cth) s 94(1).
111 'Recognise Polygamous Marriages, says Sheikh Khalil Chami', *Herald Sun* (online), 25 June 2008, at <http://www.heraldsun.com.au/news/national/recognise-polygamy-sheikh/story-e6frf7l6-1111116724455> (accessed 10 August 2012); See also, C Merritt, '*Sharia* law at work in Australia', *The Australian*, July 2011, p 1.
112 [1961] 1 All ER 687; [1961] P 70.

force' of the wife's submissions on the issue.[113]

Family courts *do* have jurisdiction over polygamous marriages which have been validly solemnised in an overseas jurisdiction but the Family Law Act stops short of effectively validating those marriages. Rather, s 6 provides that such a marriage will be *regarded* as a 'marriage' for the purposes of the Act. This extends the relief available under the Act to people who are parties to those marriages.[114]

Any relationships other than marriages (either monogamous or included due to s 6) were, until recently, outside the jurisdiction — and thus the protection — of the family court system. Section 6 would not apply to a polygamous religious marriage entered into in Australia, but only overseas. Prior to the property law reforms, at most, polygamous relationships entered into in Australia involved a first spouse who was legally married, with any additional spouses at most de facto, and not de jure spouses.[115]

This raises two questions. First, does this regime provide adequately for the rights and protection of such families at law, in light of international human rights law requiring Australia to legislate inclusive of the cultural and religious rights of minorities and in a way which ensures gender equality between women and men?[116] Specifically, does the recent reform including de facto property disputes on relationship breakdown within the jurisdiction of the federal family law system adequately protect the proprietary rights of Muslim women in polygamous de facto relationships? The effects of the reform are not certain, and it seems that applying those provisions to a polygamous de facto relationship may be difficult. While the application of s 6 to such relationships has many advantages, such as the absence of threshold jurisdictional requirements, the fact that it does not apply to polygamous marriages entered into within Australia limits its potential to provide for Australian Muslim women. Therefore, a second question remains: in a multicultural, multi-faith Australia in 2012, do polygamous relationships require further protection at law?[117]

B Polygamy and protection of Muslim women in Australian Law

Although polygamy has been practiced in Islam since its advent and is still practiced in Muslim countries and occasionally by Muslim communities in the

113 *Wold & Kleppir* [2009] FamCA 178 at [55]–[56].

114 See Parkinson, above n *, p 494; see also P Parkinson, *Australian Family Law in Context: Commentary and Materials*, 4th ed, Lawbook, Sydney, 2009, p 329.

115 Black and Sadiq, above n 21, pp 408–10.

116 See *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 27 which states 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'; See also *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature on 21 December 1965, 660 UNTS 195 (entered into force on 4 January 1969).

117 This question was addressed by the Australian Law Reform Commission in the early 1990s; see, Parkinson, above n *, pp 496–504. At that time the commission recommended against legislating for polygamous marriages after consultation with the Islamic community.

West, in the modern world this has been the exception rather than the rule. In the eighth century polygamy was instituted mainly to provide social protection and support for unmarried women in communities where there were comparatively fewer unmarried men due to war. Additionally, polygamy was only permitted for men. Women were prohibited from having more than one husband so that paternity of children would not be disputed.[118] In modern times these intended functions are not relevant, and there are concerns that it is more common for men to seek multiple wives for reasons of sexual gratification.[119] Polygamy in Islam is permitted rather than recommended.[120] It has been regulated and limited in almost all Muslim countries, due to social problems associated with the institution of polygamy and its practice.[121] Polygamy has also been linked to increases in divorce rates in some Muslim countries.[122] Independent scholarly research shows that polygamy is associated with family violence, poor child outcomes and mental health issues for women and children.[123] Research in a number of Muslim countries where polygamy is permitted and practiced such as United Arab Emirates and Algeria shows that polygamous marriage increases stress levels and rates of mental illness amongst women and children in those families.[124] Since under Islamic law women are required to be monogamous while men are able to marry up to four wives, polygamy is also considered by modern legal scholars as infringing the equality and rights of women.[125]

There is no information available specifically on the impact of polygamy on women and children in Australia, however concerns as to these effects of polygamous relationships have formed part of the justification for the criminalisation of bigamy here, and in other Western countries, under the harm principle.[126] Given all of the above considerations, it is submitted first that it

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118 See A S M A Khedhri, *Tarikh Al Tashri Al Islami [History of Islamic Law Making]*, Dar Al Kotob, Beirut 1994, p 49.

119 See M Alexandre, 'Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?' (2007) 18(1) *Hastings Women's LJ* 3; B D Rodgers-Miller, 'Out of *Jahiliyya*: Historic and Modern Incarnations of Polygamy in the Islamic World' (2005) 11 *William and Mary Jnl of Women and the Law* 541.

120 See Khedhri, above n 118, p 50; Hussain, above n 12, p 86; J Hussain, 'Muslim Family Law in Australia, Conflicting or Compatible?' in S Yasmeen (Ed), *Muslims in Australia*, *The Dynamics of Exclusion and Inclusion*, Melbourne University Press, Melbourne, 2010, pp 204, 210.

121 See Rehman, above n 108.

122 See, eg, A Religion, 'Indonesia: Women Prefer Divorce to Polygamy in Islamic Courts', at <http://www.adnkronos.com/AKI/English/Religion/?id=3.0.2978152304> (accessed 2 March 2012).

123 A Al Krenawi, 'Women of Polygamous Marriages in Primary Health Care Centres' (1999) 21(3) *Contemporary Family Therapy* 417; D Hassouneh-Phillips, 'Polygamy and Wife Abuse: a Qualitative Study of Muslim Women in America' (2001) 22 *Health Care for Women International* 735.

124 See Hassouneh-Phillips, above n 123.

125 See, eg, A E Mayer, *Islam and Human Rights, Tradition and Policies*, 4th ed, Westview Press, Colorado, 2007, p 115.

126 See, eg, J Baha, 'Why Canada's Prohibition on Polygamy is Constitutionally Valid and Sound Social Policy' (2009) 25 *Canadian Jnl of Family Law* 165. Canada's criminalisation of polygamy has been recently held to be valid by the Supreme Court of British Columbia in part due to the harmful impacts upon women and children: see *Reference re: Section 293 of the Criminal Code of Canada*, [2011] BCSC 1588.

would be inappropriate for the legal definition of marriage to include polygamous relationships. Second, it is important nonetheless for the law to protect adequately and provide for women who enter into a relationship which is polygamous, to guard against potential disadvantage.

C Taking multiculturalism seriously? Recognition of polygamous relationships

Polygamous partners do not enjoy the same status as legally married people. Even after the recent changes to de facto property division through the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) should the law provide more specifically for partners in polygamous religious marriages given Australia's status as a multicultural society?

Whether Australian law should recognise polygamous marriages was canvassed as part of the Australian Law Reform Commission's report on multiculturalism in the early 1990's.[127] In his consideration of the ALRC report, Parkinson ultimately concluded that polygamous relationships did *not* need to be included within the legal definition of marriage. However, a key emphasis of his treatment of that report as it relates to marriage law and the rights of minorities was to critique not only the ultimate question of legalising polygamy but also the *approach* taken to the evaluation of that question.[128] While legalising polygamy is not currently on the political agenda, similar reflection could benefit us in evaluating the effectiveness of the new de facto property provisions in safeguarding the property rights of polygamous partners.[129]

In the ALRC report, western Judeo-Christian concepts of rights, equality, individualism and gender equality were essentially used as the measuring stick for legal recognition of relationships and the status of marriage. Parkinson notes that the Law Reform Commission's approach accords with the traditional liberal emphasis on the 'harm principle' — ie, that the law should not, as a rule, restrict individual freedoms but with the recognised exception of limitations which are in place to prevent harm to others, but it goes further, adding that 'the law should not "support relationships in which the fundamental rights and freedoms of individuals are violated"'.[130]

The ALRC Report recommended against the recognition of polygamous marriages in Australia for two main reasons; first, that it 'offend[s] the principles of gender equality that underlie Australian laws' and second, a lack of public support for extending the institution of marriage to include polygamous relationships.[131] We support the position that polygamous relationships should not be recognised as legal marriages in Australia. However, given the continued gaps in the legal protection of polygamous

127 Australian Law Reform Commission, 'Multiculturalism and The Law' Report No 57, Aust Govt Public Service, Canberra, 1992.

128 Parkinson, above n *, pp 496–504.

129 Even this focus would leave unaddressed the question of whether the law as a whole adequately protects other legal rights of polygamous partners.

130 Australian Law Reform Commission, *Multiculturalism: Family Law*, Discussion Paper No 46, 1991, at [3.28] in Parkinson, above n *, p 483.

131 Australian Law Reform Commission, ibid, at [5.10] in Parkinson, above n *, p 496.

partners,[132] especially second spouses who are mostly women, it is important to consider whether or not other considerations require polygamous relationships to be better protected in alternative ways.

Some issues arising from principles of gender equality can be adequately addressed by ensuring that any provision extending the definition of marriage to polygamous relationships is drafted in such a way as to apply equally to both genders.[133] Marriage already requires the consent of both parties and a provision requiring the consent of existing spouses to the addition of a new spouse could also be incorporated. Consent of the first wife to additional wives is already a requirement of law in many Muslim countries,[134] so this would not raise additional issues for many Muslims entering into polygamous marriages. However, in practice, there are cases where the consent may not exist, or may not be a true consent. For example, in Pakistan, there have been significant breaches of a state law relating to the requirement of consent of the first wife. This breach does not make the second marriage invalid under Islamic law.[135]

Beyond these questions of appropriate drafting, Parkinson seems to consider that the main objection of the ALRC related to gender equality is the argument that polygamy itself is by nature 'oppressive to women',[136] and canvasses the practice in various cultures in which it may well be considered to be so, but notes that this does not automatically equate to an inherent characteristic of oppression within polygamy in all circumstances or cultural practices. This kind of objection to polygamy would fall within the second part of the ALRC's principle 'to not support relationships in which the rights of individuals are being violated'. Parkinson makes three points here. First, he notes that the ALRC did not discuss that second principle specifically as a reason for rejecting polygamy within Australian law.[137] Second, he notes that if this were a justification, then polygamous de facto relationships should also be rejected, for consistency of application.[138] Parkinson's third and focal point is that this kind of reasoning involves paternalism — it tells women what they

132 See M Bailey et al, *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada*, Queen's University Legal Studies Research Paper No 07-12, 2006. They argue that although there is a strong association between polygamy and gender inequality, certain types of polygamy (valid foreign polygamous marriages) should be protected in Canada by extending recognition to those marriages, and that women in a polygamous marriage are likely to suffer because the benefits and burdens of marriage are not fully extended to them: at 13.

133 The issue of gender equality is commonly debated when the question of polygamy is raised, and it is usual to consider whether or not a jurisdiction's laws can be drafted in a way which ensures equality; either through gender neutral language or perhaps with additional safeguards and protections built in, such as requiring the consent of the court. Parkinson makes these points at 499–500, but see also O Jessup, 'The Governor General's Wives: Polygamy and the Recognition of Customary Marriage in Papua New Guinea' (1993) 7 *AJFL* 29; I P Maithufi and G Moloi, 'Reforming Customary Family Law: the South African Experience' (2002) 80 *Reform* 42.

134 See above Pt IV-A.

135 Rehman, above n 108, p 117.

136 Parkinson, above n *, p 500. This objection is not unique to the ALRC's Report, but is a common concern where polygamy is considered elsewhere also.

137 Ibid.

138 Ibid.

may and may not do, while telling them it is for their benefit; and it applies these relational limits to consenting adult women. He notes here that forced acceptance of additional spouses could be guarded against by practical means.[139]

In addition to elements of paternalism, we would add that this basis of objection on the grounds of gender equality is founded on an essentially western concept of what gender equality involves.[140] This is understandable given the western character of Australia's dominant culture, however some western concepts of rights may not easily translate to cultural minorities whose perspectives may differ markedly from the dominant culture, particularly in how they understand and recognise equality of the sexes.[141] It makes little sense to argue against granting someone legal recognition of an equal relationship which they choose and value, simply because it does not afford them the kind of equality that is easily recognisable to the dominant culture. The question of how the values of the dominant culture inform and constrain attempts at legal provision for, and the protection of, minority cultural expression is, however, beyond the scope of this article.

Parkinson notes that lack of public support as a reason for non-recognition is problematic due to the inherent nature of a minority cultural view as being, by definition, in the minority:

> If the role of a law reform commission is seen to be to engage in public consultations and to seek a consensus in favour of particular proposals then the views of powerless or unpopular minorities are unlikely to be accepted. The opinion of a majority is not a sufficient reason for denying the human rights of a minority to cultural and religious expression.[142]

At the time of the report, there was also no real call from Muslim communities to change the law, and so no real need to consider changing the legal definition of marriage further. However, we suggest that even if there remains no call from Muslim communities to change the *legal* definition of marriage to incorporate polygamous religious marriages, the issue remains as to whether or not the law adequately protects the parties involved in those religious marriages in other ways. Given that the legal definition of marriage will remain monogamous, there are potential gaps in the legal protection of Muslim women entering into Islamic religious marriages which amount to polygamous relationships.

We agree with Parkinson that there are compelling reasons for closely

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139 Ibid.

140 Parkinson, above n *, notes a similar influence in the ALRC Report's recommendations; they are grounded in the values which the dominant culture of Australia holds to: at 494. He considers this to be expected and of itself unproblematic, and we agree. We do consider it to nonetheless raise inherent tensions for issues of how western concepts of rights are to be applied to cultural minorities.

141 It should be noted that there are distinguished Muslim scholars who argue that gender equality is a central message in Islam. See, eg, R Hassan, *Equal before Allah? Woman-Man Equality in the Islamic Tradition; Selected Articles*, Grabels, France, 1987, pp 12–24; R Hassan, 'Femininism in Islam' in A Sharma and K Young (Eds), *Feminism and World Religions*, State University of New York Press, New York, 1999; S Ebadi, 'Human Rights, Women and Islam' (2004) 14 *International Institute for the Study of Islam in the Modern world (ISIM) Newsletter* 30.

142 Parkinson, above n *, p 499.

considering the capacity of the family law system to protect minority cultural and religious rights.[143] These reasons apply equally to the outstanding questions of the protection of Muslim women in polygamous relationships. There may well be an opportunity for the law to protect more fully such women without taking the step of changing the legal definition of marriage. These women may fall outside of the jurisdiction of the family court system unless they can be classified as de facto partners. Whether they would come within that definition is as yet unclear. Do the changes to de facto property division therefore require further consideration, in order that family law in particular can 'take multiculturalism seriously'?

V Broadening the property jurisdiction of the Family Courts: Developments affecting de factos

The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) introduced, among other things, a new Part of the Family Law Act empowering federal family courts to make property orders affecting many de facto couples on the breakdown of their relationship, following the referral of relevant power to the Commonwealth from participating states.[144] In the second reading speech, the central aims of this legislation were stated as being to 'provide greater protection for separating de facto couples and simplify the laws governing them [and] . . . bring all family law issues faced by *families* on relationship breakdown within the federal family law regime'.[145] The reforms also provide a measure of equality to same sex de facto couples as the definition of 'de facto relationship' applies irrespective of the parties' genders. Unsurprisingly, the reforms have thus far been largely discussed with reference to the potential impact on the financial consequences of relationship breakdown for de facto couples in Australia generally, and various associated jurisdictional and constitutional issues; as well as the potential effect in other areas of law such as social security, bankruptcy and succession.[146]

The reforms were partly designed to provide better protection to de facto couples, and this was phrased in terms of extending the legislation to all 'families'.[147] However, it is clear that the new regime does not apply to *every* de facto relationship.[148] Most importantly, a relationship must fall within the definition of 'de facto relationship'. Despite the breadth of the new definition,[149] the reforms may not actually extend to all 'families' because the

143 Ibid, p 503.

144 This now includes all states and territories apart from Western Australia as that state has only referred its powers over superannuation.

145 Commonwealth Parliamentary Debates, House of Representatives, 25 June 2008, pp 5823–4 (Robert McClelland, Attorney-General), p 5823 (emphasis added).

146 For both a helpful overview of the reforms and a critique of how well its aims have been achieved, see, eg, Kovacs, above n 90; J Behrens, '"De Facto Relationship?": Some Early Case Law Under the Family Law Act' (2010) 24 *AJFL* 350.

147 Commonwealth Parliamentary Debates, above n 145.

148 This is a key point of Kovacs' in distinguishing the 'dream' from the 'reality': above n 90, at 107–8 and 114–16.

149 As Behrens highlights, Riethmuller FM in *Baker & Landon* (2010) 43 Fam LR 675; 238 FLR 210; [2010] FMCAfam 280; BC201001961 stated at [11] that the definition of de facto

family units contemplated by the reforms are only those which are monogamous in nature. The Federal Government specifically rejected the suggestion that s 4AA(5) could apply to polygamous de facto relationships in the Bill's Second Reading Speech, stating that the multiple relationships contemplated by that section were those in which a couple had been separated for some time but not divorced, and 'only to that extent, and in those circumstances, does the legislation apply to concurrent relationships'.[150] Of course, parliament's intended meaning does not substitute for the actual meaning of the words used.[151] Nonetheless, regard may be given to the second reading speech should this issue require judicial determination.[152]

Cases are emerging in which the categorisation of a particular relationship as a 'de facto relationship' under s 4AA is directly in issue.[153] This is predominantly because it is a jurisdictional issue under the new provisions.[154] Cases commonly require a determination on whether or not a de facto relationship existed at all[155] or at a particular point in time.[156] Some points on the meaning of s 4AA can therefore be made at this early stage.

The Family Law Act has been interpreted in some of these cases using the 'purposive approach' and accordingly as beneficial legislation.[157] Section 4AA cannot be interpreted with reference to the meaning which 'de facto relationship' has under other legislation or case law,[158] and its meaning is entirely governed by the provisions of s 4AA itself.[159] Nonetheless, the courts appear to be following the approach of state courts in exercising their 'very broad' discretion to declare the existence of a de facto relationship.[160] This involves the recognition that the make up of de facto relationships will be as varied as the people who constitute them and that the court must

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is not able to be 'closely proscribed': above n 146, at 352. This approach has since been followed by the Family Court in the single Judge decision of *Moby & Schulter* (2010) FLC 93-447; [2010] FamCA 748; BC201050841, as well as in *Dakin & Sansbury* [2010] FMCAfam 628; BC201006473.

150 Commonwealth Parliamentary Debates, above n 5, p 6543.

151 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; 70 ALR 225; 61 ALJR 190; BC8701765.

152 Acts Interpretation Act 1914 (Cth) s 15AA, and ss 15AB(1)(a) or 15AB(1)(b)(i), depending on arguments made as to the reasons for referring to the second reading speech.

153 For example, *Dahl & Hamblin* (2011) 46 Fam LR 229; 254 FLR 49; [2011] FamCAFC 202; BC201150592.

154 *Jonah & White* (2011) 45 Fam LR 460; 258 FLR 236; [2011] FamCA 221; BC201150244.

155 This was in issue in *Dakin & Sansbury* [2010] FMCAfam 628; BC201006473; *Moby & Schulter* (2010) FLC 93-447; [2010] FamCA 748; BC201050841, *Pike & Howlett* [2010] FMCAfam 802; BC201005623; *Christofis & Zorbis* [2011] FMCAfam 571; BC201104815.

156 This was in issue in *Baker & Landon* (2010) 43 Fam LR 675; 238 FLR 210; [2010] FMCAfam 280; BC201001961; *Vine & Carey* [2009] FMCAfam 1017; BC200909919; *Cole & Childs* [2010] FMCAfam 631; BC201004495; *Hamblin & Dahl* (2010) 239 FLR 111; [2010] FMCAfam 514; BC201003324.

157 See *Dahl & Hamblin* (2011) 46 Fam LR 229; FLC 93-480; [2011] FamCAFC 202; BC201150592; B*aker & Landon* (2010) 43 Fam LR 675; 238 FLR 210; [2010] FMCAfam 280; BC201001961.

158 On this point see Behrens, above n 146, and *Dakin & Sansbury* [2010] FMCAfam 628; BC201006473.

159 *Dakin & Sansbury* [2010] FMCAfam 628; BC201006473 at [13].

160 Both *Pike & Howlett* [2010] FMCAfam 802; BC201005623 and *Dakin & Sansbury* [2010] FMCAfam 628; BC201006473 follow Powell J's approach in *Roy v Sturgeon* (1986) 11 NSWLR 454; 11 Fam LR 271; DFC 95-031.

essentially approach each factual situation discretely. In *Dakin & Sansbury*, Bender FM also stated:[161]

> the nature of the relationship cannot be determined by looking at external societal views of what constitutes a de facto relationship, nor is it determined by what the parties themselves thought their relationship to be.

Section 4AA begins by setting out the basic definition of a de facto relationship — one which involves a person who is neither legally married to or related to the other person as family, but with whom 'having regard to all the circumstances of their relationship, they have a relationship as a *couple* living together on a genuine domestic basis'.[162] Subsection (2) then sets out a wide number of factors to which the court may have regard in determining whether or not that couple are in fact living together on a genuine domestic basis. Subsection (3) provides that no one factor is determinative, nor are the factors individually weighted, but any weighting is determined by the court under subs (4). Subsection (5)(a) then provides for both heterosexual and same sex de facto relationships. The inclusion of same sex relationships was an entirely new addition to the Family Law Act itself, as state and territory Acts have included same sex relationships within their various definitions of de facto relationship for some time. While differing from various other statutory definitions of de facto relationships in some respects, much of the content of the section follows a similar structure to those found elsewhere. However, s 4AA(5)(b) indicates the breadth which the Family Law Act definition is intended to have.[163] It provides that 'a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship'. It is clear that it was not Parliament's intention for this section to extend to polygamous de facto partners.[164] Nonetheless, this broad wording potentially opens the door for polygamous partners to fall within the definition of a de facto relationship and thus attract the same legal status and protection which the Act accords to other de facto partners who meet the threshold requirements. The precise relationships which are contemplated by s 4AA(5)(b) have not yet been judicially determined.

The definition raises several issues for polygamous de facto partners. The first is that the definition of a 'couple' has been stated as involving two people only: '[F]or the purposes of the definition, "a couple" is constituted by two people, whether of the same or opposite sexes'.[165] The plain wording of various subsections of 4AA seems consistent with this interpretation. For example, the heterosexual or same sex couple referred to in s 4AA(5)(a) refers to 'two people'. The rest of the new de facto property provisions, and thus the power to make orders affecting the property interests of parties to a de facto relationship, are clearly drafted in terms which contemplate that relationship consisting of only two people; for example it is property interests of 'either or

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161 Ibid.

162 Family Law Act s 4AA(1)(c) (emphasis added).

163 On this point see *Baker & Landon* (2010) 43 Fam LR 675; 238 FLR 210; [2010] FMCAfam 280; BC201001961.

164 Commonwealth Parliamentary Debates, above n 5.

165 *Moby & Schulter* (2010) FLC 93-447; [2010] FamCA 748; BC201050841 at [139] per Mushin J.

both' of the parties which may be adjusted. On the face of it, the only power that the court would have in altering property interests of a three person polygamous relationship would be to treat each de facto wife's relationship with the husband as entirely separate for the purposes of the division of property; just as it would in a situation involving a de facto couple where one party had a second relationship 'on the side'. Subsection (5)(b) seems to have been included to cover such a situation, especially when read alongside s 90SM(10) which allows someone to be added as a third party to proceedings if they have, inter alia, been involved in a de facto relationship with one of the parties. As drafted, these sections clearly cover a person who is in a de facto relationship with a married person. Section 90SM(10) would protect the de facto partner and allow them to be joined to any property proceedings if their partner's marriage broke down. However, it is unclear whether first, these provisions would extend to a Muslim woman who is the second spouse of her husband under *sharia* law, if all three adult partners live as one family unit. Under *sharia* law, each marriage is a separate relationship, and in practice, in most Muslim countries and communities, families in polygamous marriages live in separate dwellings. However, there are cases where families live together in one residence. In both cases, the husband is in charge of financial management. In Australia, given that bigamy is illegal, there are no statistics as to how Muslim polygamous family units operate. Further, if a court must regard a husband's relationship with his legal spouse as though it is discrete from that of his de facto spouse for the purposes of property division, this may restrict the court's discretion and, more pragmatically, not accurately reflect the reality of the way in which the family manages its property, depending on whether or not they have operated as one or two family units. This tension may in turn impact on the exercise of the court's discretion in making an order which is 'just and equitable'. Thus, even if it is applicable in these situations, s 90SM may not by itself provide adequately for the second spouse's interests. At the least, the court's task may be unduly complicated.

Riethmuller FM takes the 'multiple couple' approach in *Baker & Landon*[166] although he does not specifically address the question of whether or not polygamous couples could fall within that definition at all. Rather, he is addressing the impact of subs (5) on the meaning of 'de facto', given that it broadens the traditional definition as it does not require monogamy. He phrases his inclusion of what he calls 'multiple contemporaneous relationships' as being an example of what the broader definition must 'at least' include, given the existence of subs (5).[167] It is Mushin J in *Moby & Schulter* who more specifically refers to s 4AA as applying to a relationship of two people, in his analysis of the definition.

Mushin J takes a two stage approach to the exercise of the discretion in making a declaration that a de facto relationship exists. He considers that the two elements comprising 'a couple' who are 'living together' must be present, with the subs (2) factors then to be used to assess whether or not that couple

166 *Baker & Landon* (2010) 43 Fam LR 675; 238 FLR 210; [2010] FMCAfam 280; BC201001961.

167 Ibid, (2010) Fam LR 675 at 680; [2010] FMCAfam 280 at [14] per Riethmuller FM.

who are living together are doing so on a genuine domestic basis.[168]

Does this mean that s 4AA *only* applies to multiple de factos and cannot, or may not in some cases, apply to a polygamous relationship (particularly as a polygamous relationship may clearly include just one family unit)? As yet it is not possible to answer these questions definitively. The potential status of polygamous relationships was not in issue in the case and Mushin J was not making a decision on that point, so further case law is needed to specifically address polygamous relationships. Mushin J defined a 'couple' as involving two people. If a de facto couple under s 4AA always requires a two person couple as a starting point, this may well preclude the availability of relief under s 90SM from members of polygamous (as distinct from multiple) de facto couples, particularly now that the couple's status as de factos has been confirmed as a jurisdictional issue.[169]

Even if polygamous relationships are not excluded from the definition of a de facto relationship under s 4AA, the implicit assumptions as to how a 'couple' relationship operates may impact on the content of any property orders, perhaps through the approach which the court takes to their relationship, or the weighting which is given to each individual spouse's contribution to the family's welfare and property. This does not mean the court must necessarily value one spouse's contribution over another, or would not take the family's arrangements into account. Evidence would surely be given as to how the family is structured and the equality of each spouse vis-a-vis the others.[170] Rather, the court may struggle to apply a system of property division predicated upon the existence of either one couple or 'multiple' discrete couples to a family which involves polygamous partners whose lives and property are not separated along those lines.

Given the current interpretation of 'couple' as involving two people, s 4AA(5)(b) seems to cover additional relationships of one of the parties to a de facto relationship. It would not necessarily cover a polygamous relationship/family structure in which one man (for example) has several spouses, one de jure and the rest de facto. Due to the case law to date, as well as the potential application of s 90SM, for the purposes of the Family Law Act at least, a three person polygamous relationship would be treated as two discrete couples living together, and their property would be assessed accordingly. Although we have no Full Court decision on this point, this is the meaning which 'couple' has so far been given, and it accords with the ordinary meaning of the word as well as the structure of s 90SM. This is particularly the case if s 4AA(5)(b) was intended to apply where one person was still legally married but had repartnered,[171] or to make sure that secret additional partners would not be 'left out in the cold' but instead enabled to make their own separate claim on the property of their de facto partner if the relationship ends. This seems to be what is contemplated by s 90SM(10). Thus, 'multiple'

168 *Moby & Schulter* (2010) FLC 93-447; [2010] FamCA 748; BC201050841 at [139]–[140].

169 *Dahl & Hamblin* (2011) 46 Fam LR 229; FLC 93-480; [2011] FamCAFC 202; BC201150592.

170 Under Islamic law there is no hierarchy in a polygamous marriage. Indeed the Quran allows polygamy only if the husband can treat his wives equally: the Quran 4:3.

171 This was the example used by the Attorney General in his Second Reading Speech; Commonwealth Parliamentary Debates, above n 145, p 6543.

relationships which are included within subs (5)(b) are not synonymous with 'polygamous' relationships. At worst, polygamous partners may be left out of the ambit of the definition (as not being members of a 'couple'). At best, a polygamous partner may be included in property division only through s 90SM(10). Section 4AA(1)(c) requires all of the parties' individual circumstances to be taken into account when determining whether or not they are living together on a genuine domestic basis. This would definitely include the circumstance of being in an open polygamous relationship. The subs (2) factors are not exclusive, and 'the degree of mutual commitment to a shared life' in s 4AA(2)(f) is directly relevant. However, Mushin J in *Moby & Schulter* interpreted the two elements of the definition — membership of a couple and living together on a genuine domestic basis — as two separate issues, and s 4AA(2) itself only applies to the second issue, and not the definition of 'couple'.

The impact of these issues relating to the definition of 'de facto relationship' on the requirement that the property orders are 'just and equitable' is as yet unclear. Problems created by treating a polygamous partnership as one involving multiple couples could well be addressed by the broad discretion of the courts in making property orders. Members of a polygamous relationship are more likely to experience disadvantage, first, because they are not defined as 'members of a couple' and thus do not fall within the federal de facto property jurisdiction. Second, a potential gap in the legal protection offered to Muslim women who are the subsequent spouse under *sharia* law is that, if their religious marriage ceremony took place in Australia, they could not be protected under s 6 of the Family Law Act 1975 (Cth) either.

VI Future directions

A Inclusion of polygamous partners within 'de facto relationships'

The newly structured provisions for de facto property division represent a significant shift in the way 'family' is understood within the federal family court system; broadening the jurisdiction of the family courts and the definition of de facto relationship to include multiple couple de facto relationships. However, this new jurisdiction does not apply to all partners: it may well not apply to polygamous partners but only people in multiple de facto relationships simultaneously. These limitations represent gaps in the law's capacity to adequately protect and provide for Muslim women who, pursuant to their religious beliefs, may wish to enter into a polygamous marriage which is valid under *sharia* law. One way to address this may be to change the definition of legal marriage to one which encompasses polygamous relationships, perhaps with the safeguards suggested by Parkinson as a minimum requirement in the event of any possible legal recognition of polygamy.[172] However, given that the social conditions present at the time of

172 Parkinson was not advocating a change in the legal definition of marriage. He was noting the

the ALRC report remain much the same, it is likely that such a change is not practical, and it is still not supported or called for generally by Muslim communities in Australia.[173]

If the definition of marriage remains a monogamous one, an alternative is to ensure that the legal protection of de facto partnerships also extends to people in polygamous relationships. Given that a legal status of de facto relationship seems to be acceptable to some Muslim women provided that their marriage is valid according to Islamic law,[174] it is worth exploring the possibility of including polygamous family units within the new provisions for de facto property division under the Family Law Act.

Two main dynamics affect this discussion. The first concerns the structure and interpretation of s 4AA itself, that is, whether or not polygamous partnerships can actually come within the current definition of 'de facto relationship'. Much depends on the way in which the new provisions are ultimately interpreted: especially the interrelationship between the inclusion of multiple partners within subs (5)(b) and the current judicial interpretation of 'couple' as involving two people.

As discussed earlier, the precise wording of s 4AA(5)(b) does not clearly apply to a family unit which consists of multiple partners in a single polygamous relationship, but rather to a person who is in multiple relationships at one time. The various relevant factors in s 4AA(2) would no doubt assist the court in determining the second part of the definition — whether the partners are living together on a genuine domestic basis — but those factors only apply to that specific issue, and not to the definition of 'couple'. Thus, the definition of 'de facto relationship' in s 4AA may well be difficult to apply to the members of a polygamous relationship, despite provision for 'third parties' to be added to an application for property orders under s 90SM(10), and irrespective of the broad discretionary approach which courts routinely take to property division. A further complicating factor may be the limited weight which has been given in cases such as *Dakin & Sansbury* to the parties' own intentions and conceptualisation of their relationship, given that the existence of a de facto relationship is a question of fact.[175] Taking all of these factors together, it can be said that although the precise breadth of s 4AA(5)(b) is as yet unclear, both the wording of s 4AA as a whole, and the expressed parliamentary intention behind that subsection do not easily extend the ambit of the court's jurisdiction — and with it, the law's protection — to a de facto partner who is a Muslim second polygamous partner. Reform may well be needed in order to achieve that end.

The second dynamic affecting the characterisation of polygamous relationships as de facto couples is the threshold requirements governing the

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types of safeguards which would need to be in place to safeguard autonomy and the equality of women in subsequent marriages should the definition change: above n *, pp 499–500.

173 Parkinson concluded on this point that a change to the definition of marriage was not required, noting the significance of such a change given that it was not called for by the Islamic community: above n *, p 504.

174 For many practicing Muslims, as long as they are in a relationship which is valid under *sharia* (whether permanent or temporary marriage), it may not matter to them what their category of relationship is called under Australian law.

175 *Dakin & Sansbury* [2010] FMCAfam 628; BC201006473 at [13].

jurisdiction of the family courts over de facto partners. As well as being resident in a referring jurisdiction,[176] the de facto partners must meet one or more additional criteria: they must either have a relationship of a minimum total duration of 2 years; or there must be a child of the relationship; or their relationship must be registered in their state/territory.[177] Alternatively, the court may exercise jurisdiction where the order is applied for by a person who made 'substantial contributions' to the property and failure to make an order 'would result in a serious injustice' to that person.[178]

These threshold requirements for the most part delineate jurisdiction according to the factual circumstances of the parties' relationship. This is due to the characterisation of a de facto relationship as one of fact and not law. However, this necessarily leaves underlying gaps in the potential extension of the family court system's jurisdiction over polygamous de facto relationships which do not meet those criteria. As discussed above, we believe that s 4AA(5) is not likely to extend to polygamous relationships in light of the case law to date and parliamentary intention. However, the effect of these threshold requirements is that even if the relationship of a polygamous family unit *could* fall within the definition of de facto relationship in s 4AA(5), that section itself would not adequately provide for the property interests of the second partner, but only those who meet the threshold jurisdictional requirements. For example, a Muslim woman who enters into a polygamous relationship which is a valid marriage under Islamic law would nonetheless be in a form of legal limbo (at least as far as the federal jurisdiction is concerned), if the relationship ended in under 2 years, unless there was a child of the relationship. The main exception would be if she came within s 90SB(c) due to the nature of the financial contributions which she made to the relationship. It is clear that the potential gaps in the Family Law Act's capacity to provide for the property interests of Muslim women in a second marriage which is valid under Islamic law are limited, notwithstanding the existence of s 4AA(5), and s 90SM.

In future, one solution may lie with the last criterion in s 90SB(d). This subsection provides for Div 2 to apply where the de facto relationship 'is or was registered under a prescribed law of a State or Territory'. Where it was, the court need look no further to the factual circumstances of the relationship to determine the question of jurisdiction. However, at present, registration of de facto relationships is not available in all states and territories.[179] Nor are the relevant state and territory laws framed to make provision for the registration of a polygamous de facto relationship. Generally, registration is inclusive of both homosexual and heterosexual relationships; however it does not extend in any jurisdiction to a polygamous relationship. Although it is common for registration to be available either to intimate partners or to other close personal relationships, the relevant definitions again apply only to a relationship

176 See s 90SK.
177 See s 90SB.
178 Section 90SB(c).
179 See the Relationships Act 2003 (Tas); the Civil Partnerships Act 2008 (ACT) and the Relationships Act 2008 (Vic).

between two people[180] — and a person cannot have a relationship registered if they are married to another person at the time, or already in a registered relationship.[181] Those requirements would remove registration as an option for women in a polygamous relationship either where their partner already had a legal spouse, or where all members of that relationship were de facto partners only.

B Other legislative protection for polygamous partners?

It seems there are potential gaps in the legal protection of some Muslim women in polygamous relationships despite the new property jurisdiction of the family court system over many de facto relationships. Another option may be available. Section 6 of the Family Law Act already extends the jurisdiction of the family court system to marriages which are polygamous for the purposes of obtaining orders for property division and maintenance:

> For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.

The section requires the marriage to have taken place outside of Australia, but has no other restrictions on its operation or the range of relationships to which it might apply. Originally, the section's intended application was to immigrant family groups who (for example) separated after arriving in Australia so as to not leave a second spouse disadvantaged by being outside the jurisdiction of the family court system. However, as drafted, it could conceivably apply to Australians who go overseas and enter into a legally valid polygamous marriage, return home to Australia, and then separate at some later date.

Section 6 has none of the jurisdictional thresholds of the de facto property provisions. Neither would it be necessary to enquire into the factual state of the partners' relationship to ascertain if they fit within the definition of a 'de facto' relationship. Application of s 6 to Australian Muslim women in a polygamous relationship would also side step the question of whether or not a de facto 'couple' can include more than two people. It would *not* effectively validate or recognise the relationship as a legal marriage, but would nonetheless bring the parties involved within the jurisdiction of the court exactly as if they were legally married. Despite these advantages, there is one obvious practical disadvantage. To come within s 6, the parties involved would be required to go overseas to be married, rather than being married in Australia. This could well further restrict its potential application, depending on the financial resources of the parties. Nonetheless, it may be preferable for some Muslim women, as an alternative to relying on a possible status of de facto partner under Australian law. Whether or not it is an acceptable legal and practical alternative in multicultural Australia is of course another question.

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180 Relationships Act 2008 (Vic) ss 3, 5; Relationships Act 2003 (Tas) ss 4(1), 11; Civil Partnerships Act 2008 (ACT) s 5(1).

181 Relationships Act 2008 (Vic) s 7(a)(ii)–(iii); Civil Partnerships Act 2008 (ACT) s 6; Relationships Act 2003 (Tas) s 11.

VII Conclusion

Although there are major differences between Islamic law and Australian family law, there are only a few areas where the practice of Islamic family law may be inconsistent with Australian law. The obvious example is polygamy, as polygamous marriages are void under the Marriage Act, but polygamy is still practiced by a small number of Muslims in Australia. Muslim women who enter into a second religious marriage in Australia are not recognised as legal spouses and their status under the Family Law Act is unclear. This restricts the capacity of the Family Law Act to provide for their property interests in the event of their relationship breakdown. Their only possible status would be as a de facto spouse. However, even if their relationship meets the jurisdictional requirements, it is possible that their relationship may not fall within the definition of a 'de facto relationship' in s 4AA. If this is the case then these women may be left out of the reach of a provision specifically designed to apply to a broad range of de facto family relationships.

The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) has significantly extended the jurisdiction of family courts over property disputes. It is at the fringes of this new jurisdiction that questions remain. Case law has not yet addressed whether a polygamous de facto relationship does fall within the Family Law Act s 4AA(5), and it is by no means clear that it could, given the emphasis within the Part on 'couples', defined as a relationship involving only two people, and the stated intention of Parliament.

The Family Law Act continues to be interpreted as beneficial legislation, and the new de facto property jurisdiction contains the same wide discretion as its counterpart for married couples. This will allow courts to take a very practical approach to the distribution of the property of de facto couples and consider all relevant circumstances when making orders. It is possible that any property division needed for members of a polygamous de facto family unit could be adequately addressed by virtue of this discretion. However, for such an approach to be taken the relationship must of course attract the jurisdiction of the court in the first place; and this is why the potential of the courts to protect the property interests of Muslim women in polygamous de facto relationships is less clear.

Including Muslim women in polygamous relationships within the new de facto provisions of the Family Law Act would not recognise *sharia* law. Recognising a polygamous relationship under s 4AA(5) would bring it within the jurisdiction and protection of the family court system. By definition it would be recognised only as a relationship of *fact*, not of *law*. This would have no bearing on the legal definition of marriage, any more than the current s 6 does by recognising overseas polygamous marriages for some purposes. Further, even if polygamy were recognised as a legal relationship, this would not amount to recognising *sharia* law. Australia's legal system is not pluralistic and there is no suggestion that this be changed.

Islamic religious laws relating to marriage ceremonies currently enjoy the same status as the traditions of all other recognised religions under the Marriage Act, and this has been the case for some time. This position would not be altered by an interpretation of s 4AA(5) of the Family Law Act which

included polygamous relationships. Such inclusion would, however, provide valuable protection to Muslim women in polygamous relationships who make up a potentially vulnerable minority within Australian society. Including such relationships within s 4AA(5) is arguably preferable to reliance on s 6, as it would not require the parties to marry overseas. However, one benefit of s 6 is that it does not require the relationship to meet the jurisdictional requirements of the new de facto property provisions.

Ultimately, the Family Law Act does seem to offer a measure of protection to Muslim women who are in polygamous relationships, at least through the potential application of s 6 in some cases. The question remains whether or not such women are also able to access the family court system's protection through classifying their relationship as de facto within the meaning of s 4AA as it currently stands. Even if they are, depending on the facts, the jurisdictional thresholds for de facto relationships may be prohibitive. If they are not, then their protection under the Family Law Act remains quite limited. Is this appropriate in an Australian society which regards all men and women as equal, and respects all religious traditions?